Case No: C1/2015/1613, C1/2015/1620 & C1/2015/2006

Neutral Citation Number: [2016] EWCA Civ 811
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT, QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR. JUSTICE LEGGATT
CO/5608/2008 & hq13x01841

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/09/2016

Before :

LADY JUSTICE ARDEN
LORD JUSTICE TOMLINSON
and
LORD JUSTICE LLOYD JONES

- -

Between :

AL-SAADOON & ORS	**Appellants**
- and -	
THE SECRETARY OF STATE FOR DEFENCE	**Respondent**
- and -	
RAHMATULLAH & ANR	**Appellant**
- and -	
THE SECRETARY OF STATE FOR DEFENCE & ANR	**Respondents**

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- -

Michael Fordham QC, Dan Squires QC, Jason Pobjoy and Flora Robertson (instructed by **Public Interest Lawyers Limited**) for the **Appellants** in **Al-Saadoon**

Phillippa Kaufmann QC and Adam Straw (instructed by **Leigh Day Solicitors**) for the **Appellant** in **Rahmatullah**
James Eadie QC, Karen Steyn QC and Kate Grange (instructed by **Government Legal Department)** for the **Respondents** on both cases

Hearing dates : 16th - 19th May 2016

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Judgmen

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LORD JUSTICE LLOYD JONES :

1. **I. <u>INTRODUCTION</u>**

2. British military involvement in Iraq between 2003 and 2009 has given rise to a large number of civil claims before the courts of this jurisdiction, most involving allegations of ill-treatment, unlawful detention and, in some cases, unlawful killing of Iraqi civilians by British soldiers.

3. One group of claims consists of claims for judicial review in which the claimants seek orders requiring the Secretary of State for Defence ("the Secretary of State") to

investigate alleged human rights violations ("the public law claims"). There are currently 1,282 public law claims in which the claimants were represented at the time of the hearing before us by Public Interest Lawyers. In addition separate judicial review proceedings have been brought by Yunus Rahmatullah and Amanatullah Ali who are represented by Leigh Day.

4. A second group of claims consists of claims for compensation brought against the Ministry of Defence ("the private law claims"). There are currently approximately 646 such claims pending, approximately 257 claims having been settled.

5. The extent to which the European Convention on Human Rights ("ECHR") applies to the conduct of British forces in Iraq remains highly controversial. There are two particular areas of controversy.

(1) The first concerns the question of the scope of application of the Convention and when individuals are to be considered to be within the "jurisdiction" of a contracting State within Article 1 of the Convention. This issue has been much litigated and it is now established, at least, that persons taken into the custody of British forces in Iraq had certain rights under the Convention which the United Kingdom was bound to respect, in particular the right to life under Article 2, the right not to be tortured or subjected to inhuman or degrading treatment under Article 3 and the right to liberty under Article 5. However, the question whether, and if so in what circumstances, the Convention applies to the use of force against Iraqi civilians who were not in the custody of British forces remains controversial.

(2) The second major area of controversy concerns the extent to which there is a duty on the United Kingdom to investigate alleged violations of the ECHR rights of Iraqi civilians who were within the jurisdiction of the United Kingdom. Here it is clearly established that where a person who is within the jurisdiction of a contracting State is killed by agents of the State, dies in State custody or makes a credible allegation of torture or other serious ill-treatment by State agents, the State has a duty to carry out an independent and effective investigation. However, it remains in dispute whether a procedural duty of investigation arises into allegations of a violation of Article 3 where the allegation is that the claimant was transferred to United States or Iraqi authorities in circumstances where there was allegedly a real risk that they would subject the claimant to torture or mistreatment. Furthermore, there remains a dispute as to whether, and if so in what circumstances, there is a duty to investigate allegations that a claimant was unlawfully detained in violation of Article 5.

6. In his judgment of the 17 March 2015 ([2015] EWHC 715 (Admin)) Leggatt J. has included (at [21] to [31]) an account of the two public inquiries established by the Secretary of State to investigate particular incidents, the establishment by the Secretary of State of the Iraq Historic Allegations Team ("IHAT") and the legal challenges to the independence of IHAT, an account which I gratefully adopt.

7. In its judgment in *R (Ali Zaki Mousa) v Secretary of State for Defence (No. 2)* [2013] EWHC 1412 (Admin) the Divisional Court recognised that there were unresolved issues of law relating to the applicability of the ECHR. Following its further judgment in that case [2013] EWHC 2941 (Admin) the Divisional Court gave directions for the identification of appropriate preliminary issues in test cases to

resolve those issues. These are the issues which were decided by Leggatt J. in his judgment of 17 March 2015 and which are now before this court. The issues relate to four matters:

(1) The scope of application of the Convention;

(2) The extent to which there is an investigative obligation in respect of handover cases within Article 3 ECHR;

(3) The extent to which there is an investigative obligation in respect of cases within Article 5 ECHR;

(4) The impact, if any, on investigative duties under Articles 2 and 3 of the United Kingdom's obligations under the United Nations Convention Against Torture ("UNCAT").

8.

9. The first preliminary issue asks whether Article 1 ECHR applies to the assumed facts of a number of test cases. By the time of the hearing before Leggatt J. the Secretary of State accepted that on the assumed facts of ten of these test cases, involving individuals whose rights were allegedly violated while they were in the custody of British forces, the claimants were at the relevant time within the jurisdiction of the United Kingdom for the purpose of Article 1.

10. In addition, the Secretary of State applied to have the claims of Mr. Rahmatullah and Mr. Ali dismissed on the ground that they were outside the scope of Article 1. A direction was given that this issue should be considered at the same time. The Secretary of State subsequently made the same concession in relation to these claims, namely that the claimants were within the United Kingdom's Article 1 jurisdiction during any period when they were in the custody of British forces.

11. **II. <u>JURISDICTION UNDER ARTICLE 1 ECHR</u>**

12. The first preliminary issue is whether Article 1, European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") applies in the test cases. Article 1 makes provision for the extent of the application of ECHR.

> "The high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention."

13. In *Soering v United Kingdom* (1989) 11 EHRR 439 the Strasbourg Court stated at [86]:

> "Article 1 … sets a limit, notably territorial, on the reach of the Convention**.** In particular, the engagement undertaken by a Contracting State is confined to "secure" ("reconnaître" in the French text) the listed rights and freedoms to persons within its own "jurisdiction". Further, the Convention does not govern the actions of states not parties to it, nor does it purport to be a

> means of requiring contracting states to impose Convention standards on other states."

14. <u>*Bankovic v Belgium*</u>

15. *Bankovic & Others v Belgium & Ors* (App No. 52207/99) (2001) 44 EHRR SE5 concerned an application to the European Court of Human Rights arising out of the bombing of the Federal Republic of Yugoslavia by NATO forces during the Kosovo conflict. The applicants sought to invoke Articles 2, 10 and 13 ECHR. The respondent governments contended that the applicants and their deceased relatives were not, at the relevant time, within the jurisdiction of the respondent states and that the application was therefore incompatible with the provisions of the Convention. The Grand Chamber held that it lacked jurisdiction *ratione loci* over the claim. It explained the concept of jurisdiction under the ECHR as primarily territorial:

> "59. As to the "ordinary meaning" of the relevant term in article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a state is primarily territorial. While international law does not exclude a state's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant states…
>
> 60. Accordingly, for example, a state's competence to exercise jurisdiction over its own nationals abroad is subordinate to that state's and other states' territorial competence… In addition, a state may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying state in which case it can be found to exercise jurisdiction in that territory, at least in certain respects…
>
> 61. The court is of the view, therefore, that article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case…"

16. The Grand Chamber referred (at [62]) to state practice and the application of the Convention since its ratification which it considered indicated a lack of any apprehension on the part of the contracting states of their extra-territorial responsibility in contexts such as that under consideration in that case. In particular, although there had been a number of military missions involving contracting states acting extra-territorially since their ratification of the Convention, no state had indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within Article 1 by making a derogation pursuant to Article 15.

17. Furthermore, the court found confirmation of this essentially territorial notion of jurisdiction in the *travaux préparatoires* of the Convention which showed that the expert intergovernmental committee had replaced a reference to "all persons residing within their territories" by a reference to persons "within their jurisdiction" with a view to expanding the Convention's application to others who may not reside in a legal sense but were, nevertheless, on the territory of the contracting state.

18. It is also significant that in coming to its conclusion as to the scope of Article 1 the Grand Chamber rejected the view that Article 1 should be interpreted as a living instrument in the light of changing conditions. In doing so the Grand Chamber considered (at [65]) that the scope of Article 1 was "determinative of the very scope of the contracting parties' positive obligations and, as such, of the scope and reach of the entire convention system of human rights' protection". The Grand Chamber affirmed the principle stated in *Soering v UK* at [88], set out above.

19. The Grand Chamber went on to consider those cases in which extra-territorial acts of contracting states could be recognised as constituting an exercise of jurisdiction within Article 1. Having surveyed the previous case law of the Strasbourg court, it summarised the position as follows (at [71]):

> "In sum, the case law of the court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a contracting state is exceptional: it has done so when the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that country, exercises all or some of the public powers normally to be exercised by that government."

20.

21. The Grand Chamber rejected a submission that the positive obligation under Article 1 extends to securing Conventional rights in a manner proportionate to the level of control exercised in any given extra-territorial situation. While it accepted that jurisdiction and any consequent Convention responsibility of a contracting state would be limited to the circumstances of the commission and consequences of a particular act, it continued:

> "However, the court is of the view that the wording of Art. 1 does not provide any support for the applicants' suggestion that the positive obligation in Art. 1 to secure "the rights and freedoms defined in Section 1 of this lower case convention" can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question…" (at [75])

22. In response to a submission that a failure to accept that the applicants fell within the jurisdiction of the respondent states would defeat the *ordre public* mission of the Convention and leave a regrettable vacuum in the Convention system of human rights' protection, the Grand Chamber stated (at [80]):

> 23. "In short, the convention is a multi-lateral treaty operating, subject to art 56 of the convention, in an essentially regional context and notably in the legal space (espace juridique) of the contracting states. … The Convention was not designed to be applied throughout the world, even in respect of the conduct of contracting states. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the convention."
>
> 24.

25. <u>*Al-Skeini v United Kingdom*</u>

26. In the years immediately following the decision in *Bankovic*, the Strasbourg court considered the question of jurisdiction under Article 1 in a number of cases, including *Issa v Turkey* (2005) 421 EHRR 27; *Ocalan v Turkey* (2005) 421 EHRR 45; *Isaak v Turkey* [2008] ECHR 553; *Al-Saadoon v United Kingdom* (2009) 49 EHRR SE11 and *Medvedyev v France* (2010) 51 EHRR 39. In *Al-Skeini v United Kingdom* (2011) 53 EHRR 18, a Grand Chamber of the Strasbourg court took stock of these developments. The applicants in those cases were the relatives of persons who had been shot and killed by British soldiers, in the context of exchanges of fire between British soldiers and insurgents, or who had died in the custody of British troops, following the invasion of Iraq on 20 March 2003 and prior to the passing of authority to the interim Iraqi Government on 28 May 2004.

27. The Grand Chamber emphasised that jurisdiction under Article 1 is a threshold criterion in that the exercise of jurisdiction is a necessary condition for a contracting state to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of the rights and freedoms set out in the Convention (at [130]). It reaffirmed that a state's jurisdictional competency under Article 1 is primarily territorial and is presumed to be exercised normally throughout the state's territory. Conversely, acts performed or producing effects extra-territorially can constitute an exercise of jurisdiction within Article 1 only in exceptional cases. The Grand Chamber noted that the Court in its case law had recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a contracting state outside its own territorial boundaries. In each case the question whether exceptional circumstances existed which required and justified a finding by the Court that the state was exercising jurisdiction extra-territorially had to be determined with reference to the particular facts. In this regard the Grand Chamber identified three categories of case.

28. The first category was labelled by the Grand Chamber "state agent authority and control". The Grand Chamber noted that the Court had recognised in its case law that a contracting state's jurisdiction under Article 1 may extend to the acts of its authorities which produce effects outside its own territory. It examined the case law and identified the following "defining principles".

> "134. First, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of

jurisdiction when these agents exert authority and control over others.

135. Secondly, the Court has recognised the exercise of extra-territorial jurisdiction by a contracting state when, through the consent, invitation or acquiescence of the government of that territory, it exercises all or some of the public powers normally to be exercised by that government. Thus where, in accordance with custom, treaty or other agreement, authorities of the contracting state carry out executive or judicial functions on the territory of another state, the contracting state may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial state.

136 In addition, the Court's case law demonstrates 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. This principle has been applied where an individual is taken into the custody of state agents abroad. For example, in *Öcalan v Turkey* (2005) 41 E.H.R.R. 45 at [91], the Court held that:

> "[D]irectly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory."

In Issa v Turkey, the Court indicated that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in Northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish jurisdiction by virtue of the soldiers' authority and control over them. In Al-Saadoon v United Kingdom (2009) 49 E.H.R.R. SE11 at [86]–[89], the Court held that two Iraqi nationals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the United Kingdom, since the United Kingdom exercised total and exclusive control over the prisons and the individuals detained in them. Finally, in *Medvedyev v France (2010) 51 E.H.R.R. 39* , the Court held that the applicants were within French jurisdiction by virtue of the exercise by French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters. The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the contracting state over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question."

The Grand Chamber then concluded:

> "137. It is clear that, whenever the state through its agents exercises control and 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, Convention of Rights can be "divided and tailored."

29. The second category of extra territorial jurisdiction identified by the Grand Chamber, it described as "effective control over an area".

> "138. Another exception to the principle that jurisdiction under art. 1 is limited to a state's own territory occurs when, as a consequence of lawful or unlawful military action, a contracting state exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, 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 fact of such domination over the territory is established, it is not necessary to determine whether the contracting state exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the contracting state's military and other support entails that state's responsibility for its policies and actions. The 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 violation of those rights."

The Grand Chamber went on to state that it is a question of fact whether a contracting state exercises effective control over an area outside its own territory. In determining this question the court will primarily have regard to the strength of the state's military presence in the area but other indicators may also be relevant such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region.

30. In considering the third category, which it described as relating to the Convention legal space ("*espace juridique*") the Grand Chamber emphasised that the Convention is a constitutional instrument of the European public order. It does not govern the actions of states which are not parties nor does it purport to be a means of requiring the contracting states to impose Convention standards on others. In this regard the Grand Chamber explained that where the territory of one Convention state is occupied by the armed forces of another, the occupying state should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would result in a vacuum of protection within the Convention legal space. The Grand Chamber went on to say (at [142]):

> "However, the importance of establishing the occupying state's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Art. 1 of the Convention can never exist

> outside the territory covered by the Council of the Europe Member States. The Court has not in its case law applied any such restriction."

31. When the Grand Chamber came, however, to apply these principles to the facts of the individual cases before it, it expressed its conclusion as regards jurisdiction in terms which do not exactly correspond with the principles stated earlier in its judgment. It will be necessary to consider the precise basis on which these individual cases were decided.

> 32. "149. It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South-East Iraq. In these exceptional circumstances, the Court considers that 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 art.1 of the Convention.
>
> 33. 150. Against this background, the Court recalls that the deaths at issue in the present case occurred during the relevant period: the fifth applicant's son died on May 8, 2003; the first and fourth applicants' brothers died in August 2003; the sixth applicant's son died in September 2003; and the spouses of the second and third applicants died in November 2003. It is not disputed that the deaths of the first, second, fourth, fifth and sixth applicants' relatives were caused by the acts of British soldiers during the course of or contiguous to security operations carried out by British forces in various parts of Basrah City. It follows that in all these cases there was a jurisdictional link for the purposes of art.1 of the Convention between the United Kingdom and the deceased. The third applicant's wife was killed during an exchange of fire between a patrol of British soldiers and unidentified gunmen and it is not known which side fired the fatal bullet. The Court considers that, since the death occurred in the course of a UK security operation, when British soldiers carried out a patrol in the vicinity of the applicant's home and joined in the fatal exchange of fire, there was a jurisdictional link between the United Kingdom and this deceased also."

34. *The judge's decision*

35. In the court below, the claimants did not pursue an argument that the United Kingdom had sufficient control over any part of Iraq at the relevant times to give rise to jurisdiction on this ground. Their claims both below and on appeal were, accordingly, founded entirely on the principle of state agent authority and control over individuals and they relied both on the exercise of public powers by the United Kingdom and on the exercise of physical power and control.

36. In the course of his most impressive judgment, the judge came to the following conclusions on the issue of jurisdiction.

(1) The test of control over individuals, like the test of control over an area, is a factual one which depends on the actual exercise of control and not on its legal basis or legitimacy (at [74]).

(2) The Secretary of State had accepted that during the occupation period the United Kingdom was exercising public powers which would normally be exercised by the government of Iraq. With regard to the invasion period, the judge accepted that issues with regard to the exercise of authority and control over an individual by virtue of exercising public powers which would normally be exercised by the government of Iraq were questions of fact which could only be answered by considering what function the soldiers concerned were actually performing in any given case (at [77]). With regard to the post-occupation period the judge held that through the consent, invitation or acquiescence of the government of Iraq the United Kingdom exercised some or all of the public powers normally to be exercised by the government of Iraq (at [86]).

(3) With regard to the exercise of physical power and control by the agents of a state, the judge held that once it was accepted that the exercise of physical control over an individual outside the state's own territory was sufficient to bring that individual within the scope of the Convention, it was impossible to say that shooting them dead was not such an exercise of physical control. Following *Al-Skeini* it was established that Convention rights could be divided and tailored. Whether a person had been taken into custody was only relevant to the extent of the rights which must be secured. Where an individual was not in the state's custody and the state was not exercising any governmental powers in the territory, there would, nevertheless, be a negative obligation under Article 2 to refrain from unlawful killing (at [95]-[98]).

(4) The essential principle to be derived from *Al-Skeini* is that whenever and wherever a state which is a contracting party to the Convention purports to exercise legal authority or uses physical force, it must do so in a way that does not violate Convention rights (at [106]).

37. *The exceptional nature of extra-territorial jurisdiction*

38. On behalf of the Secretary of State for Defence Mr. James Eadie QC, referring to the language of *Al-Skeini*, which reflects that of earlier cases, and to more recent decisions of the Strasbourg court (see, in particular *Hirsi Jamaa v Italy* (2012) 55 EHRR 21 at [73]; *Chagos Islanders v United Kingdom* (2013) 56 EHRR SE15 at [70], [71]), submits that the judge failed to recognise the "exceptional" nature of extra-territorial jurisdiction and that he erred in failing to require some special justification to establish extra-territorial jurisdiction.

39. It is a curious feature of the Grand Chamber's analysis in *Bankovic* that it draws on different concepts of jurisdiction. In particular, as Lord Collins of Mapesbury pointed out in his judgment in *R (Catherine Smith) v Oxfordshire Assistant Deputy Coroner* ("*Catherine Smith*") [2011] 1 AC 1 at [259] and following, the passage in *Bankovic* at [59] mixes two entirely different concepts of extra-territorial jurisdiction. The reference to "nationality, flag, diplomatic and consular relations" refers to the fiction of the extra-territoriality of ships and aircrafts and diplomatic and consular premises. The reference to "effect, protection, passive personality and universality" is a

reference to those grounds on which states frequently claim to exercise criminal curial jurisdiction in respect of acts committed abroad. However, in the present context "jurisdiction" is used in a specialised sense. We are not concerned with the appropriate scope in international law of the legislative, executive or curial jurisdiction of a state, but with the circumstances in which a State can be expected in compliance with its ECHR treaty obligations to protect the human rights of persons outside its territory. These will necessarily be limited and may, therefore, fairly be described as exceptional. However, as Lord Hope of Craighead explained in *Smith v Ministry of Defence* ("*Susan Smith*") [2013] UKSC 41; [2014] AC 52 (at [30] and [46]) this does not mean that the word "exceptional" sets an especially high threshold for circumstances to cross before a finding of extra-territorial jurisdiction can be justified. It simply means that the presumption that a state's power is exercised normally within that state's territory does not apply. The judge did not fall into error by failing to consider whether some further hurdle could be cleared. The question for consideration is whether, having regard to the body of case law which has developed in relation to the scope of the Convention, any given case falls within an established exception to the presumption of its territorial application.

40. Nevertheless, it is important to acknowledge that we are concerned here with the fundamental issue of the ambit of the application of the ECHR system. As a result there is a particular need for care. In particular, the House of Lords and the Supreme Court have emphasised that Article 1 should not be construed as reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach (*Al-Skeini* [2007] UKHL 26; [2008] AC 153 per Lord Brown at [107], *Catherine Smith* per Lord Hope at [93], *Susan Smith* per Lord Hope at [44]). This does not mean that courts in this jurisdiction can hold that extra-territorial jurisdiction exists only in factual situations which have already been recognised by the Strasbourg court as qualifying. Rather, it is necessary to identify the principles underlying the decisions of the Strasbourg court and not to go beyond them. (See *Susan Smith* per Lord Hope at [46].) This, however, is not an easy task in the present circumstances where the formulations of extra-territorial jurisdiction by the Strasbourg court are open to competing interpretations and, in particular, where that court has failed to provide any guidance as to whether the principles laid down in *Bankovic* remain good law.

41. <u>*Departures from Bankovic*</u>

42. At the hearing of this appeal, considerable attention was devoted to the question whether the decision of the Grand Chamber in *Bankovic* on the scope of jurisdiction under the Convention had been impliedly overruled by the decision in *Al-Skeini*. It does appear, however, that, despite its failure to acknowledge the fact, the Grand Chamber in *Al-Skeini* has departed from the principles laid down in *Bankovic* in at least two important respects. First, in *Bankovic* the Court made clear that Article 1, unlike other provisions of ECHR, was not to be treated as a living provision to be interpreted in the light of present day conditions. (*Bankovic* at [64], [65]; *Catherine Smith* per Lord Collins at [303]). By contrast, the statement of the Strasbourg court in *Al-Skeini* (at [132]) that "to date, the court in its case law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a contracting state outside its own territorial boundaries" indicates that as new factual circumstances arise the scope of Article 1 may evolve in order to accommodate them. (See *Susan Smith* per Lord Hope at [30].) That this has already occurred is apparent

from the fact that the categories of exception to the general rule of the territorial jurisdiction acknowledged in *Al-Skeini* are clearly wider than those acknowledged in *Bankovic*. In particular, the exceptional category of "state agent authority and control" is significantly wider than the principles stated in *Bankovic.*

43. Secondly, in its discussion of cases where the use of force by a state's agents operating outside its territory may bring an individual under the control of the state's authorities, the Grand Chamber in *Al-Skeini* expressly accepted (at [137]) that the extent of the state's obligation under Article 1 to secure to that individual rights and freedoms under the Convention will depend on the situation of that individual and that, accordingly, Convention rights can be divided and tailored. This is a significant departure from *Bankovic* where the Court had rejected (at [75]) a submission that the positive obligation under Article 1 could be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question. This second departure is of vital significance in the context of the present case because it acknowledges that a contracting state may now be held liable for its extra-territorial conduct in circumstances where it is not able to secure to the individual concerned the full range of rights and freedoms under the Convention. The non-divisibility of Convention rights and freedoms can therefore no longer operate as a limitation on the scope of jurisdiction under Article 1. The reach of the Convention will now vary depending on which Convention right is invoked.

44. The Grand Chamber in *Al-Skeini* clearly intended that its formulation of the exceptional cases of extra-territorial jurisdiction should be an authoritative restatement of the governing principles. It has certainly been regarded as such in the subsequent Grand Chamber decisions in *Hassan v United Kingdom* [2014] ECHR 9936 and *Jaloud v The Netherlands* (2015) 60 EHRR 29 where, in each case, the Grand Chamber set out the text of paragraphs [130] to [139] of *Al-Skeini* before applying those principles to the facts before them. It is clear that *Al-Skeini* must now be taken as the starting point for any consideration of the extra-territorial application of the Convention.

45. Furthermore, the content of the exceptions identified by the Grand Chamber in *Al-Skeini* under the heading "state agent authority and control", and in particular its approval of the decision in *Issa v Turkey* (2005) 41 EHRR 27, represent a major extension of jurisdiction beyond the principles stated in *Bankovic*. In *Issa* the applicants alleged that their family members, Iraqi shepherds, had been beaten, detained and killed in Iraq by Turkish soldiers. The Chamber which heard the application expressed the view that a state may be held accountable for violation of Convention rights of persons in the territory of another state "but who are found to be under the former state's authority and control through its agents operating – whether lawfully or unlawfully – in the latter state". It explained that:

> 46. "Accountability in such situations stems from the fact that Art. 1 of the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory" (at [71]).

47. However, the Chamber considered that it had not been established on the facts that the Turkish armed forces conducted operations in the area in question at the relevant time. Whether this decision is consistent with that in *Bankovic* had been

much commented upon. (See, in particular, *Al-Skeini* (House of Lords) per Lord Rodger at [71] – [75]; *Catherine Smith* per Lord Collins at [307].) In *Al-Skeini*, however, the Grand Chamber (at [136]) cited *Issa* with approval as authority for the proposition that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in Northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish jurisdiction by virtue of the solders' authority and control over them. As Lord Hope concluded in *Susan Smith* (at [47]), the fact that *Issa* is referred to in *Al-Skeini* as an example of cases that fall within the general principle of state agent authority and control is particularly noteworthy because it anchors *Issa* firmly in the mainstream of the Strasbourg court's jurisprudence on this topic.

48. More generally, the combined effect of the exceptional cases of extra-territorial jurisdiction accepted by the Grand Chamber in *Al-Skeini* represents a potentially massive expansion of the scope of application of the Convention, the full implications of which remain to be worked out. It is already apparent that the Convention has, as a result, entered a field which was already regulated by international humanitarian law. In *Hassan v United Kingdom* a Grand Chamber has had to consider the compatibility of these two systems of law and the implications of their co-existence for substantive Convention rights under Article 5 ECHR. Whether in future *Al-Skeini* may come to be considered a false step in the development of the law remains to be seen. For present purposes it is sufficient to state that it is an authoritative decision of a Grand Chamber of the Strasbourg court on the scope of the application of the Convention which has been accepted as such by the Supreme Court in *Susan Smith*. Our role on this appeal is to seek to ascertain the precise scope of extra-territorial jurisdiction under the Convention and to apply it accordingly to the test cases. The answer to the question whether the jurisdiction issue in *Bankovic* would be decided in the same way following the decision in *Al-Skeini* will depend on the precise scope of the exceptions acknowledged in *Al-Skeini*.

49. *Effective control over an area*

50. In *Al-Skeini* (at [138] to [140]) the Grand Chamber described the exception to the principle that jurisdiction under Article 1 is limited to a state's own territory, which applies "when, as a consequence of lawful or unlawful military action, a contracting state exercises effective control of an area outside that national territory". The judgment makes clear that the controlling state has the responsibility under Article 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 and that it will be liable for any violations of those rights. The Grand Chamber's acceptance that Convention rights may be divided and tailored for the purposes of the exception applicable in cases of state agent authority and control (at [137]) therefore has no application to this exception. Accordingly, before this exceptional ground of jurisdiction can apply, the contracting state must have a degree of control over the area in question which enables it to secure the full range of ECHR rights to its occupants. This is an important limitation on this exception.

51. This exception has been given a specific application in cases where an individual has been held by military forces within a military establishment which is under its total and exclusive control. (See *Al-Saadoon (Admissibility)* (2009) 49 EHRR SE11 at

[88].) This particular application is, perhaps, now of less importance as a result of the development in *Al-Skeini* of the principle of state agent authority and control.

52. It was common ground before us that this exception can have no application to the present case. The Grand Chamber in *Al-Skeini* set out at length (at [80]) the reasoning of Brooke and Sedley L.JJ. in the Court of Appeal in *Al-Skeini* which led that court to the conclusion that, while the United Kingdom was an occupying power for the purposes of the Hague Regulations and the fourth Geneva Convention ("Geneva IV"), it was not in effective control of Basrah City for the purposes of ECHR jurisprudence during the period of military occupation ([2005] EWCA Civ 1609; [2007] QB 140 per Brooke L.J. at [119]-[124], per Sedley L.J. at [194]). It also referred to the conclusion of Lord Rodger in the House of Lords in *Al-Skeini* (at [83]), with whom three of the other four Law Lords agreed, that the United Kingdom was not in effective control of Basrah City and the surrounding area for purposes of jurisdiction under Article 1 at the relevant time. The Grand Chamber did not suggest that there was any reason to disagree with this conclusion. Similarly, in *Susan Smith* Lord Hope observed (at [31]) that during the post-occupation period the United Kingdom was not in effective control of an area outside its territory. In *Hassan* the Grand Chamber observed (at [75]) that in *Al-Skeini* it was unnecessary for the Strasbourg court to determine whether jurisdiction arose on the ground that the United Kingdom was in effective military control of south east Iraq during the occupation period. However, it noted that the statement of facts in *Al-Skeini* included material which tended to demonstrate that the United Kingdom was far from being in effective control of the south eastern area which it occupied. To the extent that this is a question of fact, a matter considered further below, these conclusions are not binding in this litigation. However, there has been no attempt to argue to the contrary.

53. *Espace juridique*

54. The principle of espace juridique has been developed to prevent a vacuum of protection from arising within the Convention legal space (*Loizidou* (1997) 23 EHRR 513 at [78]; *Bankovic* (2007) 44 EHRR SE5 at [80]). It applies where the territory of one Convention state is occupied by the forces of another and holds the occupying state accountable for breaches of human rights within the occupied territory. As Iraq is not a Convention state, it can have no application in the circumstances of the present case.

55. *State agent authority and control*

56. We are, therefore, concerned in this case solely with the exceptional category described by the Grand Chamber in *Al-Skeini* as "state agent authority and control". This category is divided further by the Grand Chamber into sub-categories: acts of diplomatic and consular agents, the exercise of public powers and exercise of physical power and control over individuals. Before considering in detail these sub-categories, the second and third of which are potentially directly relevant in the present case, it is necessary to consider some preliminary issues.

57. First, in its judgment in *Al-Skeini* the Grand Chamber stated (at [137]) that it was clear that whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation to secure to that individual the rights and freedoms under Article 1 of the Convention that are relevant

to the situation of that individual. I agree with Lord Hope (*Susan Smith* at [37], [46]) that the Grand Chamber was not adding a further example of the application of the principle of state agent authority and control but was describing a particular feature of all three sub-categories which it had already identified. Accordingly, in any given situation extra-territorial jurisdiction on the basis of state agent authority and control may exist in respect of certain Convention rights but not others.

58. Secondly, having set out the principles of extra-territorial jurisdiction, the Grand Chamber in *Al-Skeini* proceeded (at [149] and [150]) to state its conclusion that all of the claims before it fell within jurisdiction. The Grand Chamber did not specify which of the categories of extra-territorial jurisdiction applied in these cases but it appears – and was common ground before us – that its conclusions were founded on the public powers exception stated at [135]. This was also the view of Lord Hope in *Susan Smith* (at [40]). The matter has now been placed beyond doubt by the Grand Chamber in *Hassan* which explained (at [75]) that in *Al-Skeini* the court found that the applicants' relatives fell within United Kingdom jurisdiction because during the period 1 May 2003 to 28 June 2004 the United Kingdom had assumed authority for the maintenance of security in south east Iraq and the relatives were killed in the course of security operations carried out by United Kingdom troops pursuant to that assumption of authority.

59. Thirdly, the question arises as to the relevance to the jurisdictional issue of the legality of the conduct of the acting contracting state. It was established at an early stage in relation to the exception based on effective control of an area that it was immaterial whether the basis of effective control was lawful or unlawful. In *Loizidou v Turkey (Preliminary Objections)* (1995) 20 EHRR 99, the court found that the responsibility of a contracting state was capable of being engaged when as a consequence of military action, whether lawful or unlawful, it exercised effective control of an area outside its national territory. It explained that the obligation to secure Convention rights and freedoms in such an area derived from the fact of such control, whether it was exercised directly through that state's armed forces or through a subordinate local administration. (See also *Cyprus v Turkey* (2001) 11 BHRC 45.) This approach was approved by the Grand Chamber in *Bankovic* (at [70], [71]). This approach conforms to that of international humanitarian law.

60. The same approach has been adopted by the Strasbourg court in relation to the exceptions falling within the category of state agent authority and control. In *Issa* the Court explained that a contracting state may be held accountable for violations of the Convention rights of persons who are in the territory of another state "but who are found to be under the former state's authority and control, through its agents operating – whether lawfully or unlawfully – in the latter state" (at [71]). Statements to similar effect appear in other Strasbourg decisions including *Isaak v Turkey (Preliminary Issues)* (Application No. 44587/98, at p. 19) and *Andreou v Turkey (Preliminary Issues)* (Application No. 45653/99, at p. 10).

61. Similarly, in *Al-Skeini* the Grand Chamber, in applying the exception founded on public powers, addressed the facts – in particular, the assumption by the United Kingdom in Iraq of the exercise of some of the public powers normally to be exercised by a sovereign government – and not the legality of that occupation in international law. More recently in *Jaloud* the Grand Chamber rejected an argument by the Netherlands that the death complained of did not occur within its jurisdiction

because the Netherlands was not an occupying power in Iraq. The Grand Chamber considered that although Netherlands troops were stationed in an area of south eastern Iraq where SFIR forces were under the command of an officer from the United Kingdom, the Netherlands had assumed responsibility for providing security in that area to the exclusion of other participating states and retained full command over its contingent there. The Grand Chamber was satisfied that the Netherlands exercised its jurisdiction within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint.

62. In all these instances, what mattered was the fact that the state concerned was purporting to exercise public powers normally to be exercised by the government of the territory in question as opposed to the legal basis of its operations. This approach makes excellent sense. As the judge pointed out in the present case, it would be perverse if a state were bound to secure an individual's right to life when its soldiers are conducting security operations or exercising other public powers lawfully on foreign territory whereas the Convention would not apply if the state were able to show that it was not acting lawfully ([2015] EWHC 715 (Admin) at [74]).

63. *(1) Diplomatic and consular agents*

64. This sub-category has no direct application to the present case. However, the court's attention was drawn to *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44; [2014] 1 WLR 2697. In that case the claimant, a British national, had been convicted in Indonesia of drug trafficking offences and sentenced to death. She received consular assistance and the Foreign Office made diplomatic representations on her behalf to the Indonesian authorities. A legal challenge to its refusal to fund her legal expenses failed. The Supreme Court considered that the claimant was not, by virtue of the exception in the case of diplomatic and consular agents stated in *Al-Skeini* at [134] within the jurisdiction of the United Kingdom. In particular, that passage states that the acts of diplomatic or consular agents present in foreign territory may amount to an exercise of jurisdiction "when these agents exert authority and control over others". Lord Carnwath and Lord Mance (with whom Lord Clarke of Stone–cum-Ebony and Lord Toulson agreed) considered (at [32]) that by reference to any common sense formulation, the claimant was under the authority and control of the Indonesian authorities.

65. *(2) Public powers*

66. The applicability of the public powers exception has to be considered against the background of the United Kingdom's involvement in Iraq. The judgment of the Grand Chamber in *Al-Skeini* includes a detailed account of the history (at [9] to [23]) which was uncontroversial before us. I would draw attention to the following matters.

    (1) On 20 March 2003 a coalition of armed forces led by the United States with a large force from the United Kingdom and small contingents from Australia, Denmark and Poland, commenced the invasion of Iraq. By 5 April 2003 the British had captured Basrah and by 9 April 2003 US troops had gained control over Baghdad. Major combat operations in Iraq were declared complete on 1 May 2003. Thereafter, other states sent personnel to help with the reconstruction efforts.

(2) From 1 May 2003 onwards British forces in Iraq carried out two main functions. The first was to maintain security in the south eastern area, in particular in Al-Basrah and Maysan provinces. The principal security task was the effort to re-establish the Iraqi security forces, including the Iraqi police. Other tasks included patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations. The second main function of British troops was the support of the civil administration in Iraq in a variety of ways, from liaison with the Coalition Provisional Authority and Governing Council of Iraq and local government, to assisting with the rebuilding of the infrastructure.

(3) On 8 May 2003 the Permanent Representatives of the United Kingdom and the United States at the United Nations wrote a joint letter to the President of the United Nations Security Council which stated that the United States, the United Kingdom and coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, had created the Coalition Provisional Authority, to exercise powers of government temporarily and, as necessary, especially to provide security, to allow the delivery of humanitarian aid and to eliminate weapons of mass destruction.

(4) On 22 May 2003 the United Nations Security Council adopted Resolution 1483 which, inter alia, noted the letter of 8 May 2003 from the Permanent Representatives and recognised the specific authorities, responsibilities and obligations under applicable international law of the states as occupying powers under unified command ("the Authority").

(5) On 16 October 2003 the United Nations Security Council adopted Resolution 1511 which, under-scoring that the sovereignty of Iraq resided in the State of Iraq, called upon the Authority to return governing responsibilities and authorities to the people of Iraq as soon as practicable and authorised a multi-national force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq.

(6) On 8 March 2004 the Governing Council of Iraq promulgated the Law of Administration for the State of Iraq for the Transitional Period ("the Transitional Administrative Law") which provided a temporary legal framework for the administration of Iraq for the Transitional Period which was due to commence by 13 June 2004 with the establishment of an interim Iraqi Government ("the Interim Government") and the dissolution of the Coalition Provisional Authority.

(7) On 8 June 2004 the United Nations Security Council, acting under Chapter VII of the United Nations Charter, adopted Resolution 1546 which endorsed the formation of a sovereign Interim Government of Iraq which was to assume full responsibility and authority by 30 June 2004 for governing Iraq.

(8) On 28 June 2004 full authority was transferred from the Coalition Provisional Authority to the Interim Government and the Coalition Provisional Authority ceased to exist.

(9) Subsequently the Multi-National Force, including the British forces forming part of it, remained in Iraq pursuant to requests by the Iraqi Government and authorisations from the United Nations Security Council.

67. In international law occupation is determined by the fact of the occupying power's effective territorial control and not by any right to exercise control. Article 42 of the Hague Regulations (Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907) provides:

> 68. "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

69. Occupation is essentially a matter of fact. (See, for example *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ Reports 2005, p. 168 at [173], [176]-[180]). As to what will constitute effective control for this purpose, Professor Benvenisti writes:

> 70. "Because the test is a test of effective territorial control, the territorial and temporal scopes of occupation depend on the facts. It makes no sense to require occupants to be actually able "to enforce immediately and on the very spot the authority of an occupant" but instead, the effective control test requires "the presence of sufficient force following on the cessation of local resistance".
>
> 71. …
>
> 72. The determination whether the conditions for occupation have been met at the relevant times and in the relevant place will be based on a case-by-case factual analysis. Effective control does not require that occupation forces are present in all places at all times. It is generally accepted that it is sufficient that the occupying force can, within a reasonable time, send detachments of troops to make its authority felt within the occupied area. The number of troops necessary to maintain effective occupation will depend on various factors such as the disposition of the inhabitants, the number and spread of the population, and the nature of the terrain. Battle areas may not be considered as occupied, but sporadic local resistance, even successful at times, will not render the occupation ineffective. But obviously, if the sending of troops requires them to engage in battle to recapture an area from the enemy, the area will not be considered occupied until the troops actually manage to establish control over it." (Benvenisti, The International Law of Occupation, 2nd Ed., (2012), 3.1.1)
>
> 73.

74. *(i) The occupation period*

75. It was common ground before us that the occupation period ran from 1 May 2013 to 28 June 2004. The Secretary of State accepts, following the decision of the Grand Chamber in *Al-Skeini*, that throughout this period the United Kingdom (and the

United States of America) were occupying powers and that Article 1 ECHR applies during the occupation period to all acts of UK armed forces performed in the exercise of any of the public powers ordinarily pertaining to the sovereign government of Iraq. If the matter is examined in terms of the Grand Chamber's statement of principle at [135] of *Al-Skeini*, the United Kingdom was not exercising public powers normally exercised by the government of Iraq through the consent, invitation or acquiescence of the government of Iraq. However, it was an occupying power carrying out executive functions in accordance with custom. As the Grand Chamber explained (at [149]) the United Kingdom (with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular it assumed authority and responsibility for the maintenance of security in south east Iraq.

76. The public powers exception as formulated in *Al-Skeini* at paragraph [135] applies "when, through the consent, invitation or acquiescence of the government of that territory, it exercises all or some of the public powers normally to be exercised by that government" (emphasis added). On behalf of the Secretary of State Mr. Eadie submits that these final words are an important limitation to the exception. I consider that these words are intended to be descriptive of the sort of activity which will fall within the exception and are not intended to impose a requirement relating to the source of any lawful authority to act. This head of extra-territorial jurisdiction is not founded on any lawful authority derived from Iraq. Rather, it is founded on an assumption of authority and the exercise by an occupying power of a sufficient degree of control and authority. These are essentially matters of fact.

77. In these circumstances, in company with the judge (at [100]), I can see no good reason why this exception to the principle of territorial jurisdiction should apply only where state agents purport to exercise powers normally exercised by the occupied state. I doubt that it can have been the intention of the Strasbourg court that the Convention should apply to conduct purportedly in the exercise of powers which normally would have been exercised by the sovereign government of the territory but that extra-legal acts of kidnapping or killing should fall outside the scope of the Convention. This is an issue on which clarification from the Strasbourg court is urgently required.

78. *(ii) The invasion period*

79. The Secretary of State submits that the United Kingdom did not become an occupying power until the major combat operations were declared complete on 1 May 2003. He points to the fact that the Strasbourg cases consistently take this date as the start of the period of occupation. He further submits that prior to that date British armed forces in Iraq were clearly not exercising public powers but were engaged in fighting an armed conflict against Iraqi forces and that, accordingly, this exception to the principle of territorial jurisdiction can have no application to that period.

80. On behalf of the claimants Mr. Fordham submits that although combat operations were not formally declared complete until 1 May 2003 actual fighting had ceased some time previously and that British troops had been in control of Basrah for several weeks and were effectively acting as a police force seeking to maintain order. The factual question whether the United Kingdom was exercising authority and control over an individual by virtue of exercising public powers which would normally be

exercised by the government of Iraq was not conclusively answered by identifying the date when major combat operations were formally declared complete or when the Coalition Provisional Authority was established or when the United Kingdom became an occupying power within the Hague Regulations.

81. In *Hassan* the Grand Chamber considered (at [75]) the issue of jurisdiction in this invasion period "before the United Kingdom and its coalition partners had declared that the active hostilities phase of the conflict had ended and that they were in occupation, and before the United Kingdom had assumed responsibility for the maintenance of security in the south east of the country". However, it decided the issue of jurisdiction not on the basis of public powers but on the basis that state agents had taken the applicant into the custody of the United Kingdom. The Grand Chamber rejected a submission that this basis of jurisdiction should not apply in the active hostilities phase of an international armed conflict, where the agents of the contracting state are operating in territory of which they are not the occupying power, and where, it was submitted, the conduct of the state would instead be subject to the requirements of international humanitarian law. The Grand Chamber observed that *Al-Skeini* was also concerned with a period in respect of which international humanitarian law was applicable, namely the occupation period.

82. To my mind, the answer to this question turns on the facts. For the reasons set out earlier in this judgment I consider that the question whether the United Kingdom is exercising authority and control by virtue of exercising public powers normally exercised by the government of Iraq will depend on the facts of each case. What gives rise to this exception to the general rule of territorial jurisdiction under the Convention is not the existence in international law of a state of occupation but the facts of control and the exercise of authority. These may exist, as a matter of fact, in advance of a formal declaration of occupation. As the judge put it, the question whether British forces were exercising powers of a kind which would normally be exercised by the government of Iraq can only be answered by considering what function the soldiers concerned were actually performing in any given case.

83. *(iii) The post-occupation period*

84. Mr. Eadie on behalf of the Secretary of State draws attention to the fact that on 28 June 2004 sovereign authority was transferred by the Coalition Provisional Authority to a new Iraqi government. Thereafter, during the post-occupation period (28 June 2004 to 31 December 2008), British forces remained in Iraq as part of the multi-national force, pursuant to United Nations Security Council resolutions and with the consent of the government of Iraq. He submits that during this period UK armed forces did not exercise any powers pertaining to the Iraqi government but, rather, fulfilled a mandate given to them by the United Nations. He further submits that this has been established by the decision of the Supreme Court in *Susan Smith* which is binding on this court.

85. In *Susan Smith* Lord Hope did indeed observe (at [41]) with regard to events on 16 July 2005 and 28 February 2006:

> 86. "By that stage the occupation of Iraq had come to an end and the Coalition Provisional Authority had ceased to exist. Full authority for governing the country had passed to the Interim Iraqi Government. The United Kingdom was no

longer exercising the public powers normally to be exercised by that country's government."

87. However, these observations were purely *obiter dicta*. The question whether the United Kingdom exercised public powers within Iraq during this post-occupation phase was not in issue in that case.

88. Moreover, I can see no reason in principle why the public powers exception should not apply during the post-occupation period. First, that British armed forces were no longer an occupying force in Iraq is not determinative of the issue. The Grand Chamber in *Jaloud* demonstrated that soldiers who are not an occupying force may nevertheless trigger the public powers exception to the territoriality principle. What mattered there was that the Netherlands assumed responsibility for providing security and exercised its jurisdiction within the limits of its mission for the purpose of asserting authority and control over persons passing through the checkpoint under its control. Secondly, the multi-national force of which British forces were part was asked by the government of Iraq to remain in order to undertake a range of activities relating to the maintenance of security in Iraq. Thirdly, it is immaterial that there was a UN mandate in force in respect of the post-occupation period. The public powers exception continued to apply throughout the occupation period notwithstanding that there was a UN mandate in force during the latter stages of the occupation (United Nations Security Council resolution 1511, 16 October 2003). On the contrary, to my mind the circumstances prevailing during the post-occupation period fall squarely within the public powers exception as formulated by the Grand Chamber in *Al-Skeini* (at [135]). The British armed forces, as part of the multi-national force, remained in Iraq at the request of the Iraqi government in order to perform security functions. They were "through the consent, invitation or acquiescence" of the government of Iraq exercising some of the public powers normally to be exercised by that government.

89. *(3) Exercise of physical power and control*

90. The scope of this third sub-category of state agent authority and control was hotly contested before us. On behalf of the claimants Mr. Fordham submitted that in any case of an individual shot by a British soldier, even if the soldier was not exercising authority and control by reason of exercising public powers, the shooting was an exercise of physical power and control which brought the individual within the jurisdiction of the United Kingdom. He submitted that lethal or potentially lethal use of force brings such a case within the principle as formulated in *Al-Skeini*. In addition, he relied on a line of authority in Strasbourg ("the *Isaak* line of authority") where the Court held that cases of shooting without prior detention fell within the scope of the Convention. (*Isaak v Turkey* (Application 44587/98) 28 September 2006; *Pad v Turkey* (Application No. 60167/00), 27 June 2007; *Andreou v Turkey* (Application No. 45653/99), 3 June 2008; *Solomou v Turkey* (Application 36832/ 97), 24 September 2008). Mr. Eadie on behalf of the Secretary of State accepted that jurisdiction exists where a claimant was in the custody of British armed forces but did not accept that jurisdiction exists on the basis of physical power and control over individuals in non-custody cases. (See, in this regard, the position of the respondent States in *Bankovic* at [36] and [37].)

91. The judge approached the issue as a matter of principle. He observed that it was far from obvious whether the exercise of physical control over an individual outside a state's own territory should be sufficient to bring that individual within the scope of the Convention. However, once that principle was established he found it impossible to say that shooting someone dead did not involve the exercise of physical power and control over that person. Indeed, he considered using force to kill to be the ultimate exercise of physical control over another human being. In his view, a principled system of human rights law could not distinguish between killing an individual after arresting him and simply shooting him without arresting him first, such that in the first case there is an obligation to respect the person's right to life and in the second there is not. Once it was accepted that Convention rights can be "divided and tailored", the fact that an individual is taken into custody can only be relevant to the extent of the rights which must be secured. In a case where an individual is not in a state's custody and the state is not exercising any governmental powers in the territory, the only relevant obligation would be the negative obligation under Article 2 to refrain from unlawful killing.

92. The judge referred to *Al-Skeini*, noting that on the Secretary of State's submission only those cases where the victim was in custody would fall within the scope of the Convention on this ground whereas the Grand Chamber had found a sufficient jurisdictional link in all six cases on the ground that the individuals were killed in the course of security operations which involved the exercise of public powers. He questioned whether a general principle of jurisdiction based on the exercise of control and authority over individuals could rationally be confined to circumstances where the soldiers were at the time exercising powers normally exercised by the Iraqi government. Once the concept of jurisdiction was understood to be concerned with what a state actually did rather than with the legal basis or legitimacy of its activities, it made no sense to limit the concept to some subset of circumstances in which the state exercises extraterritorial force over individuals.

93. The judge considered that *Al-Skeini* had had the effect of overruling *Bankovic*. In his view the conclusion that people killed by bombing carried out by agents of a contracting state on the territory of another state cannot be considered to be within the jurisdiction of the contracting state cannot stand with the principle of jurisdiction based on physical power and control recognised in *Al-Skeini*. In the judge's view it is not any adverse effect which, on the approach adopted in *Al-Skeini*, brings the person affected within the jurisdiction of a contracting state, but only the exercise of powers normally exercised by the government of the territory concerned or the exercise of physical power and control over that person. Nevertheless, he derived from *Al-Skeini* the essential principle that whenever and wherever a state which is a contracting party to the Convention purports to exercise legal authority or uses physical force, it must do so in a way that does not violate Convention rights.

94. The Strasbourg court in *Al-Skeini* has departed from *Bankovic* in accepting a ground of extra-territorial jurisdiction founded on state agent authority and control which is, on any view, of enormous breadth. I accept that once this exception is admitted it becomes acutely difficult to distinguish between differing degrees of authority and control which may or may not as a result give rise to extra-territorial jurisdiction. As the judge demonstrated in his powerful judgment, the genie having been released

from the bottle, it may now prove impossible to contain. Yet, in my view, this is what the Grand Chamber has attempted to do in *Al-Skeini*.

95. The principle of state agent authority and control is an attempt to rationalise different lines of authority. If it had been the intention of the Grand Chamber to create an all-embracing principle of extra-territorial jurisdiction of the breadth of that accepted by the judge, it would have been an even greater departure from the previous authorities, requiring a particularly clear, express statement. On the contrary, all the indications are that the Grand Chamber intended to set limits on the scope of this exception. The relevant paragraph ([136]) begins with the statement that the Court's case law demonstrates 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 Article 1 jurisdiction. It then states that this principle has been applied where an individual is taken into the custody of state agents abroad and proceeds to give four examples: *Ocalan v Turkey*, *Issa v Turkey*; *Al-Saadoon v United Kingdom*; *Medvedyev v France*. All are cases in which the individual was held in the custody of agents of the respondent state. The Grand Chamber points out that what is decisive in each of these cases is physical power and control over the person in question. From this alone, it derives the principle that whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation to secure to that individual the rights which are relevant to his situation.

96. The careful use of language in *Al-Skeini* at [136] is striking and a marked contrast to that in *Issa v Turkey* where the Court stated (at [76]) in much more general terms that a state may be held accountable for violation of the Convention rights and freedoms of persons in the territory of another state but who are found to be under the former state's authority and control through its agents operating – lawfully or unlawfully – in the latter state. Moreover, unlike the relevant passage in *Al-Skeini*, the judgment in *Issa* - and paragraph [76] in particular - places no emphasis on the victim being in the custody of the respondent state.

97. The passage in *Al-Skeini* at [136] in which an exception in the case of physical power and control over the person is expounded did not form the basis of the Grand Chamber's decision. As explained above, the conclusion at paragraphs [149] and [150] applies the public powers exception. If it had been the intention of the Grand Chamber to lay down an exception based on physical power and control of the breadth of that found by the judge, it would have provided an alternative basis for finding jurisdiction in all the cases before the court. However, there is no hint of this in the judgment. Similarly, in *Jaloud* the Grand Chamber, having set out in their entirety paragraphs [130] to [139] of *Al-Skeini* examined at length the applicability of the public powers exception to the conduct of the Netherlands soldiers at the checkpoint (at [140] to [153]) concluding that the matter was within the jurisdiction of the Netherlands on the basis of that exception. If *Al-Skeini* were authority for the proposition that whenever and wherever a contracting state uses physical force it must do so in a way that does not violate Convention rights, this would have provided a simple and direct route to the same conclusion. Once again, there is no suggestion in the judgment that such a principle could provide the answer.

98. In coming to his conclusion on the scope of the physical power and control exception the judge appears to have attached little weight to the *Isaak* line of authority relied on

by the claimants. Although these cases appear, on one reading at least, to support the view that the use of lethal or potentially lethal force by a state's agent of itself is sufficient to establish jurisdiction, on closer examination, with one exception, they add little to the debate on the breadth of the exception.

(1) In *Pad v Turkey* (Application No. 60167/00, Judgment 27 June 2007) relatives of the Iranian applicants were killed by gunfire from a Turkish helicopter near the Iranian/Turkish border. The Chamber, referring to *Issa*, considered that the killings, even if they took place in Iran, occurred within the jurisdiction of Turkey on the basis that a state is accountable for violation of the Convention rights of individuals who are found to be under the state's authority and control through its agents operating, whether lawfully or unlawfully, in the territory of another state. However, in this case Turkey had conceded jurisdiction so this authority carries little weight.

(2) *Andreou v Turkey* (Application No. 45653/99, Judgment 3 June 2008) concerned a shooting incident at the UN buffer zone between Cyprus and the Turkish Republic of Northern Cyprus ("TRNC"). The applicant, while standing outside the neutral buffer zone in Cypriot territory, was shot by Turkish soldiers firing from within the TRNC. The Chamber identified a number of exceptions to the basic rule of territoriality including where persons are found to be under the State's authority and control through its agents operating in a second State (at p. 10). The applicant was held to be within the jurisdiction of Turkey. The Chamber observed that although the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as within the jurisdiction of Turkey. However, because the soldiers fired from the territory of TRNC this case is explicable as an application of the principle of subjective territoriality.

(3) *Solomou v Turkey* (Application No. 36832/97, Judgment 24 June 2008) also concerned a shooting by Turkish forces at the buffer zone between the TRNC and Cyprus. The Chamber considered (at [51]) that the deceased was under the authority and/or effective control of Turkey through its agents and concluded that the matters complained of therefore were within the jurisdiction of Turkey. However, it appears that the victim was shot within the TRNC by soldiers at an observation post which was also within the TRNC. (See [48]-[51], [70].) On this basis it would not be an extra-territorial act.

(4) *Isaak* (Application No. 44587/98, Judgment 28 September 2006) is the strongest case in this line. The deceased took part in a demonstration at the UN buffer zone between Cyprus and TRNC and was beaten to death by a mob, which included Turkish-Cypriot police officers. The Chamber referred (at p. 19) to *Issa* and considered a state's authority and control through its agents to be a basis of extra-territorial jurisdiction. It concluded that "even if the acts complained of took place in the neutral UN buffer zone, the Court considers that the deceased was under the authority and/or effective control of the respondent State through its agents" and was therefore within the jurisdiction of Turkey.

99. *Isaak* is the high water mark of the authorities in support of the claimants. It finds jurisdiction on the basis of authority and control by a State's agents in circumstances

where there is no prior arrest or detention and it justifies the conclusion by reference to *Issa*. The Grand Chamber in *Al–Skeini* was clearly aware of this line of authority; it referred to *Andreou* and to *Solomou* in an earlier passage. (See footnote 49 to [122].) *Isaak*, however, does not appear to have been referred to in *Al-Skeini*. It is, to my mind, significant that the Grand Chamber did not at paragraph [136] of *Al-Skeini* formulate a principle by reference to *Isaak*. This suggests that it did not intend to extend this category of extra-territorial jurisdiction to cases where the only jurisdictional link was the use of lethal or potentially lethal force and that this is, therefore, insufficient to bring the victim into the acting State's jurisdiction for this purpose.

100. Mr Eadie submitted on behalf of the Secretary of State that *Bankovic* is cited as authority at a number of points in *Al-Skeini* and that it cannot, therefore, be regarded as impliedly overruled in the later case. It follows, he submits, that the use of lethal or potentially lethal force cannot, of itself, give rise to a sufficient jurisdictional link for such a link would otherwise have existed in *Bankovic* as a result of the NATO bombing raid. Mr. Fordham for the claimants, on the other hand, showed a certain reluctance to submit that *Bankovic* had been impliedly overruled, pointing out that his case did not require him to establish that it had. He submitted that the test cases involve encounters far more immediate and similar to those which have previously been held to fall within Article 1 than aerial bombing from an aircraft thousands of feet above a city. I am unable to conclude, simply on the basis of sporadic references to *Bankovic* in footnotes in *Al-Skeini*, that the Grand Chamber must be taken to have intended that the conclusion in the earlier case that the bombing was outside the scope of the Convention should stand. *Al-Skeini* certainly departs from *Bankovic* in a number of important respects but there is no recognition of this or consideration of the present status of *Bankovic* in the text. It would not be appropriate to speculate as to the reason for this failure.

101. In these circumstances, I am unable to agree with the judge that the effect of *Al-Skeini* is to establish a principle of extra-territorial jurisdiction under Article 1 to the effect that whenever and wherever a state which is a contracting party to the Convention uses physical force it must do so in a way that does not violate Convention rights. (C.f. *obiter dicta* in *Serdar Mohammed v Ministry of Defence* [2015] EWCA Civ 843; [2016] 2 WLR 247 at [93] and [95], where this point was not argued.) The concept of physical power and control over a person will necessarily cover a range of situations involving different degrees of power and control. However, for the reasons set out above, I consider that in laying down this basis of extra-territorial jurisdiction the Grand Chamber required a greater degree of power and control than that represented by the use of lethal or potentially lethal force alone. In other words, I believe that the intention of the Strasbourg court was to require that there be an element of control of the individual prior to the use of lethal force.

102. The test of physical power and control is inherently imprecise. It may well be that it will be difficult to draw sensible distinctions between different types or degrees of power and control. However, if the logical consequence of the principle stated in *Al-Skeini* is that any use of extra-territorial violence is within the acting state's jurisdiction for this purpose, I believe that that is a conclusion which must be drawn by the Strasbourg court itself and not by a national court. I have referred earlier in this judgment to the particular need for care in determining this fundamental issue of the

ambit of application of the ECHR system and the principle, repeatedly stated in the House of Lords and the Supreme Court, that Article 1 should not be construed as reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach. In view of the controversial nature of the *Al-Skeini* decision, the uncertainty surrounding its effect and the breadth of the extension of extra-territorial jurisdiction for which the claimants contend, it is for the Strasbourg court to take this further step, if it is to be taken at all.

103. I accept that if I am correct as to the approach required by the statement of principle in *Al-Skeini* it will be necessary to attempt to distinguish between different types and degrees of physical power and control and that this will result in fine and sometimes tenuous distinctions. Thus, for example, on the facts alleged in *Issa*, had the Turkish troops simply shot the victims without first exercising any physical power or control over them, the case would not fall within this exception to extra-territorial jurisdiction. However, I consider the necessity of drawing such distinctions an inevitable consequence of the principle formulated by the Grand Chamber in *Al-Skeini*. Moreover, I can see that difficulties will arise in defining the degree of physical power or control which must be exercised. In this regard, I note that Mr. Eadie does not submit that an individual must be formally detained before this exception can apply and accepts that there may be more difficult cases which do not strictly involve detention but where, nevertheless, the situation is so closely linked to the exercise of authority and control of the state as to bring it within its jurisdiction for this purpose. I consider that this concession was correct. Furthermore, it is clear from the assumed facts of *Issa v Turkey* that this exception applies regardless of whether the exercise of control was lawful.

104. The judge did not shrink from acknowledging the consequences of his conclusion as to the breadth of this exceptional head of jurisdiction. He noted (at [106]) that it creates "real and difficult problems as to how human rights law under the Convention can be accommodated to the realities of international peacekeeping operations and situations of armed conflict". He considered that there are strong policy reasons for seeking to interpret the territorial scope of the Convention in a way which limits the extent to which it impinges on military operations in the field. He also expressed concern that once the Convention was held to apply to the use of force in overseas military operations, the inevitable consequence of any major foreign intervention would be a flood of claims before the courts. I share the judge's concern at these consequences which flow, to a greater or lesser extent, from any reading of *Al-Skeini*. I also agree with the judge that these consequences do not provide a legitimate reason for declining to give effect to the expanded scope of application of ECHR if that is the clear intention of the Strasbourg court. However, for the reasons which I have attempted to explain, I consider that the expanded scope of application of ECHR is not as expansive as that acknowledged by the judge.

105. In these circumstances, while acknowledging the force of the judge's reasoning, I am unable to agree with his conclusion as to the scope of the exception to territorial jurisdiction founded on physical power and control exercised by a state agent.

106. *Application to test cases*

107. *The PIL cases*

108. Against this background I now turn to consider the assumed facts of the test cases.

109. *PIL 6: Atheer Karim Khalaf.*

110. On 29 April 2003, during the invasion period, Uday Karim Khalaf drove his car to a petrol station in Basra to queue for petrol. When he reached the head of the queue Mr. Khalaf opened the door to get out but was ordered by a British soldier to pull back. Mr Khalaf forgot that his car door was open and when he reversed it hit a British soldier standing by the side of the car and knocked him down. Mr. Khalaf was unaware of what happened and continued to reverse. The soldier stood up, pointed his gun through the driver's side window and shot Mr. Khalaf in the stomach. He then pulled Mr. Khalaf out of the car, held his head and started hitting it against the pavement while another soldier started smashing the car window with his rifle. A female soldier intervened. Mr. Khalaf was taken to a military hospital but later died of his wounds.

111. In a parallel civil claim it is averred by the Ministry of Defence that two Warrior armoured vehicles containing seven soldiers from the Black Watch were at the petrol station supporting three staff and three auxiliary policemen in implementing the supply of rationed fuel to Iraqi civilians.

112. Notwithstanding that this incident occurred during the invasion period, I consider that these soldiers had assumed responsibility for the performance of a function, namely policing the supply of rationed fuel to civilians, in the exercise of public powers normally exercised by the Iraqi police on behalf of the government of Iraq. Accordingly I consider that this case falls within the public powers exception and that Mr. Khalaf was within the jurisdiction of the United Kingdom.

113. With regard to the exception based on the exercise of control, I consider that Mr. Khalaf was not covered by this exception at the time of the shooting. However, it is possible that thereafter the soldier exercised a degree of control over him which would bring the subsequent conduct within this exception. This will require further investigation of the facts.

114. *PIL 82: Captain Taleb.*

115. On 17 December 2004, during the post-occupation period, Captain Taleb was driving his wife and infant child in his car. As he approached cross roads, British soldiers attempting to stop the car shone a blinding spotlight into the car and almost immediately began shooting. Numerous bullets hit the car and Captain Taleb was hit. After some time a passing driver came to his assistance and took him to hospital where he was declared dead on arrival.

116. I consider that the British forces were exercising police or military powers which would normally be exercised by the Iraqi government's security forces. Accordingly, this case falls within the public powers exception.

117. However, I do not consider that this case falls within the exception based on control of an individual because there was no element of prior control.

118. *PIL 129: Raad Karim*

119. In the early hours of 15 November 2006, during the post-occupation period, the claimant's brother was shot and killed by British soldiers during a raid on his family home in Basra.

120. I consider that this case falls within the public powers exception because the British forces were exercising police or military powers which would normally be exercised by the Iraqi government's own security forces. Whether there was a sufficient degree of prior control so as to bring this case within the exception based on control of the individual would require further investigation of the facts.

121. *PIL 156: Yousif Naser.*

122. This claim concerns the claimant's nephew, Ali Salam, who on 10 April 2007, during the post-occupation period, was walking to work when he heard gun shots. He ran to take cover and was killed by shots fired from a British tank.

123. In this case British forces were exercising police or military powers which would normally be exercised by the Iraqi government's own security forces and the case therefore falls within the public powers exception. I do not consider that the case falls within the exception based on control of the individual.

124. *PIL 73: Maytham To-ma Dahir Al-Salami.*

125. This claim concerns the claimant's brother, Qassim, who was shot in the head and killed by British soldiers when they raided his family home in Basra on 23 April 2007, during the post-occupation period.

126. I consider that the British forces were exercising police or military powers which would normally be exercised by the Iraqi government's own security forces and that the case accordingly falls within the public powers exception. Whether the case falls within the exception based on control of the individual would require further investigation of the facts.

127. *PIL 3: Maytham Jaber, Ati Al-Mayahi*

128. *PIL 7: Salam Khadim Badan Al-Maliki*

129. These two cases may conveniently be considered together.

130. PIL 3. On 23 March 2003 the Claimant's brother Nadhim was hit by a bullet which the claimant believes was fired by British troops. He was driven, still alive, to a medical facility in Kuwait. The claimant last saw Nadhim being anaesthetised and taken by stretcher onto a military helicopter which then took off. This was the last time Nadhim was seen by his family.

131. PIL 7. On 29 April 2003 the claimant's 12 year old son, Memmon, was playing outside his home in Basra when he picked up a munition which exploded and seriously injured him. He was taken by a British Army patrol to a military hospital on a British Army base. The claimant went to the hospital on several occasions but was not permitted to see his son and later understood that he had been taken to a US field hospital in Kuwait. He has not been able to establish Memmon's whereabouts since.

132. In the court below it was submitted on behalf of the Secretary of State that these individuals were not within the jurisdiction of the United Kingdom because they were never taken into custody. It is not entirely clear whether this submission is maintained in the light of Mr Eadie's modified stance on the scope of the control exception. In any event, I agree with the judge that the fact that the purpose of exercising control is benign cannot affect the question of jurisdiction. These individuals were undoubtedly under the physical power and control of agents of the United Kingdom. This conclusion is supported by *Hirsi Jamaa v Italy* (2012) 55 EHRR 21 where Somalian and Eritrean nationals seeking to reach the Italian coast were intercepted at sea, transferred to Italian military vessels and returned to Libya. The Strasbourg court rejected Italy's argument that as the purpose of the operation was to save human lives on the high seas, the individuals concerned did not fall within its jurisdiction. Accordingly, I agree with the judge that in each of these test cases the individual concerned was within the Article 1 jurisdiction of the United Kingdom when last seen.

133. *PIL 176: Oasim Sahib, Talib Al-Kharsa.*

134. The claimants allege that a number of unarmed Iraqi civilians were deliberately killed by British forces during a security operation in the town of Majar-al-Kabir on 17 June 2007, during the post-occupation period. The incident included shooting at close range on the ground and shooting from a helicopter. The claimant's 18 year old son was shot dead whilst standing at the door of the family home after being woken by gunfire.

135. The Secretary of State's case is that the operation was US-led and that the UK supporting role was limited. He maintains that British armed forces were not present during the operation, had no control over the actions of personnel who were there and provided limited logistical support. It was accepted that because the operation took place within the United Kingdom's area of operations, it was consulted on the planning of the operation and provided a refuelling point for US helicopters 40 kilometres away from Majar-al-Kabir.

136. I agree with the judge that, although it is arguable that the planning of the operation and the provision of logistical support involve the exercise of governmental powers, this limited role does not involve the exercise of authority or control over individuals killed by US forces in the course of the operation so as to bring them within the jurisdiction of the United Kingdom for this purpose.

137. *PIL 45: Ahmed Awdeh.*

138. The claimant's son, Lafteh, then aged 22, was killed on 4 September 2003 by a British Army truck. Lafteh was on a dirt road track close to an asphalt road on which the convoy was travelling. In trying to avoid a ditch on the road a truck swerved and hit Lafteh who died immediately from his injuries. The truck sped away and the rest of the column of vehicles followed.

139. The claimant submits that the case falls within the public powers exception because the purpose of the troops driving in convoy was to help to provide security and therefore exercise powers that would normally be exercised by the Iraqi government. The claimant submits that Lafteh's death occurred in the course of the exercise of public powers or, in the terms employed by the Strasbourg court in *Al-Skeini* at [150],

was "contiguous" to the exercise of such functions so that he was within the jurisdiction of the United Kingdom.

140. The judge at [130], drew attention to the fact that the public powers exception is founded on the exercise by State agents of authority and control over an individual. In his view, British troops were not exercising authority and control over individuals simply by driving along a road, even when that caused an accidental death. In my view, the victim was not within the jurisdiction of the United Kingdom at the material time because the United Kingdom was not exercising a governmental function involving public powers in relation to him, nor was he under the authority and control of an agent of the United Kingdom.

141. *Rahmatullah and Ali*

142. The facts relating to Yunus Rahmatullah and Amanatullah Ali are set out by the judge at [131] and [132] of his judgment. These claimants were detained by British forces in February 2004 in an area of Iraq which was under US authority. Shortly afterwards they were transferred into the custody of US forces in accordance with a Memorandum of Understanding signed in 2003 (the "2003 MoU") which established arrangements for the transfer of detainees between the armed forces of the United States, the United Kingdom and Australia. The 2003 MoU included a provision for the state into whose custody an individual was transferred to return a detainee to the original detaining power without delay upon request. By the end of June 2004 Mr. Rahmatullah and Mr. Ali had been transported by US forces to Bagram Airbase in Afghanistan. They allege that, while detained there, they were subjected to torture and other serious mistreatment.

143. In May 2011, an application was made in this jurisdiction on behalf of Mr. Rahmatullah for a writ of habeas corpus directed to the Secretary of State for Defence and the Secretary of State for Foreign and Commonwealth Affairs. By this date Mr. Rahmatullah had been imprisoned in Bagram Airbase without charge or trial for over seven years. The application was refused by a Divisional Court but was granted on appeal. The Court of Appeal considered that there was sufficient reason to believe that Mr. Rahmatullah's continued detention by the United States was unlawful and that the United States would return him upon a request from the UK government to justify the issue of the writ (*Rahmatullah v Secretary of State for Defenc*e [2012] 1 WLR 1462). However, when a request to return Mr. Rahmatullah was made to the US authorities, they did not return him to the United Kingdom and in these circumstances no further order was made on the writ. Both the decision of the Court of Appeal to issue the writ of habeas corpus and the subsequent decision to make no further order on the writ were upheld on an appeal to the Supreme Court (*Rahmatullah v Secretary of State for Defenc*e [2013] 1SC 614). Mr. Rahmatullah was not released from custody until June 2014. Mr. Ali remains imprisoned.

144. The Secretary of State accepts that, on the assumption that the facts are as pleaded by the Claimants, Mr. Rahmatullah and Mr. Ali were within the jurisdiction of the United Kingdom for the purposes of Article 1 during the initial period when they were in the custody of British forces before they were transferred to the custody of US forces. However he denies that they remained within the jurisdiction of the United Kingdom for the purposes of Article 1 in any period after the transfer to US forces had taken place. Miss Phillippa Kaufmann QC, on behalf of Mr. Rahmatullah and Mr. Ali,

submits that by virtue of the 2003 MoU and by virtue of international humanitarian law, the United Kingdom retained a degree of control over Mr. Rahmatullah and Mr. Ali which resulted in their remaining within the jurisdiction of the United Kingdom for this purpose, notwithstanding that they had been transferred to the custody of US forces. The substantive complaints brought by Mr. Rahmatullah and Mr. Ali are that the United Kingdom failed to take steps to avert a real and immediate risk of ill treatment (Article 3) or arbitrary detention (Article 5) by a third party.

145. Miss Kaufmann placed at the forefront of her submissions the decision of the Grand Chamber in *Hassan v United Kingdom* [2014] 38 BHRC 358. Mr. Tarek Hassan was arrested by members of British forces in the region of Basra on 23 April 2003. He was taken by British forces to Camp Bucca which had been established on 23 March 2003 as a UK detention facility but which officially became a US facility on 14 April 2003. For reasons of operational convenience, the United Kingdom continued to detain individuals they had captured at Camp Bucca. The 2003 MoU referred to above applied to this use of shared facilities. Mr. Hassan was interviewed, following which the UK authorities decided he was a civilian who did not pose a threat to security and ordered that he be released as soon as practicable. On 2 May 2003 he was taken by bus and released at a drop off point near where he had been arrested. He did not contact his family. Four months later his body was discovered in a remote area of Iraq some seven hundred kilometres from Camp Bucca. The Grand Chamber held that Mr. Hassan was within the jurisdiction of the United Kingdom throughout the whole period from the time of his capture by British troops until his later release from detention, even though he was held at a detention facility which was officially a US facility and was guarded by US troops. The basis of this decision was that the United Kingdom was responsible for deciding whether he should be released. The Grand Chamber (at [78]) considered that the United Kingdom retained authority and control over all aspects of his detention relevant to his complaints under Article 5.

146. I consider that *Hassan* is clearly distinguishable from the facts relating to Mr. Rahmatullah and Mr. Ali. Notwithstanding the fact that the same MoU applied in the case of Mr. Hassan, the arrangements operating at Camp Bucca were such that Mr. Hassan remained under the direct authority and control of British forces. He was admitted to the camp as a UK prisoner. Shortly after his admission he was taken to a compound which was entirely controlled by British forces. In accordance with the MoU, the United Kingdom had responsibility for the classification of UK detainees under Geneva III and IV and for deciding whether they should be released. It was the UK authorities who decided that he should be released. On this basis the Grand Chamber concluded that while certain operational aspects of his detention were transferred to US forces, in particular guarding him when outside the compound in which he was held, the United Kingdom retained authority and control over all aspects of his detention relevant to his complaints under Article 5.

147. The judge in the present case, correctly in my view, considered that what matters for the purpose of establishing jurisdiction under Article 1 is whether the contracting state has the power to decide whether the individual should be kept in detention or released and the power to dictate how the individual is treated while in custody. This is a question of fact and legal rights and obligations are relevant only insofar as they are evidence of what the position is in practice. For the purposes of extra-territorial jurisdiction on grounds of state agent authority and control over an individual,

Convention rights can now be divided and tailored. Accordingly, for the purposes of Article 5 what matters is whether the UK authorities had the power to decide whether a person should be kept in custody and for the purposes of Article 3 what matters is whether the UK authorities had the power to decide how they were treated while in custody. In the case of Mr. Rahmatullah and Mr. Ali neither of these conditions is satisfied.

148. Miss Kaufmann submitted, however, that this is too narrow an approach. She submitted that the United Kingdom retained a sufficient degree of authority and control over Mr. Rahmatullah and Mr. Ali even after they had been transferred to the custody of US forces with the result that they remained in the jurisdiction of the United Kingdom for this purpose. Here she relied, initially at least, on the 2003 MoU and in particular Article 4 which provides that any prisoners of war, civilian internees and civilian detainees transferred by a detaining power will be returned by the accepting power to the detaining power without delay upon request by the detaining power. However she later accepted that this is of limited effect because it is not legally binding. She latterly based her submission on Article 12 of Geneva III which provides that when prisoners of war are transferred by a detaining power to an accepting power, responsibility for the application of the Geneva Convention III rests on the accepting power while they are in its custody. Article 12 continues:

> 149. "Nevertheless if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with."
>
> 150.

151. Article 45 of Geneva IV makes corresponding provision in respect of protected persons. Miss Kaufmann submits that this gives rise to a sufficient degree of authority and control by the United Kingdom over the individuals concerned to establish jurisdiction for the purposes of Article 1.

152. I consider that this submission casts the net of jurisdiction too wide. The exception to the territoriality principle acknowledged in *Al-Skeini* in the case of physical power and control over a person depends on the fact of such physical power and control. Its significance is that it enables the contracting state to act to secure certain Convention rights depending on the circumstances and the degree of physical power and control it possesses. It simply is not present in the cases now under consideration. The power and duty of the United Kingdom arising under the Geneva Conventions to take corrective measures or to request the return of the individuals concerned are no substitute because they are too remote. The history of Mr. Rahmatullah's application for habeas corpus reveals what Lord Neuberger M.R. described as the melancholy truth that, in reality, the United Kingdom did not possess such power or control while he was detained by the US authorities. (See *Rahmatullah* [2012] 1 WLR 1462 at [109].) He and Mr. Ali were undoubtedly under the physical power and control of the United States.

153. **III. <u>ARTICLE 3 ECHR: INVESTIGATIVE OBLIGATIONS</u>**

154. Article 3

155. Article 3 ECHR provides:

> 156. "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

157. Article 3 imposes three types of duty. First it imposes a negative duty on the State not to subject anyone within its jurisdiction to torture or to inhuman or degrading treatment or punishment. Secondly it imposes a positive obligation to take steps to protect an individual within its jurisdiction who is exposed to a real and imminent risk of serious harm of which the State authorities are aware. In addition, it has become established, thirdly, that Article 3 gives rise to an obligation not to send an individual to another State where there are substantial grounds for believing that he would face a real risk of being subjected to torture or other prohibited treatment. This third duty was recognised by the Strasbourg court in *Soering v United Kingdom* (1989) 11 EHRR 439 and I shall refer to it as "the *Soering* obligation".

158. We are concerned in this part of the case with the question whether, and if so in what circumstances, an investigative obligation may arise in *Soering*–type cases. In particular we are here concerned with an alleged adjectival duty on a contracting state to investigate allegations of breach of the *Soering* duty under Article 3 after the event, as opposed to an obligation on a contracting state to investigate as part of the substantive *Soering* obligation. (C.f. *R (Nasseri) v Secretary of State for the Home Department* [2010] 1 AC 1, per Lord Hoffmann at [9]-[15].) The issues are formulated as follows:

> 159. "(2) Whether there is an investigative obligation which arises in all handover (*Soering*–type) cases where there is an arguable breach of the principle that detainees will not be transferred if, at the time of transfer, there was a real risk of torture or serious mis-treatment.
>
> 160. (3) If the answer to (2) is yes, what is the content of that investigative obligation?
>
> 161. (4) If the answer to (2) is no, are there other circumstances in which an investigative duty arises in handover (*Soering*–type) cases and if so, what are the features necessary to trigger that investigative duty? What would the content of any such investigative obligation be?"

162.

163. In *Soering* the Grand Chamber of the Strasbourg court described the obligation which it derived by implication from Article 3 in the following terms:

> i) "In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably

involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment." (at [91])

ii)

164. The principle is not limited to extradition but applies generally to removal from the territory of a contracting state. It has also been applied to the transfer of individuals arrested by UK forces in Iraq to the custody of the Iraqi authorities (*Al-Saadoon v United Kingdom* (2010) 51 EHRR 9).

165. The *Soering* duty conforms with basic principles of jurisdiction under the Convention in that a contracting state is required to secure the corresponding right to those within its jurisdiction. It is a duty on a contracting state not to expose a person within its jurisdiction to a risk outside its jurisdiction. Nevertheless, it is directly concerned with risk arising outside the territory of a contracting state and it therefore adds very significantly to the protection afforded by Article 3.

166. On behalf of the claimants Mr. Fordham submits that there is a duty to investigate any arguable breach of Article 3. He submits that an investigative duty arises in all *Soering*–type cases where there is an arguable claim that the person transferred to the custody of another State faced a real risk of torture or serious mistreatment. In the court below the Secretary of State submitted that the duty to investigate arguable breaches of Article 3 was limited to cases where there was an arguable claim that an individual within the jurisdiction of the United Kingdom was subjected to torture or inhuman or degrading treatment. However, on this appeal, Mr. Eadie has supported the conclusion of the judge below on this issue.

167. The judge rejected the submission that there is an investigative obligation which arises in all *Soering*–type cases where there is an arguable breach of the principle that detainees must not be transferred if, at the time of transfer, there was a real risk of torture or other serious mistreatment. He considered that the submission that an investigative obligation arises in all such cases was inconsistent with principle and with authority. He did conclude, however, that there were two situations in which, in principle, a violation of a *Soering* obligation under Article 3 could give rise to a duty to investigate: cases in which a contracting state perpetrated mistreatment and cases in which a contracting state aided or assisted mistreatment.

168. The judge included in his judgment a particularly helpful survey of the Strasbourg case law on investigative obligations arising in general in connection with Article 3. He identified two bases on which the Strasbourg court had found a duty to investigate arguable violations of Article 3. The first is founded on Article 13 ECHR which confers a right to an effective remedy:

> 169. "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority

notwithstanding that the violation has been committed by persons acting in an official capacity."

170. In *Aksoy v Turkey* (1996) 23 EHRR 553, the Strasbourg court held that Turkey's failure to investigate whether the applicant had been tortured while in detention, despite the fact that the prosecutor had been made aware of his injuries, violated Article 13.

> 171. "Accordingly, as regards Art. 13, where an individual has an arguable claim that he has been tortured by agents of the State, the notion of "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure." (at [98])

172. The court considered that such a requirement was implicit in the notion of an effective remedy under Article 13. (See also *Aydin v Turkey* (1997) 25 EHRR 251 at [103]).

173. A second line of authority has founded an investigative obligation on Article 3 itself. In *Assenov v Bulgaria* (1998) 28 EHRR 652 the Strasbourg court considered that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision read in conjunction with the duty under Article 1 required by implication that there should be an effective official investigation, which should be capable of leading to the identification and punishment of those responsible (at [101], [102]). There the court also held that the failure to hold a thorough and effective investigation constituted a violation of Article 13 (at [118]). (See also *Labita v Italy* [2000] ECHR 161 at [131]).

174. In *Ilhan v Turkey* (2002) 34 EHRR 44 the Grand Chamber attempted to reconcile these two lines of authority. It stated that Article 13 would generally provide the necessary procedural safeguards and suggested that there would be a procedural breach of Article 3 only if the court was unable to determine whether there had been a substantive breach of Article 3 at least in part as a result of the failure of the authorities to conduct an effective investigation. I share the judge's puzzlement as to why the existence of a procedural obligation to investigate an allegation of ill-treatment can depend on whether the court was able to conclude beyond reasonable doubt that ill-treatment in fact took place. Moreover, as the judge demonstrated, this distinction has not been consistently followed since the decision in *Ilhan*. (See the authorities referred to by the judge at [148].) However, nothing turns on this for the purposes of the present case.

175. The above cases are concerned with a duty to investigate an arguable claim or credible assertion of ill-treatment by State agents contrary to Article 3. An investigative obligation has also been held to arise in certain cases where the ill-treatment was inflicted by third parties who were not agents of the state. Such cases are the counterpart under Article 3 of authorities under Article 2. (See, for example, *Edwards v United Kingdom* (2002) 35 EHRR 487; *R (Amin) v Secretary of State for the Home Department*; [2003] UKHL 51; [2004] 1 AC 653.) In *Edwards* the Strasbourg court held that the failure of the United Kingdom to provide an effective

investigation into the killing of a prisoner by his cell mate was a breach of its investigative obligation under Article 2.

176. In *97 Members of the Gldani Congregation of Jehovah's Witnesses v Georgia* (2008) 46 EHRR 30, an Article 3 case, the applicants, who were members of the congregation, were attacked in the theatre in which they were meeting by a group of Orthodox believers. The Strasbourg court referred to the positive duty of protection which arises under Article 3 which calls for reasonable and effective measures in order to prevent ill-treatment of which the authorities were or ought to have been aware. It then continued:

> 177. "97. Furthermore, Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation (see Assenov and Others v Bulgaria, …, § 102). Such a positive obligation cannot be considered in principle to be limited solely to cases of ill-treatment by State agents (see M.C. v Bulgaria, … § 151). Thus, the authorities have an obligation to take action as soon as an official complaint has been lodged. Even in the absence of an express complaint, an investigation should be undertaken if there are other sufficiently clear indications that torture or ill-treatment might have occurred. A requirement of promptness and reasonable expedition is implicit in this context. A prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. Tolerance by the authorities towards such acts cannot but undermine public confidence in the principle of lawfulness and the State's maintenance of the rule of law (see Batı and Others v Turkey, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV (extracts); Abdülsamet Yaman v Turkey, no. 32446/96, § 60, 2 November 2004; and, mutatis mutandis, Paul and Audrey Edwards v the United Kingdom, no. 46477/99, § 72, ECHR 2002-II)."
>
> 178.

179. The court concluded (at [111]) that the authorities failed to take action promptly to end the violence and to protect the victims. It also concluded (at [124]) that the applicants were subsequently faced "with total indifference on the part of the relevant authorities who, for no valid reason, refused to apply the law in their case". The court therefore concluded that Georgia had failed to comply with its positive obligations under Article 3. (See also *MC v Bulgaria* (2005) 40 EHRR 20 at [151]; *Secic v Croatia* [2007] ECHR 1159 at [53]; *D v Commissioner of Police for the Metropolis* [2015] EWCA Civ 646; [2016] QB 161; *DSD v Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB), Green J. at [211]-[255].)

180. It should be noted, however, as the judge pointed out in the present case (at [171]), that what is engaged in such cases is the positive obligation of a contracting state to protect those within its jurisdiction from treatment prohibited by Article 3 and that this may require the state to investigate a credible complaint of such ill-treatment with a view, inter alia, to identifying and punishing those responsible. The duty is one to investigate alleged ill-treatment. It is not a duty to investigate the conduct of state officials in exposing individuals to the risk of ill-treatment. (See *Gldani* at [97] and [124].) In this regard I would draw attention to two further matters. The first is the observation of the Strasbourg court in *Edwards v United Kingdom* at [74] that there

was a duty to investigate because the deceased was a prisoner under the care and responsibility of the authorities when he died from acts of violence of another prisoner and that in this situation it was irrelevant whether state agents were involved by acts or omissions in the events leading to his death. Secondly, whereas a breach of the substantive *Soering* duty is committed where a contracting state exposes an individual to a risk of ill-treatment contrary to Article 3 (*Mamatkulov v Turkey* (2005) 41 EHRR 25 at [69]), an investigative duty in conjunction with the positive duty of protection under Article 3 arises only where the prohibited ill-treatment has occurred (See, by analogy, *R (Amin) v Secretary of State for the Home Department* per Lord Bingham at [31]).

181. In his judgment Leggatt J. observed (at [169]) that no case had been cited in argument before him in which the Strasbourg court, let alone any domestic court, had said that there is a duty to investigate not just an allegation of ill-treatment committed by state agents but an allegation that state agents have exposed an individual to a risk of ill-treatment by others.

182. In support of his submission that all breaches of the *Soering* duty attract an investigative obligation, Mr. Fordham on behalf of the claimants places particular emphasis on the decision of the Grand Chamber of the Strasbourg court in *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25. In that case the Grand Chamber found that the applicant was detained in Macedonia on 31 December 2003 and subjected to incommunicado detention in a hotel until 23 January 2004. During his detention he was guarded, repeatedly interrogated and threatened with a gun. On 23 January 2004 he was handcuffed, blindfolded and driven to Skopje Airport where he was placed in a room with a number of masked men, assaulted, hooded and chained before being placed on an aircraft that was surrounded by armed Macedonian security guards. During the flight he was anaesthetised. A Macedonian exit stamp dated 23 January 2004 was affixed to his passport. The applicant alleged that his pre-flight treatment was at the hands of a special CIA rendition team. He was flown to Afghanistan where he was detained in a small cell, assaulted and interrogated at a CIA facility called the "Salt Pit" in Kabul. His requests to meet a representative of the German government were ignored. He began a hunger strike, his health deteriorated and he was denied medical treatment. He was force fed on 10 April 2004, became extremely ill and received medical attention. On 28 May 2004, hooded and chained, he was flown back to Europe and released in Albania near the border with Macedonia/Serbia.

183. The Grand Chamber (at [168]) summarised the alleged violation of Article 3 in the following terms

> 184. "The applicant complained that the respondent State had been responsible for the ill-treatment to which he had been subjected while he was detained in the hotel and for the failure to prevent him from being subjected to "capture shock" treatment when transferred to the CIA rendition team at Skopje Airport. He further complained that the respondent State had been responsible for his ill-treatment during his detention in the "Salt Pit" in Afghanistan by having knowingly transferred him into the custody of US agents even though there had been substantial grounds for believing that there was a real risk of such ill-treatment. In this latter context, he complained that the conditions of detention, physical assaults, inadequate food and water, sleep deprivation, forced feeding

> and lack of any medical assistance during his detention in the "Salt Pit" amounted to treatment contrary to Art. 3 of the Convention. Lastly, he complained that the investigation before the Macedonian authorities had not been effective within the meaning of this article."

185. The violation of Article 3 alleged by the applicant therefore included breaches of all three substantive limbs of Article 3. In addition there was an allegation of a breach of the procedural obligation to conduct an effective investigation. It is apparent from paragraph [172] that this last allegation related generally to the alleged breaches of the substantive obligation. It simply states that the authorities had conducted a cursory and grossly inadequate investigation into "his arguable allegations".

186. The Grand Chamber considered the procedural aspects of Article 3 first. It began by stating that

> 187. "where an individual raises an arguable claim that he has suffered treatment infringing Art. 3 at the hands of the police or other similar agents of the State, that provision read in conjunction with the State's general duty under Article 1 … requires by implication that there should be an effective official investigation." (at [182]).

188. At this point the matter stated to give rise to an investigative obligation is an arguable claim that he has suffered treatment by the State infringing Article 3 i.e. a breach of the State's negative obligation to abstain from such conduct. This formulation does not support the view that a breach of the *Soering* obligation can trigger such an investigative obligation. The Grand Chamber's consideration of what the procedural duty requires – including "a serious attempt to find out what happened" (at [183]) – may be wide enough to include an investigation into a breach of the *Soering* obligation but it is also expressed in terms of investigating the incident which are not apt in the case of a breach of the *Soering* obligation (see [183]).

189. At paragraph [186] the Grand Chamber applied the legal principles to the facts of the case. It observed that the applicant had brought to the attention of the public prosecutor his allegations of ill-treatment by State agents and their active involvement in his subsequent rendition by CIA agents. It was this which the court considered "laid the basis of a prima facie case of misconduct on the part of the security forces of the respondent State, which warranted an investigation by the authorities in conformity with the requirements of Art. 3 of the Convention". A later passage (at [188]) considers the circumstances of the applicant's rendition and concludes that "[a]n investigation of the circumstances regarding the aircraft and the passenger would have revealed relevant information capable of rebutting or confirming the well-foundedness of the applicant's account of events." However, it is clear from paragraph [186] that the allegations which required investigation went far beyond violation of the *Soering* obligation and involved criminal wrongdoing by agents of the State. Accordingly, I agree with the judge that nothing in this decision justifies an inference that a duty to investigate arises whenever an arguable claim is made that a person was exposed to a real risk of treatment contrary to Article 3 by reason of their transfer to another State. In any event, even if the breach of the *Soering* obligation established in *El-Masri* could be taken, of itself, as triggering an investigative obligation, *El-Masri* was a case in which the Macedonian authorities knowingly exposed him to a real risk of ill-treatment (see in particular [168] and [220]) and the

case provides no support for the view that all breaches of the *Soering* obligation necessarily give rise to such an investigative obligation.

190. The claimants also rely, in this regard, on *Dzhurayev v Russia* (2013) 57 EHRR 22. There the Strasbourg court found (at [138]) that the applicant was kidnapped by unidentified persons in Moscow, detained there by his captors for one or two days, then forcibly taken by them to an airport and put on board a flight to Tajikistan, where he was immediately placed in detention by the Tajik authorities. The court considered the applicant's allegation that the Russian authorities were involved in his forcible transfer to Tajikistan in connection with issues arising under Article 3.

191. First, the court concluded (at [176]) that the applicant's forcible return to Tajikistan exposed him to a real risk of treatment contrary to Article 3. It then went on to consider whether the Russian authorities complied with their positive obligation to protect the applicant against the real and immediate risk of forcible transfer to Tajikistan. The court considered that where the authorities of a contracting state are informed of a real and immediate risk of torture and ill-treatment through transfer by any person to another state, "they have an obligation under the Convention to take, within the scope of their powers, such preventive operational measures that, judged reasonably, might be expected to avoid that risk" (at [180]). It found that the authorities were well aware or ought to have been aware of the real and immediate risk but, nevertheless, failed to take any timely preventive measure and were accordingly in breach of the state's positive obligations under Article 3 (at [183] – [185]).

192. Secondly, the court, referring to *Assenov* and *El Masri*, reiterated that Article 3 requires "that there should be an effective official investigation into any arguable claim of torture or ill-treatment by state agents" (at [187]). It considered (at [190]) that "these well-established requirements of the Convention fully apply to the investigation that the authorities should have conducted into the applicant's abduction and his ensuing exposure to ill-treatment and torture in Tajikistan". The relevant information was brought to the attention of the authorities immediately after the abduction.

> 193. "It became obvious at a certain stage that under Article 3 of the Convention the applicant had a prima facie case that warranted an effective investigation at the domestic level. While the role played by Russian state agents in the incident might have been questionable immediately after the applicant's abduction in Moscow by unidentified persons, the complaint about his ensuing transfer to Tajikistan through a Moscow airport in breach of all legal procedures must have triggered the authorities' utmost attention, inasmuch as the applicant's representatives claimed that state agents had been actively or passively involved in that operation." (at [191])

194. The court concluded, on this basis, that the numerous flaws in the investigation were manifestly inconsistent with Russia's obligations under Article 3.

195. Thirdly, the court considered the claim that Russia was liable on account of the passive or active involvement of its agents in the applicant's forcible return to Tajikistan. In its view it would not normally be possible, under normal circumstances, for a person to be taken to an airport and removed from the country without the

authorisation or at least the acquiescence of state agents in charge of the airport. Furthermore, Russia had not provided any explanation as to how the applicant could have been taken onto an aircraft and removed from Russia without accounting to any state official. In these circumstances it concluded (at [203]) that Russia was responsible for the applicant's forcible removal to Tajikistan on account of the involvement of agents of the Russian state in that operation.

196. To my mind, *Dzhurayev* does not support the claimants' submission that an investigative obligation arises in all cases where there is an arguable case that a contracting state has exposed an individual to a real risk of ill-treatment in another state to which he was removed. The investigative duty which was held to apply in *Dzhurayev* was expressly founded on the principle that there should be an effective official investigation into any arguable claim of torture or ill-treatment by state agents and, on the facts of that case, clearly arose from the involvement of agents of the Russian state in the applicant's abduction and transfer to Tajikistan.

197. Accordingly, I agree with the judge that these decisions do not support the proposition that an investigative obligation arises in all handover cases where there is an arguable breach of the *Soering* principle. Moreover, I can see no reason in principle why such a broad investigative obligation should be considered necessary in order to give effect to the prohibitions imposed by Article 3.

198. Mr Eadie, on behalf of the Secretary of State drew attention to the fact that the *Soering* duty itself arises by implication from the express terms of Article 3. He submitted that to impose a further investigative obligation in *Soering*-type cases would be to impose implication on implication. While I would accept that the process of implication of obligations into the Convention is to be carried out with caution, lest the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept (see *Brown v Stott* [2003] 1 AC 681 per Lord Bingham at p. 703 E-G), there are many instances in which the Strasbourg court has developed the scope of Convention duties beyond the express provisions of the Convention text, where it was necessary or plainly right to do so. The fact that the implication of an investigative duty in conjunction with the *Soering* duty, which is itself implied, would be a second layer of implication would not, of itself, be an obstacle if the implication were otherwise justified.

199. The judge, however, (at [165] – [167]) identified three important differences in principle between the infliction of torture or inhuman or degrading treatment and a breach of the *Soering* obligation. They may be summarised as follows:

(1) In terms of harm, exposing someone to a risk of ill treatment cannot reasonably be equated with actually subjecting a person to such treatment.

(2) In terms of culpability, a breach of the *Soering* obligation can be committed without any *mens rea* or personal liability on the part of any state official. A breach may be established simply by showing the existence of substantial grounds for believing that the individual in question would face a real risk of being subjected to treatment contrary to Article 3 if sent to the receiving state. There is no requirement that state officials should have knowledge of the risk.

(3) Whereas subjecting a person to torture or other inhuman or degrading treatment is contrary to the criminal laws of civilised societies, the same cannot be said of a breach of the *Soering* obligation.

On these grounds the judge concluded that the *Soering* obligation cannot be regarded as having the same fundamental status as the prohibition against torture and inhuman or degrading treatment itself.

200. On behalf of the claimants Mr. Fordham submits that these three matters cannot form the basis of a distinction between those rights which give rise to an investigative obligation and those which do not because they apply equally to the protective obligation in respect of which there is an investigative obligation. However, as indicated above, the duty to carry out an investigation in connection with the protective obligation is a duty to investigate a credible claim of ill-treatment with a view to identifying and punishing those responsible and not a duty to investigate the conduct of state officials in exposing the individuals concerned to the risk of ill-treatment. Once it is established that the investigative obligation in connection with the positive protective duty under Article 3 is a duty to investigate the ill-treatment, the attempted analogy with *Soering*-type cases breaks down. In the latter situation it is the alleged mistreatment by the foreign state which is comparable to the conduct which must be investigated in the former. Moreover, a contracting state's obligation to conduct an effective official investigation into ill-treatment in such cases applies only in relation to ill-treatment alleged to have been committed within its jurisdiction (*Al-Adsani v United Kingdom* (2002) 34 EHRR 11, at [38]). Where alleged ill-treatment occurs outside the jurisdiction of the contracting state it has no power and no obligation to investigate it.

201. I consider the judge's analysis to be highly persuasive. *Soering*-type cases are distinguishable in this way from the other two categories of substantive obligations under Article 3 and are likely, in practice, to lead to the conclusion that it is not necessary, in order to make Article 3 effective, to impose an ancillary investigative obligation in such cases.

202. For these reasons I agree with the judge in response to issue (2) that neither on the authorities nor in principle is there to be found any support for the proposition that there is an investigative obligation which arises in all *Soering*-type cases where there is an arguable breach of the principle that detainees will not be transferred if, at the time of transfer, there was a real risk of torture or serious mistreatment. Accordingly, issue (3) does not arise for consideration.

203. The judge then turned to issue (4) which asks whether there are any circumstances in which an investigative duty arises in *Soering*-type cases. As his conclusions on this point were not controversial before us and as I am in total agreement with them, they can be dealt with briefly. The judge identified two bases on which, in principle, a violation of Article 3 could occur in a *Soering*-type case which would give rise to a duty to investigate. The first is a situation in which an individual is handed over by a contracting state to agents of another state who torture or mistreat him under the direction or at the instigation of the contracting state. In such circumstances the contracting state which instructs or procures such treatment should be responsible in the same way as the state which carries it out. Furthermore, in such circumstances the

contracting state could be said to exercise physical power and control over the victim with the result that he remained within the state's jurisdiction for the purpose of Article 1. The judge concluded (at [188]) that in such circumstances the same duty of investigation would arise as in any other case where there is an arguable claim that an individual has been subjected to ill-treatment by agents of the state within its jurisdiction.

204. The second situation identified by the judge (at [189] et seq.) is one in which it cannot be said that the contracting state which handed over the detainee continues to exercise control over him but there is nevertheless a sufficient level of involvement in torture or other serious mistreatment to which the detainee is subsequently subjected to amount to complicity in such treatment on the part of the contracting state. So far as the existence of an investigative duty is concerned, the judge considered this situation indistinguishable from that where the contracting state itself inflicts the ill-treatment. The need to expose the facts and punish those responsible is the same in both cases. He concluded, therefore, that if in any handover case there is an arguable claim that the state which transferred the detainee is responsible for violating Article 3 through complicity in torture or other serious mistreatment inflicted by agents of the receiving state, an investigative duty would arise.

205. So far as concerns the content of any investigative obligation arising in a *Soering*–type case the judge considered that the obligation would be to conduct an investigation which is effective in the sense of being designed to find out the true facts and identify those responsible for any criminal conduct, as well as being independent. I agree and would simply add that in those circumstances in which an investigative duty arises, precisely what is required of an investigation will depend on the particular circumstances of each case. As Lord Phillips of Worth Matravers observed in *R(L) v Secretary of State for Justice* [2008] UKHR 68; [2008] 3 WLR 1325 at [31]:

> 206. "The duty to investigate imposed by Article 2 covers a very wide spectrum. Different circumstances will trigger the need for different types of investigation with different characteristics. The Strasbourg court has emphasised the need for flexibility and the fact that it is for the individual State to decide how to give effect to the positive obligations imposed by Article 2".

207. (See to similar effect *Armani Da Silva* (Application 5878/08, Judgment of 30 March 2016, at [234]; *R(AM) v Secretary of State for the Home Department* [2009] EWCA Civ 219 per Elias L.J. at [101] et seq.) In the same way I consider that investigations under Article 3 will necessarily be highly fact-sensitive in nature. What is required of an inquiry under Article 3 is likely to vary considerably from case to case.

208. <u>Article 3 Test Cases</u>

209. There are two test cases under this head. In the first the claimant, Ali Lafteh Eedan (PIL 11) was arrested twice by British forces, first on 9 May 2003 and secondly on 11 August 2008. He claims that following his first arrest he was taken by British soldiers to Camp Bucca where he was detained for 45 days. He claims that he was ill-treated at Camp Bucca which at the relevant time was administered by the US army. His second arrest in August 2008 followed a raid on his home by UK and US forces. He

claims that he was badly beaten by the soldiers and taken to a British operating base at Basra Airport. From there he claims that he was flown to a US base, Camp Cropper, in Baghdad where he was detained for ten days before being released. He alleges that at Camp Cropper he was subjected to serious ill-treatment.

210. In the second case the claimant Ahmed Abdul-Sadeh (PIL 168) was arrested in a raid by US and UK forces in August 2008. He claims to have been badly assaulted and abused at the time of his arrest. He was taken to the British operating base in Basra before being transported to US custody at Camp Cropper where he alleges that he suffered serious ill-treatment.

211. In both of these cases the allegations of ill-treatment by British forces at the time of arrest or while in the custody of British forces may require investigation under Article 3. However, for the reasons set out above, the complaint that the claimant in each case was handed over to US forces and then allegedly suffered serious ill-treatment while in US custody is not a complaint requiring an investigation under Article 3. There is no factual basis in the statements of assumed facts for an arguable claim that British forces were complicit in the ill-treatment allegedly perpetrated by US forces.

212.

213. **IV <u>ARTICLE 5: DETENTION</u>**

214. We are here concerned with the question whether, and if so when, there is a duty to investigate alleged violations of Article 5 ECHR. The specific issues are as follows:

> 215. (5) Does an investigative obligation arise in respect of all cases of detention which are arguably in violation of Article 5 ECHR?
>
> 216. (6) If the answer to (5) is yes, what is the content of that investigative obligation?
>
> 217. (7) If the answer to (5) is no, are there other circumstances in which an investigative duty arises in cases involving arbitrary detention in violation of Article 5 and, if so, what are the features necessary to trigger that investigative duty? What would the content of any such investigative obligation be?

218. In the court below the claimants' primary case was that there is a duty to investigate all cases of detention which are arguably in violation of Article 5 ECHR. In rejecting this submission, the judge observed that, as a matter of principle, he could see no need or justification for interpreting Article 5 as imposing on a contracting state a duty to investigate every arguable claim that a person has been detained in violation of Article 5. Where an investigation is required into a possible violation of Article 2 or Article 3, its primary purposes are to bring to light serious wrongdoing and to ensure that those guilty of criminal conduct were identified and punished. However, in most Article 5 cases there is no dispute about the fact or circumstances of the individual's detention. Rather, the issue is whether the detention is lawful. The remedies established by Article 5(4) to take proceedings to challenge the lawfulness of detention and Article 5(5) which confers an enforceable right to compensation for unlawful detention are express remedies which would in normal circumstances be sufficient. Furthermore, as a finding that a person has been detained unlawfully by

the State does not generally imply that any official is or may be guilty of a crime, it cannot be said that an investigation is needed in order to ensure that the individuals responsible were punished. The judge also considered that there is no domestic authority or any decision of the Strasbourg court which supports the proposition that there is a duty on the State to hold an investigation whenever an arguable claim is made that the detention of an individual violates Article 5.

219. On this appeal the claimants do not seek to challenge the judge's decision on what was their primary case below. In agreement with the judge, whose reasoning of this point I find compelling, I would answer "No" to the question raised by issue (5). In this circumstance issue (6) does not arise.

220. Before us Mr. Fordham on behalf of the claimants concentrated on what was his alternative case below, namely that the circumstances in which a duty to investigate an alleged violation of Article 5 arises are not limited to cases of enforced disappearance but that an investigative duty arises in all cases where detention takes place beyond the reach of the courts, even if such detention is not secret or unacknowledged.

221. *Enforced Disappearance*

222. It was common ground before us that a procedural duty to investigate arises under Article 5 in cases where there is an arguable claim that a person within the jurisdiction of a Contracting State has been the subject of enforced disappearance.

223. In international law the term "enforced disappearance" describes a deprivation of liberty outside the protection of law where the state responsible refuses to acknowledge the detention or disclose the fate of the person detained. I am unable to improve on the judge's description (at [209]) that its cruelty and vice lie in the facts that the disappeared person is completely isolated from the outside world and at the mercy of his captors and that his family is denied knowledge of what has happened to him.

224. In determining the extent of obligations arising under Article 5 ECHR it is relevant to have regard to other applicable rules of international law (Article 31(3)(c), Vienna Convention on the Law of Treaties). Thus, in *Al-Adsani v United Kingdom* (2002) 34 EHRR 11 the Grand Chamber stated (at [55]):

> iii)"The Convention … cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a Human Rights Treaty, and it must also take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part."
>
> iv)

225. In 1992 the United Nations General Assembly adopted the UN Declaration on the Protection of All Persons from Enforced Disappearance which declared:

> "The systematic practice of disappearance is of the nature of the crime against humanity and constitutes a violation of the right to recognition as a

person before the law, the right to liberty and security of the person, the right not to be subjected to torture: it also violates or constitutes a grave threat to the right to life."

226. The Parliamentary Assembly of the Council of Europe in Resolution 1463 of 3 October 2005 defined enforced disappearance as follows:

> ""Enforced disappearances" entail a deprivation of liberty, refusal to acknowledge the deprivation of liberty or concealment of the fate and the whereabouts of the disappeared person and the placing of the person outside the protection of the law."

227. The Parliamentary Assembly condemned enforced disappearance as a very serious human rights violation on a par with torture and murder.

228. The International Convention for the Protection of All Persons from Enforced Disappearance ("the CED") was adopted by the United Nations General Assembly on 20 December 2006 and entered into force for the States party to the Convention on 23 December 2010. Fifty two States, including many members of the Council of the Europe but not the United Kingdom, are currently parties to the CED.

229. Article 1 provides that no one shall be subjected to enforced disappearance and stipulates that no exceptional circumstances whatsoever may be invoked as a justification. Article 2 includes the following definition:

> "For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

230. Article 4 provides that each state party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law. Article 5 declares that the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law. Article 6 provides that each state party shall take the necessary measures to hold criminally responsible at least any person who commits, or solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance and in certain defined circumstances a superior of such a person. Article 7 provides that each state party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness. Article 12 provides, in relevant part:

> "1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly

and impartially and, where necessary, undertake without delay a thorough and impartial investigation.

2. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the authorities referred to in paragraph 1 of this Article shall undertake an investigation, even if there has been no formal complaint…"

231. Article 5 ECHR should, so far as possible, be interpreted in harmony with these instruments and in particular the CED which has substantial and growing international support.

232. *Strasbourg Case Law*

233. It was not in dispute before us that the Strasbourg court has consistently held that Article 5 requires the authorities of contracting states to investigate an arguable claim of enforced disappearance.

234. *Kurt v Turkey* (1998) 27 EHRR 373 concerned the disappearance of the applicant's son (K). The applicant complained that in November 1993 Turkish Security Forces carried out an operation in the village in south east Turkey where she lived with K. He was arrested. On the following day she saw him surrounded by soldiers and showing injuries as though he had been beaten. She had not seen him since. The Turkish Government admitted that security operations took place in that village on the dates in question and alleged that clashes occurred with suspected terrorist members of the PKK. It denied that K had been taken into custody by the security forces and maintained that there were strong grounds for believing that he had joined or had been kidnapped by the PKK.

235. The Strasbourg court referred to the guarantees provided by Article 5 and in particular the requirements of Article 5(3) and (4) with their emphasis on promptitude and judicial control. It noted that what was at stake was both the protection of the physical liberty of individuals and their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection (at [123]). It continued

"124. The Court emphasises in this respect that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since."

236. The Court had accepted that K was held by soldiers on the morning of 25 November 1993. It referred to the fact that his detention at that time was not logged and that there existed no official trace of his subsequent whereabouts or fate.

> "That fact in itself must be considered a most serious failing since it enables those responsible for the act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of the detainee. In the view of the Court, the absence of holding data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting it must be seen as incompatible with the very purpose of Article 5 of the Convention." (at [125])

237. The Court found there had been a particularly grave violation of Article 5.

238. In addition the applicant complained that she had been denied an effective remedy under Article 13. In finding a violation of Article 13 the Court observed:

> "In the view of the Court, where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure. Seen in these terms, the requirements of Article 13 are broader that a Contracting State's obligation under Article 5 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible." (at [140])

239. Similarly, in *Cyprus v Turkey* (2002) 35 EHHR 30 a Grand Chamber of the Strasbourg court heard an application by the Republic of Cyprus which included a claim that some 1,491 Greek Cypriots were still missing twenty years after the Turkish invasion of Northern Cyprus in 1974. The Grand Chamber found no substantive violation of Article 5 since there was no concrete evidence that the missing persons had ever been in Turkish custody. However, referring to *Kurt* the Grand Chamber found that there had been a continuing violation of Article 5 by virtue of the failure of the Turkish authorities to conduct an effective investigation into the whereabouts and fate of the missing Greek-Cypriot persons in respect of whom there was an arguable claim that they were in custody at the time they disappeared (at [150]). (See, to similar effect, the following cases involving allegations of enforced disappearance, referred to by the judge at [224], where the Strasbourg court held that failure to conduct an effective investigation constituted a violation of Article 5 and/or Article 13: *Cakici v Turkey* (2001) 31 EHRR 133; *Timurtas v Turkey* (2001) 33 EHRR 6; *Tas v Turkey* (2001) 33 EHRR 15; *Cicek v Turkey* (2003) 37 EHRR 20; *Bazorkina v Russia* [2006] ECHR 751; *Luluyev v Russia* [2006] ECHR 967; *Varnava v Turkey* [2009] ECHR 1313; *Er v Turkey* (2013) 56 EHRR 13.)

240. The judge drew the following conclusions from these authorities:

(1) Where there is an arguable claim that a person has been taken into state custody and has not been seen since, there is a duty on the state under Article 5 to investigate what has happened to that person.

(2) The cases also support the proposition that, in such a case, there is a duty of investigation with the wider purpose of leading to the identification and punishment of those responsible for the disappearance, albeit that the source of this duty is said to be Article 13 rather than Article 5.

I agree with these conclusions which were not challenged on the appeal.

241. These authorities must be contrasted with another line of Strasbourg authority concerning detention contrary to Article 5 where no duty to investigate has been held to arise. Indeed, Mr Eadie relied on these further authorities as setting the limit of the investigative duty by restricting it to cases of enforced disappearance.

242. In *Gisayev v Russia* [2011] ECHR 76 the First Section of the Strasbourg Court was satisfied that the applicant had made a prima facie case that on 23 October 2003 he had been abducted by a large group of state agents who had held him in unacknowledged detention and had tortured him on a permanent basis until his release on 7 November 2003, with a view to obtaining information on, among other things, Chechen rebel fighters. The court concluded that during that period the applicant had been held in unacknowledged detention in complete disregard of the safeguards provided by Article 3 and that that constituted a particularly grave violation of his right to liberty and security under Article 5. The applicant does not appear to have argued that there was in his case a breach of an investigative duty under Article 5. However, he did complain that there had been no effective remedies in respect of the violations of his rights secured by Articles 3 and 5 of the Convention, contrary to Article 13. The court held that the applicant had an arguable claim that he had been ill-treated by representatives of the authorities and that the domestic investigation into that matter had been inadequate. It considered that, as a result, any other remedy available to the applicant including a claim for damages had limited chances of success. It therefore held that there had been a violation of Article 13 in conjunction with Article 3 (at [159], [160]). However, when it came to consider the failure to investigate the alleged violation of Article 5, the court held that there had been no breach of an investigative duty.

> 243. "161. As regards the applicant's reference to Article 5 of the Convention, the Court notes that according to its established case-law the more specific guarantees of Article 5(4) and (5), being a *lex specialis* in relation to Article 13, absorbed its requirements (see, among other authorities, *Medova v Russia* ...). It also notes that it has found a violation of Article 5 of the Convention as a whole on account of the applicant's unacknowledged detention. Accordingly, it considers that no separate issue arises in respect of Article 13 read in conjunction with Article 5 of the Convention in the circumstances of the present case."
>
> 244.

245. In both *Medova v Russia* [2009] ECHR 70, (referred to in *Gisayev* at [161]) and *Chitayev and Chitayev v Russia*, Application No. 59334/00, judgment 18 January 2007, the First Section of the Strasbourg court applied the same reasoning, namely

that Article 5(4) and (5) absorbed the requirements of Article 13, in concluding that there had been no separate violation of Article 13 read in conjunction with Article 5.

246. In the present case the judge stated that he was unable to reconcile this reasoning with the decision in *Kurt* which requires a thorough and effective investigation into the disappearance of a person under the control of the State which is capable of leading to the identification and punishment of those responsible. Furthermore, he expressed himself unable to see how, in cases where the State is denying that the person was ever detained, it can be said that the specific guarantees of Article 5(4) and (5) absorb the requirements of Article 13 for an effective remedy. I agree with the judge that in such circumstances Article 5(4) will be unable to operate and that there is unlikely to be an effective right to compensation under Article 5(5) without a meaningful investigation (Judgment at [229]). In these circumstances it is the State's denial of any detention and the concealment of its circumstances which will prevent Article 5(4) and (5) from providing any effective remedy. By contrast, in most cases where an allegation is made of detention which is arguably in violation of Article 5, there would be no such denial or concealment by the State, there would be no dispute about the fact or circumstances of the detention, and Article 5(4) and (5) will normally be able to operate to provide an effective remedy**.**

247. It is, however, clear that a duty to investigate does not arise in all cases where there is an arguable violation of Article 5.

248. On this appeal Mr Fordham has restricted himself to his alternative case below. He maintains that there is a general duty of investigation under Article 5, although the remedy under Article 5(4) will almost invariably obviate any need for independent investigation. He submits, however, that insofar as there is an investigative sub-set, an investigative duty arises where detention arrangements are implemented by the State authorities with the result that detention takes place beyond the reach of the courts, even if such detention is not secret or unacknowledged.

249. In support of this contention Mr Fordham criticises the judge's failure to recognise the fundamental nature of Article 5 and the guarantee against arbitrary detention. In this regard he draws attention to many decisions of high authority which emphasise the fundamental importance of the guarantees contained in Article 5, both in Strasbourg (e.g. *Kurt* at [122], *Al Jedda* (2011) 53 EHRR 23 at [99], *Medvedyev* at [117], *El-Masri* at [230]) and in this jurisdiction (*A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68). He submits that it is this fundamental nature of the right in question which explains the incidence of the investigative duty.

250. While I readily accept the fundamental importance of the guarantees provided by Article 5, it does not follow that Article 5 must be equated for all purposes with Articles 2, 3 and 4. On the contrary, the structure of Article 5 and, in particular, the remedies provided by Article 5(4) and (5) run contrary to Mr Fordham's submission and indicate that the machinery of Article 5 need not be identical to that of other Articles guaranteeing fundamental rights. This is apparent from the approach of the Strasbourg court.

251. The only authority cited by the appellants in support of their alternative case is *El-Masri*. Mr Fordham submits that it was the refusal of access to legal counsel and to the courts, combined with the concept of arbitrary detention, which lay at the heart of

El-Masri and which would be sufficient to justify imposing an investigatory obligation. In its discussion of the alleged violation of Article 5 in *El-Masri*, the facts of which have been referred to in detail earlier in this judgment, the Grand Chamber of the Strasbourg court drew attention to the following features of the applicant's detention. There was no court order for his detention as required under domestic law. His confinement in the hotel was not authorised by a court. His detention had not been substantiated by any custody records. During his detention the applicant did not have access to a lawyer, nor was he allowed to contact his family or a representative of the German Embassy. He was deprived of any possibility of being brought before a court to test the lawfulness of his detention. The court observed that his unacknowledged and incommunicado detention meant that he was left completely at the mercy of those holding him and that it was wholly unacceptable that in a State subject to the rule of law a person could be deprived of his liberty in an extraordinary place of detention outside any judicial framework. His detention in such a highly unusual location added to the arbitrariness of the deprivation of liberty. The court concluded that during the period of his detention in Skopje he was held in unacknowledged detention in complete disregard of the safeguards contained in Article 5. With regard to his subsequent detention the Grand Chamber found (at [239]) that the Macedonian authorities not only failed to comply with the positive obligation to protect him from being detained in contravention of Article 5 but they actually facilitated his subsequent detention in Afghanistan by handing him over to the CIA despite the fact that they were aware or ought to have been aware of the risk of that transfer. The Grand Chamber referred to its earlier conclusion that Macedonia had not conducted an effective investigation into the applicant's allegations of ill-treatment. For the same reasons it found that no meaningful investigation was conducted into his credible allegations that he was detained arbitrarily and accordingly found that Macedonia had violated Article 5 in its procedural aspect.

252. The justification given by the Grand Chamber for its conclusion that there was a duty to conduct an investigation in these circumstances is its statement, earlier in the judgment, of the applicable legal principle.

> 253. "The Court emphasises in this connection that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over an individual, the authorities have a duty to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt, effective investigation into an arguable claim that a person has been taken into custody and has not been seen since." (at [233])

254. This passage is in almost identical terms to the passage from the judgment in *Kurt* (at [124]) set out earlier in this judgment. As the judge pointed out (at [238]) there are difficulties in applying the principle stated in *Kurt* directly to the facts of *El-Masri* because *El-Masri* was not a case where the person taken into custody had not been seen since. On the contrary, the detention of Mr El-Masri was temporary, and following his release he was able to give a very full account of the facts and circumstances of his detention. *El-Masri* does, therefore, involve an extension of the principle applied in the earlier Strasbourg cases.

255. Nevertheless, the facts of *El-Masri* are very close to earlier cases of enforced disappearance in which the Strasbourg Court had held that an investigative duty arose. It is true that denial of access to a lawyer or to a court were important features of the violation of article 5 in *El-Masri*. However, there is to my mind no justification for the significance which Mr Fordham seeks to confer on them as, of themselves, giving rise to an investigative obligation. Rather, the court (at [240]) approached the facts of *El-Masri* on the basis that it concerned enforced disappearance in international law.

> 256. "Having regard to the above, the Court considers that the applicant's abduction and detention amounted to "enforced disappearance" as defined in international law. The applicant's "enforced disappearance", although temporary, was characterised by an ongoing situation of uncertainty and unaccountability, which extended through the entire period of his captivity".
>
> 257.

258. Furthermore, the reliance by the Grand Chamber in *El-Masri* on the reasoning in *Kurt* provides further support for the view that it was addressing issues arising in cases of enforced disappearance. The decision in *El-Masri* should be seen therefore as an extension of the enforced disappearance line of authority to cases of temporary disappearance. I do not consider that it provides any support for the broader proposition contended for by Mr Fordham that an investigative obligation will arise under Article 5, or Article 5 in conjunction with Article 13, whenever detention is beyond the reach of the courts, even if such detention is not secret or unacknowledged.

259. In the present state of the Strasbourg jurisprudence, enforced disappearance cases are acknowledged to give rise to an investigative obligation because where agents of the State have assumed control over an individual it is incumbent on the authorities to account for his or her whereabouts. This is the justification expressly stated in *Kurt* (at [124]) in relation to enforced disappearance cases where a person has been arrested and has not been seen since and repeated in the rather wider circumstances of *El-Masri* (at [233]). In my view it remains a valid reason for requiring an investigation in the particular circumstances of *El-Masri*, notwithstanding the reappearance of the victim, because of the unacknowledged, covert nature of the detention, the fact that the victim was held incommunicado and the refusal of the authorities to acknowledge the fact of detention by agents of the State or to account for what has happened. These factors combine in *El-Masri* to create a compelling case for requiring a prompt and effective investigation into what has taken place. Furthermore, in both situations an investigation is also required to meet the purpose of identifying and punishing those responsible for the disappearance.

260. It remains to be seen whether the Strasbourg court may extend this sub-set of Article 5 cases which give rise to an investigative obligation to other situations where only some of the features of *El-Masri* are present. However, I can see no reason in principle why it should be extended to all cases in which a person has been detained in the absence of judicial scrutiny or control, even if the detention is not secret or unacknowledged. In such cases where the detention has not been concealed or wilfully denied by the State, the procedures under Article 5(4) and (5) will normally provide a suitable remedy.

261. *Issue 7(A): The effect of international humanitarian law.*

262. A further issue 7(A) relating to Article 5 has been added to the list of issues. It reads:

> "Is Article 5 ECHR modified or displaced by international humanitarian law during an international armed conflict?"

263. In his judgment, the judge explains that this issue was added to the list of preliminary issues at a time when the Secretary of State was seeking to argue, with regard to activities by British forces in Iraq during the invasion and occupation periods, that detention was governed by international humanitarian law applicable to international armed conflicts and belligerent occupation, operating as a *lex specialis* which displaced or modified Article 5. If the Secretary of State was right in either of these alternative contentions, it would have an obvious bearing on the issue of the procedural duties owed by the United Kingdom under Article 5.

264. The implications of the decision of the Grand Chamber in *Al-Skeini* are likely to be very wide-ranging and, I suspect, are at this time only beginning to emerge. The massive extension of the scope of application of the Convention into new fields not originally contemplated by its framers, will call for refinement of concepts and accommodations between the Convention and other legal systems. This is already apparent in the decision of the Grand Chamber of the Strasbourg court in *Hassan v United Kingdom* (App No. 29750/09; (2014) 38 BHRC 358).

265. The facts of *Hassan* have been referred to earlier in this judgment at [101] and following. In that case the United Kingdom requested the Strasbourg court to disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law. The Grand Chamber, after referring to Article 31(3)(b) of the Vienna Convention on the Law of Treaties, which provides that in the interpretation of a treaty there shall be taken into account any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation, considered that it was the practice of the contracting States to ECHR not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions ("Geneva III and Geneva IV") during international armed conflicts. (*Bankovic v Belgium* at [62].) The Grand Chamber then went on to note that the Convention must be interpreted in harmony with other rules of international law of which it forms part. The Grand Chamber, referring to decisions of the International Court of Justice, considered that the protection offered by human rights conventions and that offered by international humanitarian law co-exist in situations of armed conflict. (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136 at [106]; *Armed Activities on the Territory of Congo (Democratic Republic of Congo v Uganda*) [2005] ICJ Rep 168 at [215] – [216]).

266. The Grand Chamber considered (at [104]) that even in situations of armed conflict the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. Accordingly, by reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in times of armed conflict, the grounds of permitted deprivation of liberties set out in sub-paragraphs (a)–(f) of Article 5 should be

accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under Geneva III and Geneva IV The Grand Chamber explained (at [105]) that deprivation of liberty pursuant to powers under international humanitarian law must be "lawful" to preclude a violation of Article 5(1). The Grand Chamber considered that that meant the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5(1) which is to protect the individual from arbitrariness.

267. The Grand Chamber then went on to address the question of procedural safeguards under Article 5 in terms which are of particular relevance to the present issue.

> "106. As regards procedural safeguards, the Court considers that, in relation to detention taking place during an international armed conflict, Article 5 §§ 2 and 4 must also be interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law. Articles 43 and 78 of the Fourth Geneva Convention provide that internment "shall be subject to periodical review, if possible every six months, by a competent body". Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent "court" in the sense generally required by Article 5 § 4 (see, in the latter context, *Reinprecht v Austria*, no. 67175/01, § 31, ECHR 2005-XII), nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the "competent body" should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay. While the applicant in addition relies on Article 5 § 3, the Court considers that this provision has no application in the present case since Tarek Hassan was not detained in accordance with the provisions of paragraph 1(c) of Article 5."

268. It appears therefore that in a situation of international armed conflict Article 5 ECHR and the provisions of international humanitarian law will co-exist and will both apply to issues of detention. Because the provisions of these two regimes are very different, no doubt reflecting the different fields in which they were originally intended to operate and the different purposes they were originally intended to achieve, it is necessary to effect an accommodation between the two. (This co-existence may also have certain unintended practical consequences such as that identified by Arden L.J. in *Al-Jedda v Secretary of State for Defence (No. 2)* [2011] QB 773 at [108].) In *Hassan* this resulted in a striking modification of the procedural obligation under Article 5. As a result, in an international armed conflict a system of judicial control over detention may not always be required. In the present case, as the judge pointed

out, this further undermines the appellants' attempt to found an investigative obligation under Article 5 on an absence of judicial control.

269. I would answer Issue (7A) in the affirmative.

270. *Application to the test cases.*

271. The judge set out his conclusions on the application of these principles to the test cases at [243] to [248] of his judgment, where he summarised the facts in some detail. As I am in total agreement with his conclusions I can set out my conclusions very briefly

(1) Shawkat Mahmoud Ibrahim Al-Nadawi (PIL 1), a conscript in the Iraqi army, surrendered to British forces in the first few days of the war in March 2003 and was detained for about three months before being released. The International Committee of the Red Cross ("ICRC") monitored his detention after about two weeks. In my view there is no duty under Article 5 to conduct an investigation into his detention.

(2) Haidar Abdul Karim Al-Doori (PIL 57) was arrested by British forces on suspicion of hiding weapons and imprisoned in a British military detention facility for six months before being released in June 2004. For the first 28 days he was held in solitary confinement but after that was permitted visits by his parents. In my view there is no duty under Article 5 to conduct an investigation into his detention.

(3) Hamid Dinar Hussein Alloui Al-Khafaji (PIL 121) was detained at a British military base on suspicion of being a member of a terrorist organisation. For the first 29 days of his detention he was held in solitary confinement and interrogated on several occasions. Thereafter he was held with other inmates and received visits from his family. On one such visit in April 2007 he swapped places with his brother and walked out of the base. He was given documents which explained the reason for his detention and that his status was subject to regular reviews. In my view there is no duty under Article 5 to conduct an investigation into his detention.

(4) Adil Abid-ali Jurayyah (PIL 143) and Hmood Khalil Hmood (PIL 144) were both arrested on 11 January 2007 and taken to a British facility at Basra Airport for questioning. They were released later the same day. In my view there is no duty under Article 5 to conduct an investigation into their detention.

(5) Shakir Hilal Al-Fahdawi (PIL 182) and his son were stopped and arrested by British soldiers on 12 April 2003 i.e. during the invasion period. They claimed they were taken to a facility known as "Station 22". They were released after 22 days. There was no official place of detention of that name and the Secretary of State has found no record of their detention. I agree with the judge that the absence of a record of his detention is not sufficient to trigger a duty to investigate the claim of unlawful detention. I agree with the judge that even on the assumed facts this case does not have the characteristics of an enforced disappearance.

272. In none of the test cases, therefore, does an investigative duty arise in relation to detention. I note, however, that in a number of the test cases the claimants complain

of ill-treatment during their detention. This is a distinct matter. If these allegations are credible they may well require investigation.

V UNITED NATIONS CONVENTION AGAINST TORTURE

273. Issues (8) and (9) relate to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 10 December 1984 ("UNCAT").

> (8) Does UNCAT and/or customary international law give rise to domestically enforceable legal rights?
>
> (9) If the answer to (8) is yes,
>
> When do those rights arise i.e. is there any limitation on the scope of those rights?
>
> Do those rights make a difference to the scope of an investigative obligation arising under the ECHR; and if so in what respect?
>
> (i) If so what is the content of that investigative obligation?
>
> (ii) Does the scope of any investigative obligation go beyond the scope of any investigative obligation which would arise under Article 3 ECHR; and if so, in what respects?

274. The judge concluded on Issue (8) that neither on the basis of its effect as a treaty nor on the basis of customary international law is it tenable that the provisions of UNCAT give rise to domestically enforceable legal rights. Moreover, he concluded that, in any event, it would not lead to the appellants' desired conclusion as to the content of any duty to investigate allegations of mis-treatment, because even if UNCAT gives rise to domestically enforceable rights, there is nothing to suggest that Article 12 UNCAT imposes a broader investigative duty on a State party under Article 3 ECHR. The judge refused permission to appeal against his decision on these issues.

275. The appellants now renew their application for permission to appeal against the judge's decisions on these issues, although they no longer maintain their case on customary international law. As I am in complete agreement with the judge on these issues and would refuse permission to appeal on this ground, I will state my conclusions relatively briefly.

276. UNCAT entered into force on 26 June 1987. It currently has 159 parties including the United Kingdom which ratified the Convention on the 8 December 1988. UNCAT provides in relevant part:

> *"Article 1*

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

277. 3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

…

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

278. Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to

believe that an act of torture has been committed in any territory under its jurisdiction."

279. The appellants seek to rely on these provisions in two ways.

(1) First, they seek to rely on UNCAT as an alternative source of a duty to investigate allegations of torture or other inhuman or degrading treatment carried out by British forces in Iraq in any circumstances where Article 3 ECHR does not apply, in particular by reason of the circumstances falling outside the jurisdiction of the United Kingdom for this purpose.
(2) Secondly, they seek to establish that any investigation of alleged ill- treatment by British forces in Iraq should include an inquiry into whether the United Kingdom complied with its obligations under Articles 10 and 11, UNCAT.

280. The judgment below drew attention to a disagreement between the parties as to the meaning of the words "in any territory under its jurisdiction" in Articles 2, 11, 12 and 13 UNCAT. The Secretary of State contended that it did not have the effect of extending the application of UNCAT to any part of Iraq when British forces were present there. The appellants, on the other hand, relied on the opinion of the CAT Committee, established under Article 16, UNCAT, that the words include "all areas where the State exercises, directly or indirectly, in whole or in part *de jure* or *de facto* effective control in accordance with international law". (CAT Committee, General Comment No. 2 (2008) at [16]). The CAT Committee went on to express the view that the words would be wide enough to include prohibited acts "during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities or other areas over which a State exercises factual or effective control". The judge (at [265]) assumed, without deciding the point, that the interpretation by the UNCAT Committee was correct and that the United Kingdom's relevant obligations under UNCAT were therefore applicable throughout the period of UK operations in Iraq in places where persons captured or arrested by British forces were detained. I am content to make the same assumption.

281. The central issue for consideration here is whether UNCAT confers rights which are directly enforceable by individuals in domestic law. As treaty making and the conduct of international relations are executive functions under our constitution, a treaty provision does not become part of domestic law unless it is implemented by Parliament (*J.H. Rayner v Department of Trade and Industry* [1990] 2 AC 418 at 476-7, 500). Save that section 134, Criminal Justice Act 1988 creates an offence of torture in compliance with Article 4 UNCAT, the provisions of UNCAT have not been implemented into the domestic law of the United Kingdom by the UK Parliament. Nevertheless, the appellants submitted below that the provisions of UNCAT on which they seek to rely have effect in domestic law within the United Kingdom on two alternative grounds. First they submitted that under the principle of legality UK public authorities owe a duty in domestic public law not to override fundamental rights including those contained in international human rights treaties. Secondly they submitted that the relevant provisions of UNCAT have the status of customary international law which automatically forms part of domestic law in the United Kingdom. The judge rejected those submissions.

282. The appellants now seek to appeal against the judge's conclusion that the provisions of UNCAT do not confer rights on individuals in domestic law. They, quite correctly

in my view, no longer seek to rely on their argument that the relevant provisions of UNCAT form part of domestic law by virtue of being rules of customary international law. However they maintain their submission on the principle of legality.

283. Here the appellants make two linked submissions.

(1) The principle of legality, properly understood, has the effect that the United Kingdom's human rights obligations under Articles 10 and 11, UNCAT are enforceable public law obligations owed by domestic public authorities in domestic law, provided that their violation has not been mandated or empowered by Parliament through clear primary legislation.
(2) The United Kingdom's duty of effective independent investigation under Article 3 ECHR, triggered by credible claims of torture and inhuman and degrading treatment of Iraqi civilians in British military detention in Iraq, must therefore as a matter of legal duty extend to an investigation into whether there was compliance with those obligations.

284. I consider that these submissions are fundamentally flawed for the following reasons.

285. First, the principle of legality is a principle of statutory interpretation. In the absence of express language or necessary implication to the contrary, general words in legislation must be construed compatibly with fundamental human rights because Parliament cannot be taken to have intended by using general words to override such rights. (See, for example, *Ex parte Simms* [2000] 2 AC 115 at [131]; *Ahmed v Her Majesty's Treasury* [2010] 2 AC 534 at [111]-[112]; *Axa General Insurance Ltd and others v HM Advocate and others* [2012] 1 AC 868; *Guardian News and Media Ltd v City of Westminster Magistrates' Court* [2013] QB 618; *Evans v Attorney General* [2015] AC 1787.) Once again, the judge in the present case expressed the matter with total clarity when he observed (at [269]) that "the principle of legality … is a principle of statutory interpretation, not a broad principle as to how the courts should develop the common law."

286. Secondly, the principle depends for its application on the fundamental rights in question already being part of domestic law. (See, for example, *Yam v Central Criminal Court* [2016] 2 WLR 19 per Lord Mance at [36].) It does not operate by reference to rights and duties between States on the international plane, nor can it transform such rights into domestic law.

287. Thirdly, although international treaty obligations may sometimes guide the development of the common law (*FG v Work and Pensions Secretary* [2015] 1 WLR 1449 per Lord Hughes at [137]), this is inappropriate where the proposed development would conflict with the principle of Parliamentary sovereignty, in particular where Parliament has decided not to implement the provision into domestic law (*Re McKerr* [2004] 1 WLR 807) or has already entered the field to strike the appropriate balance (*Keyu v Foreign Secretary* [2015] 3 WLR 1665 at [118]). In the present case Parliament has implemented Article 4 UNCAT, but must be taken to have decided not to implement its other provisions. Moreover, Parliament has implemented into domestic law the highly sophisticated body of human rights protections contained in the ECHR by the Human Rights Act 1998. It would not be appropriate to modify its scheme in relation to procedural investigative obligations under the guise of developing the common law.

288. Finally I should record my agreement with the judge on three further issues.

289. First, I agree with the judge that Article 12 UNCAT does not appear to impose a broader duty of investigation than Article 3 ECHR. The requirement of reasonable grounds to believe that an act of torture has been committed under Article 12 UNCAT seems to set a higher hurdle than the test of credible assertion or arguable claim under Article 3 ECHR. Furthermore Article 12 does not on its face require an investigation under that provision to examine whether there has been a failure to comply with Article 10 or Article 11 UNCAT. Accordingly, even if the appellants are able to establish that the provisions of UNCAT on which they seek to rely do have effect in domestic law, it is difficult to see how this might assist them.

290. Secondly, the provisions of ECHR must be interpreted in harmony with rules of international law of which it forms part (*Al-Adsani v United Kingdom* at [55]) and therefore the development of Article 3 ECHR may in certain circumstances be influenced by UNCAT. I have referred earlier in this judgment to an example of such a process whereby the interpretation of Article 5 ECHR has been influenced by international instruments on enforced disappearance. However, nothing in UNCAT supports the appellant's contention that an investigation under Article 12 UNCAT is required to examine whether there has been compliance with Article 10 or Article 11 UNCAT.

291. Thirdly, when there is a duty to investigate an allegation of torture or other serious ill-treatment under Article 3 ECHR the circumstances to be investigated will often include the instructions, training and supervision given to those persons to whom the custody of the individual was entrusted. (See *R (Ali Zaki Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin); [2013] HRLR 32, at [148]). In such an investigation the obligations of the United Kingdom under Articles 10 and 11 UNCAT will form a relevant part of the background and the investigator may think it appropriate to examine what steps were taken to comply with those international obligations.

292. For these reasons I would refuse permission to appeal on this ground.

293. **LORD JUSTICE TOMLINSON :**

294. I agree.

295. **LADY JUSTICE ARDEN :**

296. I also agree.