Neutral Citation Number: [2021] EWCA Civ 117

Case No: B3/2020/0006

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
The Honourable Mr Justice Johnson

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 February 2021

Before :

LADY JUSTICE SIMLER

Between :

TOMANOVIC & OTHERS	**Appellant**
- and -	
THE FOREIGN AND COMMONWEALTH OFFICE	**Respondent**

- -
- -

Mr Fergus Randolph QC (instructed by **Ms Jovanka Stojsavljevic** of Savic & Co Solicitors for the **Appellant**

Hearing dates: 28 January 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website.

Lady Justice Simler :

Introduction

1. Like all judges before me who have had to consider the circumstances giving rise to various proceedings pursued by the claimants as I shall refer to them, (all of whom are the family members of people who were killed or abducted in Kosovo in 1999/2000) I wish to acknowledge the grave impact those crimes and the absence of any investigation have had on them. The circumstances, and the ongoing lack of closure for them, are plainly tragic and undoubtedly distressing.

2. The application before me is an application under CPR 52.30 to re-open a decision of this court (made by McCombe LJ on 27 February 2020 and reviewed on 11 December 2020) refusing permission to appeal on the papers, from a judgment of Mr Justice Johnson dated 5 December 2019. It arises in the following circumstances.

3. The underlying proceedings, *Tomanovic and others v FCO*, concern claims against the respondent, the Foreign & Commonwealth Office (referred to as the "FCO"), that Mr Ratel, Head of the Special Prosecutions Office of the Republic of Kosovo from January 2013 to March 2016, failed to investigate offences committed against the claimants' loved ones; this was a breach of the obligation to investigate unlawful killings and abductions under s.6 Human Rights Act 1998 read with articles 2 and 3 of the European Convention on Human Rights ("the Convention"); and that a claim lies against the FCO as Mr Ratel's employer responsible for his secondment to work as a prosecutor in Kosovo.

4. There had been earlier litigation: the UNMIK Human Rights Advisory Panel ("HRAP") found that UNMIK had violated the first claimant's rights under articles 2 and 3 of the Convention (decision of 23 April 2013) and the Human Rights Review Panel ("HRRP") decided that EULEX had violated the first claimant's rights under articles 2, 3, 8 and 13 of the Convention (decision of 11 November 2015) and thereafter reached the same decision in respect of the remaining claimants (by a decision of 19 October 2016). This is recorded by the judge at [42] and [43] of the judgment below. The first, second and third claimants then brought proceedings against the Ministry of Defence ("MoD") (known as *Kontic and others v MoD* [2016] EWHC 2034, "*Kontic*") seeking damages (among other things) for breach of articles 2 and 3. The claims failed. Significantly, Irwin J found (among other things) that the acts and omissions were attributable to the UN not the UK; and the claimants were not within the jurisdictional competence of the UK. In the judgment below, the judge described *Kontic* as having been treated by the parties as a test case, and held that although directed at the MoD, the claimants were well aware of Mr Ratel's role and could and should have pursued the current claims arising out of his alleged conduct in those proceedings. He described a late attempt to do so that was not ultimately pursued.

5. In the present case, the FCO applied for summary judgment on the basis that the claimants had no real prospect of success in their claims against the FCO because (among other things) it was said that, the claimants were not within the jurisdiction of the UK for the purposes of article 1 of the Convention so as to permit a claim under the HRA 1998; Mr Ratel's conduct of his official functions as Head of the Special Prosecutions Office was not attributable to the UK; and the claim was res judicata and an abuse of process.

6. There was a contested hearing of that application and by an order dated 5 December 2019, Johnson J entered summary judgment in favour of the FCO, with the effect that the claims brought by the claimants, were brought to an end. In summary, Johnson J made findings as to the factual context against which to assess the FCO's grounds for seeking summary judgment. In short summary:

   i) the Special Prosecution Office of the Republic of Kosovo was an independent prosecution service operating under the laws of Kosovo, and was headed up by Mr Ratel in the relevant period. It was staffed by EULEX and local prosecutors. Mr Ratel was obliged to follow instructions given to him by EULEX and to act in the sole interest of the mission.

   ii) The legal relationship between EULEX Kosovo, an international mission established by an EU Joint Action (analogous to a treaty between states) and staffed by personnel seconded by a large number of contributing states (including but by no means dominated by the UK), and the staff seconded to EULEX, was analysed by the Court of Appeal in *FCO and others v Bamieh* [2019] EWCA Civ 803. Johnson J quoted from that analysis and made findings by reference to it at [22] to [26]. In short, those seconded to EULEX were in Kosovo to act in the "sole interest of the mission" and to report to and take lawful instructions from their EULEX manager. Mr Ratel reported to a Czech line manager, not an FCO secondee. His contract with the FCO whereby he agreed to be a UK government funded secondee employed by the FCO and seconded to EULEX Kosovo, stated: "You will report to, and be obliged to take lawful instructions from, the manager appointed to you by EULEX Kosovo". His evidence was that he was required "to follow the directions of the chain of command and senior management, as designated by EULEX".

   iii) On the factual question whether the FCO exercised any authority, direction or control over Mr Ratel in the conduct of his prosecutorial functions, there was no evidence that the FCO either had power under the legal framework to do so or did so absent an expressed power nonetheless.

   iv) To the extent that there was a conflict in the evidence, this related to the extent of briefings made by Mr Ratel and others to the FCO and meetings at the embassy. But the judge held that even if there were meetings and briefings, as Ms Bamieh and Ms Fearon suggested, they contained no or very little detail about individual cases and did not provide a basis to enable the FCO to exert any form of operational control. There was no evidence whatsoever that the FCO sought to exercise operational control, and no reason, given the legal framework, for the FCO to do so.

   v) He concluded that even taking the claimants' evidence at its highest, the claimants had no real prospect of establishing that the FCO exercised direction or control over Mr Ratel's actions as a prosecutor, that that conclusion could safely and reliably be reached on the available evidence and without a full disclosure process, and there was no other compelling reason for this issue to proceed to trial.

7. The judge then reached conclusions on all the issues raised. So far as material to this application and to the appeal, he concluded:

i) *The claimants were not within the jurisdiction of the UK for the purposes of article 1 of the Convention*: [89] to [102] of the judgment. The events took place in Kosovo outside the territory of the UK. The issue of jurisdiction was determined against the claimants in *Kontic* and permission to appeal on this issue was refused by the Court of Appeal. In any event, applying the "state agent authority and control" basis for establishing extraterritorial jurisdiction, it would be necessary to show that the UK was exercising control over the claimants or their relatives and that feature was simply not present. Moreover, the secondment of a public official by one state to perform public functions within the territory of another state does not, by itself, amount to the exercise of extraterritorial jurisdiction by the sending state. The fact that Mr Ratel was employed and paid by the FCO and subject to residual disciplinary control by the FCO, did not come close to the UK exercising jurisdiction in Kosovo for the purposes of article 1 of the Convention. The FCO had no power to direct Mr Ratel in the manner in which he exercised his prosecutorial functions and nor was there any evidence that it sought to do so. The judge also found there was no evidence that Kosovo or EULEX consented to, or invited, or acquiesced in the exercise by the UK of a prosecutorial authority within Kosovo. Those conclusions on jurisdiction were sufficient to mean that the claimants had no real prospect of success on their claims.

ii) *Mr Ratel's conduct as Head of the Special Prosecution Office was not attributable to the UK*: [103] to [117] of the judgment. The judge recognised that there was a debate about the correct test for attribution (discussed in *Kontic*). However, whichever test was applied (whether based on ultimate or operational control) it made no difference on the facts of this case because Mr Ratel was seconded to EULEX in a manner which did not give the UK *any* control over the overall mission of EULEX or the Special Prosecution Office, far less any ability to direct or control him in his prosecutorial functions. There was neither ultimate control nor any operational control. This was a separate reason for concluding that the claimants did not have any real prospect of success in their claims.

iii) *The claims amounted to re-litigation abuse of process in the sense explained in Henderson v Henderson:* dealt with at [129] to [150] of the judgment. The judge found that the matters raised in these proceedings could have been raised in *Kontic* and indeed to an extent were raised in *Kontic* as he described at [51]. He undertook a broad merits-based judgment, taking account of the public and private interests involved and also of all the facts of the case. He recognised that different defendants were involved and there were some differences in the relief claimed, but neither was material for the reasons he gave. He recognised that an overarching point of distinction was the focus in the present proceedings on the conduct of Mr Ratel, whose conduct was not in issue in *Kontic.* However he found that the claimants were well aware before they issued the proceedings in *Kontic* that Mr Ratel had been the Head of the Special Prosecution Office and could therefore have raised in *Kontic* the matters alleged in these proceedings. He found a clear connection and significant overlap between the subject matter of the two sets of proceedings. He concluded accordingly that not only could the claimants have raised these matters in the litigation in *Kontic* but they should have done so. Applying the broad merits-based assessment required, he

concluded that the present proceedings were an abuse of the court's process so far as each of the claimants was concerned. For that further reason he concluded that the claimants did not have a real prospect of success on the claim.

iv) *There was no other compelling reason why the claim should proceed to trial:* this was dealt with at [158] to [162] of the judgment. The judge concluded that such factual conflicts as existed were on points that were not materially relevant to the issues in the case. There was a sufficient factual basis confidently to assess the claimants' prospects on the critical factual issues and disclosure would not make a material difference. Moreover, although some of the legal tests in play (such as the jurisdiction or attribution) might be capable of further development in the case law, the FCO's defence did not depend on any nuances in the jurisprudence: the claims were simply not capable of satisfying the test for jurisdiction or attribution because of the basic and incontrovertible facts including, in particular, that the FCO did not exercise any direction or control over Mr Ratel's prosecutorial functions. Finally, the judge accepted the contention that if the claims were not permitted to proceed, then the breach of the claimants' rights under articles 2 and 3 of the Convention would not have any legal remedy, but concluded that allowing the claims to proceed to trial would lead to the same result given his conclusions.

8. The judge refused permission to appeal to this court.

9. A renewed application for permission to appeal was initially refused by McCombe LJ who considered it on the papers. McCombe LJ gave the following reasons for that decision:

> "…. The Respondent's employee, Mr Ratel, was seconded to the EU institution, EULEX Kosovo between 2013 and 2016. EULEX Kosovo provided prosecutors from various member states to the Special Prosecution Office in Kosovo (SPRK) to work with other local prosecutors under an initiative of the EU Council. He was seconded to act as Head of SPRK. The claim is that, during that period of office, he failed to investigate offences committed against the claimants' close relatives in breach of Arts. 2 and 3 of the ECHR. For such alleged failure in the office of SPRK during Mr Ratel's tenure, it is said that the Respondent, the seconding employer, is liable in law.
>
> The claim has only to be stated to see that it was a highly speculative one. For reasons given by the judge, which I find wholly persuasive, it is explained why the claim has no real prospect of success. I also agree with the judge that there was no other compelling reason why the case should go to trial. For the same reasons, this proposed appeal has no real prospect of success and there is no other compelling reason to permit an appeal.
>
> I have read with care the skeleton argument adduced by the applicants… Along with the judge's judgment, I find the Respondent's submissions to the judge on the permission

> question and those made in its Respondent's statement of 20 January 2020 entirely compelling, in showing why permission to appeal should be refused."

10. Following an application made by Mr Randolph QC on behalf of the claimants under CPR 52.30 and the principle in *Taylor v Lawrence,* McCombe LJ indicated that he remained of the "same opinion as I held previously and for the same reasons", emphasising in particular the attribution issue but without departing in any way from his earlier decision on all points. He referred to the high threshold to be crossed on an application to reopen, and stated that he would have refused the application without more. However, in view of the tragic circumstances underlying the case, he adjourned the application to give the claimants an opportunity to advance the application before a different Lord/Lady Justice at an oral hearing. Written evidence has been filed but not served as is customary.

The court's jurisdiction under CPR 52.30

11. The relevant provision of CPR 52.30 states:

> "52.30 – (1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless –
>
> (a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (c) there is no alternative effective remedy.
>
> (2) In paragraphs (1), (3), (4) and (6), "appeal" includes an application for permission to appeal.
>
> …
>
> (5) There is no right to an oral hearing of an application for permission unless, exceptionally, the judge so directs.
>
> (6) The judge must not grant permission without directing the application to be served on the other party to the original appeal and giving that party an opportunity to make representations.
>
> (7) There is no right of appeal or review from the decision of the judge on the application for permission, which is final.
>
> (8) The procedure for making an application for permission is set out in Practice Direction 52A."

12. This rule enshrines the residual jurisdiction, confirmed by a five-judge constitution of the Court of Appeal in *Taylor v Lawrence*, to re-open an appeal so as to avoid real injustice in circumstances that are exceptional. In confirming the existence of this

jurisdiction, the court emphasised the importance of it being "clearly established that a significant injustice has probably occurred and that there is no alternative remedy".

13. The authorities make clear that the jurisdiction can only be properly invoked where it is demonstrated that "the integrity of the earlier litigation process has been critically undermined". In *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514, at [65], Sir Terence Etherton, then Chancellor of the High Court explained that the paradigm case for reopening

> "…is where the litigation process has been corrupted, such as by fraud or bias or where the judge read the wrong papers. Those are not, however, the only instances for the application of CPR 52.17. The broad principle is that, for an appeal to be re-opened, the injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claim of finality in litigation……It also follows that the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large, or that the point in issue is very important to one or more of the parties or is of general importance is not of itself sufficient to displace the fundamental public importance of the need for finality."

14. In *Goring-on-Thames Parish Council v South Oxfordshire District Council* [2018] EWCA Civ 860 (cited by McCombe LJ in his 11 December decision), the court said the appellants' reasons for re-opening the application for permission to appeal a possession order in that case amounted to no more than a criticism that the decision to refuse permission to appeal was wrong. That was not enough to invoke the *Taylor v Lawrence* jurisdiction. The court endorsed the principles summarised above and added to the summary of the principles given in *Lawal*

> "the requirement that there must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined."

15. Mr Randolph also relied on the recent decision of this court in *R (on the application of Wingfield) v Canterbury City Council & Anor* [2020] EWCA Civ 1588. Having referred to the authorities I have summarised above, this court extracted five principles from the authorities, helpfully summarised as follows:

> "(1) A final determination of an appeal, including a refusal of permission to appeal will not be reopened unless the circumstances are exceptional (*Taylor v Lawrence*).
>
> (2) There must be a powerful probability that a significant injustice has already occurred, and that reconsideration is the only effective remedy (*Taylor v Lawrence*, *In Re Uddin*).
>
> (3) The paradigm case is fraud or bias or where the judge read the wrong papers (*Barclays Bank v Guy*, *Lawal*).

> (4) Matters such as the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large or the point in issue is important, are not of themselves sufficient to displace the fundamental public importance of the need for finality (*Lawal*).
>
> (5) There must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined (*Goring-on-Thames Parish Council*)."

16. This court went on to suggest a two-stage process for addressing an application for reconsideration of a refusal of permission to appeal: first asking whether the Lord or Lady Justice of Appeal who refused permission grappled with the issues or wholly failed so to do; and secondly, if the issues were grappled with, whether in doing so a mistake was made that was "*so exceptional, such as wholly failing to understand the point that was clearly articulated, which corrupted the whole process and where, but for that error, there would probably have been a different result*". In so doing, I see nothing that detracts or departs in any way from the exceptional and restrictive nature of this jurisdiction as described above and in *Wingfield* itself. To the extent that Mr Randolph was attempting to suggest otherwise, there is no foundation for such a submission.

The application and my analysis

17. Adopting and applying the approach I have summarised, and recognising the high threshold that must be crossed on an application such as this, I have reached the conclusion that no proper basis for reopening the permission application has been established: it is neither necessary to do so to avoid real injustice nor are there exceptional circumstances. My reasons for these conclusions follow.

18. First, Mr Randolph submitted that the appeal should be reopened in order to avoid real injustice. His argument in summary was as follows. Undisputed findings of breaches of articles 2 and 3 of the Convention have already been made by specialist human rights panels, the HRRP decisions of 11 November 2015 and 19 October 2016. If the decision refusing permission is not reopened the claim will be at an end and no legal remedy for the breaches will ever be available. In writing but not pursued orally, Mr Randolph submitted that McCombe LJ failed to appreciate this when refusing permission to appeal because he wrongly referred to the claim as *alleging* those breaches rather than to the fact that undisputed breaches had been established.

19. It is not arguable that there was such a misunderstanding by McCombe LJ when refusing permission to appeal. True it is that he observed that the claim had only to be stated to see that it was a "highly speculative one". However it is clear that what he viewed as speculative was the suggestion that Mr Ratel's tenure at the Special Prosecution Office in Kosovo could result in the FCO, as seconding employer, being liable in law for the failures (or alleged failures, it matters not) to investigate offences committed against the claimants' close family relatives in breach of articles 2 and 3 of the Convention. Mr Randolph was correct not to pursue this point orally in the circumstances.

20. Mr Randolph submitted that the refusal decision reflects that a critical factor in refusing permission to appeal was the inability to attribute responsibility to the FCO. That conclusion however, was in error of law and a wrong turn was taken by Johnson J. The effect of that wrong turn was to deny any remedy to these claimants in circumstances where there are undisputed findings of egregious breaches of their fundamental human rights. The consequence is very real and causes significant injustice to them.

21. The errors relied on by Mr Randolph are both substantive and procedural. As to the procedural matters, Mr Randolph contended that they constitute exceptional circumstances justifying reopening the appeal. He relied on paragraphs 2(v), 4(iii), 4(iv) and 8(v) of the Grounds of Appeal which assert that Johnson J relied repeatedly on material "*never put before the Court or Counsel. As such, his judgment and consequential order was predicated on 'secret' material on which the parties made no submissions. As such his findings in that regard breached inter-alia the Appellants' rights, comprising a serious procedural irregularity. By acting in such a manner, the first instance judge was applying his mind to a totally different case to that which was being put by the parties*." Moreover, although not set out in writing, Mr Randolph also contended that McCombe LJ failed altogether to grapple with these particular grounds, as he submitted is clear from his refusal decision, where he in effect endorsed the judge's judgment for the reasons he gave but failed to address these points. This too amounts, he submitted, to exceptional circumstances.

22. I deal in more detail below with the particular paragraphs relied on by Mr Randolph. In summary, it is not arguable that there were serious procedural irregularities caused by the reliance on so-called "secret" material or because Johnson J applied his mind to a totally different case to that which was being put by the parties. None of the authorities or points said to have been wrongly relied on by the judge is arguably material in context, for the reasons set out below. I invited Mr Randolph to explain how the authorities or points were material to the decision made by the judge. He declined to do so contending that it was not for him on this application to show that the matters are material – that is for the next stage. I disagree. Even if I had concluded that there was reliance by Johnson J on some matters that could or should have been ventilated in court, there must be a powerful probability that the decision in question would have been different had this been done. I do not consider there to be any realistic probability that the decision in question would have been different in those circumstances, still less a powerful probability.

23. Nor am I prepared to infer that McCombe LJ failed wholly to grapple with these issues. These particular paragraphs (2(v), 4(iii), 4(iv) and 8(v) of the Grounds of Appeal) are expressly addressed in the FCO submissions to the judge responding to the permission to appeal application. This document (together with a later statement in response to the permission application) was referred to by McCombe LJ in his refusal decision. Although he did not (and was not required to) deal serially with each point, he made clear he regarded the FCO submissions as "entirely compelling in showing why permission to appeal should be refused". In any event, as I have already indicated, the points were not material and even if not grappled with, that cannot be said to undermine the clear understanding of the basis of the appeal disclosed by the reasons given by McCombe LJ for refusing permission, or to have corrupted the appeal process. Exceptional circumstances have not been established. Nor is it arguably probable (in circumstances where none of the points made a material difference to the first instance

decision) that a different outcome would have resulted had McCombe LJ addressed each of these points individually.

24. The substantive errors of law relied on by Mr Randolph in his oral submissions focussed solely on the question of attribution as giving rise to injustice because the claimants will be deprived of any remedy. Given that this was simply one of three separate bases on which the judge concluded that the claimants had no real prospects of success in their claim, it is a wholly insufficient basis on which to reopen the permission question. In any event, I have considered the other matters raised in the Grounds of Appeal and concluded that none of the points raised establishes a reasonably arguable case that the judge was wrong to reach the conclusions he did and to dismiss the claim. Moreover, as the judge observed, although some of the legal tests in play (in relation to jurisdiction or attribution) might be capable of further development in the case law, the FCO's defence did not depend on any nuances in the jurisprudence: the claims were simply not capable of satisfying the test for jurisdiction or attribution because of the basic and incontrovertible facts. Most significantly, the FCO did not exercise any direction or control over Mr Ratel's prosecutorial functions.

25. In any event, given the incontrovertible facts found by Johnson J, it is clear that allowing the claims to proceed to trial would lead to the same result and accordingly there is no injustice in the claims being stopped at this stage, notwithstanding the established breaches of the claimants' rights under articles 2 and 3 of the Convention.

26. Without departing in any way from the general application of those points, my shortly stated reasons for rejecting the specific points raised by Mr Randolph are as follows.

Ground 1: procedural and substantive challenges to the finding that the claimants were not within the jurisdiction of the UK for the purposes of article 1 of the Convention

27. I have summarised the judge's findings and conclusions above. In writing but not pursued orally, Mr Randolph submitted that the judge failed to apply the correct test for the "public powers gateway", by including a requirement for "authority and control" which he submitted does not form part of this test.

28. This argument has no real prospect of success for the reasons given by the judge. First, the issue of jurisdiction was determined against the claimants in *Kontic* and permission to appeal on this issue was refused by the Court of Appeal. In any event authority for Johnson J's approach is to be found in *Al-Skeini*, in the judgment of the Grand Chamber at 137 where the "public powers" gateway was described as an example of extra-territorial jurisdiction falling under the general heading of "State agent authority and control" and as arising "whenever the State through its agents exercises control and authority over an individual". There was no dispute that it was the KLA and non-British soldiers who were responsible for the deaths and disappearances of the claimants' relatives – they had not been under the authority or control of the UK – and the claimants were unable to demonstrate that the UK was exercising control over them or their relatives.

29. Nor was there any arguable error in the judge's reliance on the Grand Chamber's decision in *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745, because that case arose in a different factual context concerning article 6 of the Convention (see [96] of the judgment). The judge was alive to the factual differences between the two and

the existence of dissenting opinions. Nonetheless he was entitled to regard *Drozd* as a helpful illustration of the boundaries of this form of extraterritorial jurisdiction, by providing an analogy with the secondment of people from contracting states to international missions, such as Mr Ratel to the EULEX mission. Given the findings of fact made by the judge, I can see no arguable basis for disturbing his conclusion that the evidence did not come close to the UK exercising jurisdiction in Kosovo for the purposes of article 1 of the Convention, because the FCO had no power to direct Mr Ratel in the manner in which he exercised his prosecutorial functions and to do so would have been inconsistent with both the agreed contractual position, the domestic law in Kosovo and the governing instruments of the EULEX mission.

30. As for the alleged serious procedural irregularity contended for by Mr Randolph by reference to the judge's reliance on *Bankovic v Belgium* (2007) 44 EHRR SE5 and *Gentilhomme v France* [2002] ECHR 441, neither of which was opened by the parties, discussed in court, or referred to in submissions (and so they were part of the "secret material"), it is correct that the judge made reference to those judgments at [98] in support of his understanding that an essential feature of jurisdiction, by the public powers gateway, is that Kosovo (or EULEX) consented to, or invited, or acquiesced in the exercise by the UK of a prosecutorial authority within Kosovo. However I do not consider that this gives rise to a material procedural irregularity argument with any real prospect of success. In *Al-Skeini* the Grand Chamber made clear, at [135], that for the "public powers gateway" to be engaged, those powers must be exercised "through the consent, invitation or acquiescence of the Government of that territory", in this case, Kosovo, or EULEX in assisting the Kosovo institutions. The judge simply stated the law as it applied and this does not arguably amount to a procedural irregularity. That dispenses with this point. Moreover, the "consent, invitation or acquiescence" requirement flowed from the Grand Chamber's interpretation of the words "within their jurisdiction" in article 1 of the Convention as a matter of general application. The facts of *Bankovic* (whether distinguishable or not) were irrelevant to that question.

31. None of the remaining arguments in relation to jurisdiction raise any arguable error of law for the compelling reasons given by the judge.

Ground 2: procedural and substantive challenges to finding that the relevant acts of Mr Ratel could not be attributed to the UK

32. In his oral submissions, Mr Randolph focused on two points: a substantive error of law and a serious procedural flaw. I am not persuaded that any of the points raised (whether orally or in writing) affords any real prospect of success of this ground, not least because ultimately, the claimants' evidence did not begin to provide a basis to find that the UK was exercising authority or control over the manner in which Mr Ratel discharged his prosecutorial functions.

33. The judge set out the legal framework at [22]-[26] and [67]. He concluded that Article 7(4) of the Joint Action confirmed that the UK as the seconding state transferred operational control to the EULEX chain of command. Further, articles 8(1)-(3) and 11(5) provided that the EULEX Head of Mission exercised command and control of EULEX and its personnel at theatre level. Further, articles 8(6) and 10(2) provided that EULEX maintains disciplinary control over staff, leaving residual power for disciplinary action with the seconding state (as recognised in *Bamieh* at [13]).

34. Mr Randolph relied on the arguments advanced below and summarised at paragraphs 51 to 54 of his skeleton argument to contend that properly construed, article 10(2) shows that all claims linked to the secondment are a matter for the FCO and in consequence, the UK exercised or could exercise control over Mr Ratel. That is reinforced by article 7(4) which provides that all "seconded staff shall remain under the full command of the national authorities of the seconding state or EU institution". These arguments were dealt with by the judge. For the reasons he gave at [25] by reference to the judgment of Gross LJ at [86] of *Bamieh,* the reference to "relationships between seconded EULEX staff *inter se*" was made in relation to the specific issue on which the parties in *Bamieh* were divided (i.e. the factual reality of the employment for the purposes of determining whether the Employment Tribunal had territorial jurisdiction over whistleblowing claims brought by an FCO employee seconded to EULEX). It was not the "fulcrum" of the critical distinction for the purposes of article 10(2) itself. Rather, the "fulcrum" was correctly identified by the judge as being whether the claim related to the "conduct of the Mission", which gave rise to "theatre level" questions (as Gross LJ noted at [86]).

35. The legal framework simply did not support a conclusion that the FCO could exercise control over Mr Ratel's prosecutorial conduct. Nor did the claimants' own evidence demonstrate that the FCO exercised the necessary direction and control in that regard. Further, and consistently with this position, Mr Ratel's contract required him to "report to, and be obliged to take lawful instructions from, the manager appointed to you by EULEX Kosovo". The criticisms made in writing by Mr Randolph about the judge's reliance on the contract depend on direction or control being found in the relevant legal framework, when as I have indicated, it could not be found there. Once the judge's findings summarised above are accepted, the remaining submissions advanced by Mr Randolph on this ground fall away.

36. Nor does the criticism made by Mr Randolph of the judge's reliance on *Zahiti v EULEX* (HRRP Case No 2012-14, decided on 4 February 2014) give rise to any arguable serious procedural irregularity or error of law. The judge had reached his conclusion on attribution (as summarised above), and simply referred to the HRRP decision as being consistent with it, rather than deriving independent support from it. Nor does reference to it give rise to any other arguable error since it had no independent bearing on his ultimate findings regarding attribution.

37. Finally, in relation to attribution, in writing Mr Randolph sought to reargue the point advanced below that the UK, as a participating member state within the Council of the EU and EULEX, should have Mr Ratel's conduct attributed to it, otherwise a "legal black hole" might arise. This argument was advanced and rejected in *Kontic* as having no support in any of the leading cases. Mr Randolph referred the judge to a decision of the German Higher Administrative Court of North Rhine-Westphalia (case 4 A 2948/11 (VG Köln 25 K 4280/09)). This was summarised at [111], and distinguished by the judge at [112] to [116]. Mr Randolph's submission that the judge was wrong to do so, raises no arguable error with real prospects of success. First, the judge noted that at the time of that decision, the EU did not have its own legal personality to attribute liability. In the present case, the Treaty of Lisbon provided the EU with legal personality which came into force prior to Mr Ratel's secondment. Mr Randolph submitted this was not an accurate characterisation of the judgment, which was more equivocal in that it indicated the EU's legal personality was accepted in practice. However, the judge

considered the decision irrespective of the finding on the EU's legal capacity, and concluded (unarguably correctly) that the assessment of attribution was made on the particular facts of the case; that "fact sensitive conclusion" had no application to the very different facts of the present case in light of the finding that the operational responsibility for Mr Ratel lay with the EU not the UK.

38. As to the alleged procedural irregularity relied on by Mr Randolph, to the effect that the court "reached its conclusion based on the learned judge's own knowledge of German – certainly no other source for the conclusion is referred to or otherwise cited", this is not arguable. As the respondent submits, the "source for the conclusion" is clearly set out in the judgment as comprising a considered analysis of various aspects of the court's reasoning and its factual assessment that underpinned the court's entire reasoning: see [115].

Ground 3: challenge to finding that the present proceedings amount to an abuse of proceedings

39. Mr Randolph did not pursue this ground in oral submissions at all. In writing however he contended that the finding was wrong in law for three reasons. None establishes an arguable error of law with reasonable prospects of success. First, the judge conducted a broad merits-based assessment taking proper account of the public and private interests involved in order to decide whether the proceedings were an abuse of process. He plainly took account of the differences between the two sets of proceedings in conducting that assessment. He concluded that both claims were pursued against the Crown which is indivisible albeit different government departments were named. *Kontic* was treated as a test case: all claimants were aware of it and the same solicitors acted in both sets of proceedings so there was no practical distinction between the claimants. The real factual distinction as the judge identified, was the focus in the present proceedings on Mr Ratel, whereas in *Kontic* the claimed breach was of more general obligations. However in that regard, the claimants were well aware of Mr Ratel's role: as they accept, they knew of his secondment months before the *Kontic* hearing and only sought to raise the issue in the course of that hearing and did not ultimately pursue it. They could and should have pursued the case now advanced in those circumstances, as the judge was entitled to find. At [51], the judge referred to submissions made on behalf of the claimants in *Kontic,* which referred to the fact that the Chief Prosecutor was a secondment from the UK, thereby establishing attribution, and accordingly, the basis of this claim was in fact raised.

40. None of the points raised in the grounds of appeal undermines, even arguably, that conclusion. The fact that submissions from EU institutions were received late in the day is no good reason for delay. Nor is the requirement for permission from the court to add the FCO as a party an answer to why the claimants did not make any attempt to apply for such permission. It is speculative to suggest that permission is unlikely to have been given and even if correct, that would in all likelihood have been based on the fact that the claim should have been made earlier in any event. The claimants through their solicitors, were aware that Mr Ratel was Head of the Special Prosecution Office from at least November 2013. They were also aware that Mr Ratel was employed by the FCO from March 2016. It may be thought that secondment was an obvious inference to draw from the facts known. But in any event, they did in fact know of it before the hearing in *Kontic.*

41. Furthermore, it was not the submissions in and of themselves that the Treasury Solicitor objected to, as Irwin J noted in *Kontic* at [10]: the objection was because the submissions were "late, not filed with permission, and are said not to relate to the matters set down for determination at preliminary issue". It was because of the "irregular way" in which those submissions were produced, and the respondent's objections, that Irwin J did not read them: to do so "would be to encourage an incoherent position". Nor did the judge fail to take account of the Treasury Solicitor's response to the letter of claim in *Kontic*, including a request that the FCO be removed as a putative defendant. In fact the Treasury Solicitor responded that the FCO should be removed as a prospective defendant, *or* the claimants should particularise the claims, if any, made against the FCO. This was because the Treasury Solicitor did not understand "what claim, if any, is made against the FCO". This did not arguably amount to a denial of the secondment.

Ground 4: challenge to finding that there was no other compelling reason to allow the case to continue to trial

42. Again, the errors raised in writing were not pursued orally in relation to this ground. The first three written reasons relied on by Mr Randolph as errors depend on an assertion that there was a materially relevant factual conflict that needed to be resolved at trial. This is not arguable. For the reasons set out in the judgment at [69] and summarised above, there is no materially relevant factual conflict to be resolved.

43. The contention that the judge was incorrect to conclude that the absence of remedy did not provide a compelling reason for allowing the claims to proceed because the claimants would, if the claims proceeded, seek permission to amend their claims to include claims based on the UK's liability *qua* EU member state, is not arguable. It would be contrary to the overriding objective to reopen the appeal on this basis. The claimants could have sought such an amendment earlier, particularly in circumstances where it appears to have been in their minds from at least May 2016. Moreover, the amended reply makes reference to the UK's liability *qua* EU member state but the claimants elected not to pursue this point at the hearing.

44. Finally, as to the contention that reliance on *Berntsen v Tait* [2015] EWCA Civ 1001, without giving the parties an opportunity to comment or make submissions prior to the judgment being handed down, was a serious procedural irregularity, there is nothing in this point. Again it is correct that the judge made reference to this case, but as is clear from [162], it merely confirmed the conclusion he had already reached as a matter of very broad generality, and he does not appear to have derived any independent support from it.

Conclusion

45. I have sought to deal above with the main contentions advanced by Mr Randolph, both orally and in writing. The claimants can rest assured that I have considered all of the material provided in support of this application and all points made on their behalves, even where those are not expressly dealt with above.

46. For all the reasons I have given, I have concluded that the application to re-open falls well short of meeting the requirements of CPR 52.30. The claimants have suffered no "real injustice" in the sense described above; though nothing I have said should be read

as detracting in any way from the tragic circumstances with which they and their families have had to contend. Nor for the reasons given, are there exceptional circumstances that justify reopening the application.

47. The application is therefore dismissed.