Neutral Citation Number: [2017] EWHC 3289 (QB)
Case No: HQ13X01906 and HQ10X03739

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2017

Before:

MR JUSTICE LEGGATT

- -

Between:

Kamil Najim Abdullah Alseran **Abd Ali Hameed Ali Al-Waheed** **MRE** **KSU**	**Claimants**
- and -	
Ministry of Defence	**Defendant**

- -

Richard Hermer QC, Helen Law, Alison Pickup, Edward Craven, Maria Roche and **Melina Padron** (instructed by **Leigh Day**) for the **Claimants Alseran and Al-Waheed**
Richard Hermer QC, Harry Steinberg QC, Rachel Barnes, Maria Roche and **Nina Ross** (instructed by **Leigh Day**) for the **Claimants MRE and KSU**
Derek Sweeting QC, James Purnell and **Saara Idelbi** (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 13 June – 12 July 2016; 20 March – 6 April 2017; 16 October 2017

- -

Judgment Approved

Mr Justice Leggatt:

I. INTRODUCTION

1. The still unfinished business resulting from the UK's military intervention in Iraq between 2003 and 2009 includes a large group of claims proceeding in our courts known as the "Iraqi civilian litigation". The claimants in these cases are Iraqi citizens

who allege that they were unlawfully imprisoned and ill-treated (or in a few cases that their next-of-kin was unlawfully killed) by British armed forces and who are claiming compensation from the Ministry of Defence ("MOD"). Questions of law raised by the conflict in Iraq, some of them novel and very hard questions, have been argued in the English courts and on applications to the European Court of Human Rights since soon after the conflict began. Until now, however, such arguments have taken place on the basis of assumed facts or limited written evidence. This judgment follows the first full trials of civil compensation claims in which the claimants themselves and other witnesses have testified in an English courtroom.[1]

Summary of claims and conclusions

2. Because this is a long judgment which addresses in detail many factual and legal questions, I will summarise the claims and my main conclusions at the start. This is, however, a bare summary only and the reasons for the conclusions summarised here are set out in the following seven parts of the judgment.

The lead cases

3. Of the more than 600 remaining claims in this litigation, the four claims which are the subject of this judgment have been tried as lead cases. There is no assumption that these cases are typical or representative of others, but most of the legal issues which they raise and some of the same factual issues are likely to arise in other cases.

4. The claims have been advanced on two legal bases. The first is the general law of tort under which a person who has suffered injury as a result of a civil wrong can claim damages from the wrongdoer. Because the relevant events occurred in Iraq, the Iraqi law of tort is applicable to these claims. But the claims are subject to a doctrine known as Crown act of state which (in broad terms) precludes the court from passing judgment on a claim in tort arising out of an act done with the authority of the British government in the conduct of a military operation abroad.

5. The second legal basis for the claims is the Human Rights Act 1998, which makes a breach of the European Convention on Human Rights by a UK public authority unlawful as a matter of UK domestic law and gives the victim a potential claim for damages.

6. The claims made and main conclusions reached in the four lead cases are as follows.

Alseran

7. Kamil Najim Abdullah Alseran, aged 22 at the time, was captured in his home at the end of March 2003 during the advance on Basra by British forces. Following his capture he was taken to a temporary camp which was used as a prisoner collection point. Mr Alseran has alleged that the conditions in which he was held at this camp were inhuman and that he was assaulted by British soldiers who made the prisoners lie face down on the ground and ran over their backs. The MOD has disputed these

[1] There have been two major public inquiries into allegations of unlawful killing and ill treatment of Iraqi nationals by British soldiers in which witnesses have given live evidence: the Baha Mousa inquiry and the Al-Sweady inquiry.

allegations and also required Mr Alseran to prove that the soldiers who captured and allegedly assaulted him were British (and not US) soldiers. From the temporary camp Mr Alseran was taken to a prisoner of war internment facility near the port of Umm Qasr which became known as Camp Bucca, where he was interned for several weeks before being released.

8. The psychiatrists who gave expert evidence agreed that Mr Alseran still suffers from anxiety, depression and traumatic symptoms as result of his experiences at the hands of coalition forces. As well as complaining of ill-treatment, Mr Alseran claimed that the whole of his detention was unlawful.

9. My main conclusions in Mr Alseran's case are, in summary:

   i) British forces captured Mr Alseran on 30 March 2003 and were responsible for detaining him until he was released on 7 May 2003.

   ii) As a person found in a battle zone, it was lawful under the law of armed conflict (now known as international humanitarian law) for British forces to capture Mr Alseran and evacuate him from the area for reasons of security. But there was no legal basis in international or national law for his subsequent internment at Camp Bucca.

   iii) On the balance of probability Mr Alseran's allegation that, following his capture, he (and other prisoners) were assaulted by soldiers running over their backs is true. The MOD was liable for this conduct which was also inhuman and degrading treatment in breach of article 3 of the European Convention.

   iv) The conditions in which Mr Alseran was detained at the temporary camp and at Camp Bucca were harsh but did not amount to inhuman treatment.

   v) The system for review of detention at Camp Bucca was flawed because the approach adopted was to treat an individual who claimed to be a civilian (such as Mr Alseran) as a prisoner of war unless there was no doubt that the person was a civilian. That approach was based on a wrong understanding by the MOD of the Geneva Conventions. The correct approach would have been to consider whether there was evidence that the individual claiming civilian status was a combatant or had taken part in hostilities. If – as in Mr Alseran's case – there was no such evidence, then there was no power to intern him, whether as a prisoner of war or as a civilian internee. Had the correct test been applied, Mr Alseran should and probably would have been released by 10 April 2003.

   vi) Because it was contrary to international humanitarian law, Mr Alseran's detention between 10 April and 7 May 2003 violated article 5 of the European Convention and also gave rise to liability in tort (as the British government did not authorise detention which was in breach of the Geneva Conventions and the Human Rights Act).

   vii) In circumstances where Mr Alseran did not begin proceedings in England until March 2013, his claims in tort are time-barred, but his claims under the Human Rights Act are not.

viii) Mr Alseran is awarded damages under the Human Rights Act for (i) the ill-treatment following his capture, in a sum of £10,000, and (ii) his unlawful detention for 27 days, in a sum of £2,700.

MRE and KSU

10. When the war began, MRE and KSU were serving on a merchant ship which was moored in the Khawr az Zubayr waterway north of Umm Qasr. MRE was 37 years old and was employed as an engineer on the ship. KSU was 27 years old and was employed as a guard. On the evening of 24 March 2003 their ship was boarded by coalition forces and the four crew members including MRE and KSU were captured. They were taken by boat a long way out to sea to a large warship on which they were held overnight. The claimants allege, and it was not disputed at the trial, that on arrival at this ship they were forced to strip naked and subjected to an intrusive physical inspection which involved sexual humiliation. KSU was also burnt on the buttock with a lit cigarette. A major issue at the trial was whether the soldiers who captured the claimants and mistreated them on the warship were British soldiers.

11. The following morning MRE and KSU were taken back by boat to Umm Qasr port and from there by road to Camp Bucca, where they were interned. It was not disputed by the MOD that the soldiers who met them when they disembarked and transported them in a Land Rover to Camp Bucca were British soldiers. It was also not disputed at the trial that for the duration of this journey the claimants were hooded with sandbags. But allegations that MRE was struck on the head with a rifle butt on the dock at Umm Qasr and was later kicked in the knee by a soldier while detained at Camp Bucca were denied. MRE and KSU claim that the whole of their detention was unlawful.

12. The psychiatrists who gave expert evidence agreed that both MRE and KSU still suffer from post-traumatic stress disorder as result of their experiences at the hands of coalition forces.

13. My main conclusions in these cases are, in summary, as follows:

i) Although the claimants' allegations that they were mistreated at the time of their capture and on the large warship are true, they have failed to prove that the soldiers who captured and mistreated them were British.

ii) It is, however, clear that from when they disembarked at Umm Qasr port on 25 March 2003 until their release from Camp Bucca, which occurred on 10 April 2003, MRE and KSU were in the custody of British forces who were responsible for their detention throughout that time.

iii) The hooding of the claimants with sandbags during their transportation to Camp Bucca was inhuman and degrading and violated article 3 of the European Convention as well as amounting to an assault. MRE also suffered an eye injury caused when a small shard of glass or other sharp object inside the sandbag covering his head entered his eye.

iv) MRE was struck on the head on the dock at Umm Qasr and later kicked in the knee by a British soldier while detained at Camp Bucca, as alleged. As a

result of the blow to his head, MRE has since suffered from migraine headaches, migraine-related balance disorder, visual vertigo and a central auditory processing disorder. The kick to his knee caused swelling but was not a serious injury. Both incidents were assaults giving rise to liability in tort and the first also constituted inhuman treatment which violated article 3 of the European Convention.

v) As in the case of Mr Alseran, the conditions in which MRE and KSU were detained at Camp Bucca were harsh but did not amount to inhuman treatment.

vi) The claimants were entitled under international humanitarian law and article 5 of the European Convention to have their cases assessed and a decision whether to intern or release them made promptly following their arrival at Camp Bucca on 25 March 2003. Making all due allowance for the wartime conditions, such an assessment should have taken place within, at most, ten days of their internment. Their cases were not considered, however, until 10 April 2003 – when the decision was made to release them. In the result, they were unlawfully detained for six days. Their detention during this period violated article 5 of the European Convention and also gave rise to a claim in tort (as the British government did not authorise detention which was in breach of international humanitarian law and the Human Rights Act).

vii) In circumstances where MRE and KSU did not begin proceedings in England until December 2010, their claims in tort are time-barred, but their claims under the Human Rights Act are not.

viii) Accordingly, the claims which succeed are those under the Human Rights Act based on: (a) the hooding of MRE and KSU, for which they are each awarded damages of £10,000; (b) an eye injury sustained by MRE as a result of the hooding, for which he is awarded additional damages of £1,000; (c) the blow struck to MRE's head, for which he is awarded general damages of £15,000 together with £1,440 for the cost of medical treatment; and (d) six days of unlawful imprisonment, for which MRE and KSU are each awarded damages of £600.

Al-Waheed

14. Abd Ali Hameed Ali Al-Waheed was arrested in a house raid carried out by British soldiers in Basra city on the night of 11/12 February 2007. He was 53 years old at the time and had recently remarried. The soldiers who raided the house were looking for his brother-in-law, Ali Jaleel, who was suspected of involvement in terrorist activities. Ali Jaleel was out but a partly assembled IED and a large quantity of explosives were found in the house.

15. On his arrest, Mr Al-Waheed was taken first to the Brigade Processing Facility at Basra Airport and, from there, to the Divisional Temporary Detention Facility at Shaibah, where he was interned. He alleged that at the time of his arrest and during the journey to Basra Airport he was systematically beaten and tortured by soldiers and that at Basra Airport and during the first 13 days of his internment at Shaibah he was subjected to multiple forms of inhuman and degrading treatment. He further alleged

that his detention was unlawful, for the whole, or alternatively part, of the period for which he was detained.

16. The expert psychiatrists agreed that, when they examined Mr Al-Waheed in April 2016, he was suffering from post-traumatic stress disorder and depression with significant anxiety symptoms. They also agreed that Mr Al-Waheed's mental health problems and the multiple physical symptoms from which he also suffers, including lower back pain and joint pains, are inter-related and cause him significant impairment.

17. My main conclusions in this case are, in summary, as follows:

    i) Mr Al-Waheed's allegations of mistreatment are greatly exaggerated. Nevertheless, there is contemporaneous medical evidence which shows that between the time of his arrest and his arrival at the Basra Airport base he was beaten on the upper back and arms (probably with rifle butts); he was also punched in the face by British soldiers and suffered a painful finger injury.

    ii) In addition to this assault, Mr Al-Waheed was subjected to the following practices which were routinely used at the relevant time in handling prisoners, but which amounted to inhuman and degrading treatment:

        a) "harsh" interrogation, which involved a deliberate attempt to humiliate the detainee by insulting and shouting personal abuse at him;

        b) being deliberately deprived of sleep for the purpose of interrogation during the first day and a half of his detention; and

        c) complete deprivation of sight and hearing by being made to wear blacked out goggles and ear defenders for most of the first 12 hours following his arrest and thereafter whenever he was taken out of his cell while undergoing interrogation during the first 13 days of his detention.

    Mr Al-Waheed's other complaints about the conditions of his detention have not been made out.

    iii) Although British forces had no power under Iraqi law to intern people, they had such a power under international law at the relevant time as a result of a resolution of the United Nations Security Council which authorised internment where this was necessary for imperative reasons of security. On this basis it was lawful for British forces to arrest Mr Al-Waheed, as there were reasonable grounds for suspicion that he may have been involved in bomb-making and was therefore a threat to security. However, following extensive interrogation, the review committee decided on 22 February 2007 that he had no connection with his brother-in-law's activities and did not pose a threat to security and should therefore be released. That decision was revoked the next day for reasons which do not stand scrutiny. In consequence, Mr Al-Waheed was detained without any legal basis from 23 February 2007 until he was ultimately released on 28 March 2007, a period of 33 days. His detention during this period violated article 5 of the European Convention and also gave

rise to a claim in tort (as the British government did not authorise detention which was contrary to international law and the Human Rights Act).

iv) In circumstances where Mr Al-Waheed did not begin proceedings in England until March 2013, his claims in tort are time-barred, but his claims under the Human Rights Act are not.

v) Mr Al-Waheed is awarded damages under the Human Rights Act in the following amounts: (i) £15,000 in respect of the beating which he suffered after his arrest; (ii) £15,000 in respect of the further inhuman and degrading treatment which he suffered encompassing harsh interrogation, being deprived of sleep and being deprived of sight and hearing; and (iii) £3,300 in respect of his unlawful detention for 33 days.

Timeline of the Iraq conflict

18. Before I discuss the claims in more detail, I will put them in a broad chronological context. The invasion of Iraq by a coalition of armed forces, led by the United States and including a large force from the United Kingdom, began on 20 March 2003. By 5 April 2003 British troops had captured Basra and by 9 April 2003 US troops had gained control of Baghdad. Major combat operations were formally declared complete on 1 May 2003.

19. On 8 May 2003 the Permanent Representatives of the UK and the US at the United Nations addressed a joint letter to the President of the Security Council. The letter explained that the US, the UK and their coalition partners had created the Coalition Provisional Authority ("CPA") in order 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." On 16 May 2003 the CPA issued Regulation No 1, discussed further below, whereby in section 1(2) the CPA assumed:

> "all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant UN Security Council Resolutions, including Resolution 1483 (2003), and the laws and usages of war."

UN Security Council Resolution 1483, which (amongst other things) recognised the "specific authorities, responsibilities and obligations under applicable international law" of the US and the UK as occupying powers, was adopted by the UN Security Council on 22 May 2003.

20. On 16 October 2003 the UN Security Council adopted Resolution 1511, which (amongst other things) set out a series of steps for transferring the administration of Iraq to a new Iraqi government and also authorised a multi-national force ("MNF") under unified command "to take all necessary measures to contribute to the maintenance of security and stability in Iraq."

21. On 5 June 2004 the US Secretary of State (Mr Powell) and the Prime Minister of the new interim Iraqi government (Dr Allawi) wrote to the President of the UN Security Council. The letter from Mr Powell confirmed that the MNF stood ready:

> "to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security …"

The letter from Dr Allawi requested a further resolution of the Security Council to authorise the MNF to contribute to maintaining security in Iraq, "including through the tasks and arrangements set out in the letter from [Mr Powell]".

22. On 8 June 2004 the UN Security Council adopted Resolution 1546. This endorsed a timetable for Iraq's political transition to democratic government which included the transfer of governing responsibility and authority to the interim Iraqi government by 30 June 2004 and further steps leading to a constitutionally elected government by 31 December 2005. Resolution 1546 also conferred on the MNF authority to "take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution." The letters annexed to the resolution were the letters dated 5 June 2004 from Mr Powell and Dr Allawi.

23. On 28 June 2004 sovereign authority was transferred from the CPA to a new interim Iraqi government and the CPA ceased to exist. British forces remained in Iraq as part of the MNF under the mandate conferred by Resolution 1546.

24. This mandate was originally due to expire on 31 December 2005 but it was subsequently extended by three further Security Council resolutions.[2] The mandate of the MNF ultimately expired on 31 December 2008 (though it was not until some time in 2009 that British forces completed their withdrawal from Iraq).

The litigation

25. In total, 967 claims have been issued by Leigh Day on behalf of Iraqi citizens against the MOD in matters other than those relating to their employment and/or engagement by the defendant in Iraq.[3] Of these, 331 claims have been settled, four have been discontinued or struck out and 632 claims – including the four which are the subject of this judgment – remain unresolved.

26. Ten claims, split into three groups, have been progressed – or, in the case of the third group, are being progressed – as lead cases through the full civil litigation process of serving statements of case, giving disclosure of relevant documents, exchanging witness statements and expert reports and holding a trial. In the remaining cases a truncated procedure has so far been adopted. This involves the claimant setting out his case in a detailed letter of claim and the MOD then conducting specified electronic searches for documents relating to the claimant and disclosing the documents found.

---

[2] Resolution 1637 of 8 November 2005, which extended the mandate until 31 December 2006; Resolution 1723 of 28 November 2006, which extended the mandate until 31 December 2007; and Resolution 1790 of 18 December 2007, which extended the mandate until 31 December 2008.

[3] This figure does not include claims issued by Leigh Day on behalf of Iraqi citizens against the MOD in matters relating to their employment or engagement by the MOD in Iraq.

This process is being conducted on a rolling basis, with 15 letters of claim due for service each month. Further directions for the disposal of the cases which have completed or have yet to complete this process will be given after the parties have considered the implications of this judgment.

The trials

27. The first trial (of the first group of claims) took place in June/July 2016. It was originally going to encompass three claims arising from different phases of the Iraq conflict, but one of the claims was settled before the trial began. A difficulty arose in the run-up to the trial when the claimants and their witnesses from Iraq were refused visas by the Home Office to enter the United Kingdom to attend court. I invited argument on whether that refusal infringed the right to a fair trial and, if so, whether there was a legitimate basis for it. Shortly before the argument on this question was due to be heard, entry clearance was granted and visas were issued. In the event, seven Iraqi witnesses including the two claimants, Mr Alseran and Mr Al-Waheed, gave oral evidence at the trial. (Another Iraqi witness who had come to the UK to give evidence did not in the event testify as her evidence was ultimately not challenged by the MOD.) The MOD adduced evidence from three witnesses of fact in the case of Mr Alseran and from 14 witnesses of fact in the case of Mr Al-Waheed. In addition, the parties adduced evidence from medical experts in a variety of disciplines and also from experts on the subjects of Iraqi law, conditions in Iraq and the Iraqi legal system. The relevant parts of the proceedings were translated simultaneously from and into Arabic.

28. At the time when the trial of these cases was scheduled and when the hearing took place, certain issues of law which are of general importance in the litigation were under appeal to the Supreme Court. It was agreed that judgment should be reserved until the appeals had been decided and the parties had been able to address the implications of the Supreme Court's decisions. In the event the Supreme Court handed down its judgments on 17 January 2017. By that time the second trial of lead cases was imminent. In these circumstances I heard argument on the implications of the Supreme Court's decisions as part of the second trial. I also directed that evidence given in each trial would be treated as evidence in the other. Permission was given to apply for exceptions to be made if this direction gave rise to unfairness, but no such application has been made.

29. Originally, the second trial was due to comprise four claims, but one of them was stayed because of the claimant's lack of capacity to give instructions and another was struck out after Leigh Day ceased to act for the claimant. The two claimants whose cases proceeded to trial were captured and detained at the same time and have made similar allegations of mistreatment. Because the alleged mistreatment includes mistreatment of a sexual nature, which carries a heavy stigma in Iraq, these claimants have been granted anonymity and have been referred to as "MRE" and "KSU". At the trial of their claims in March/April 2017 both MRE and KSU gave oral evidence. Two other Iraqi witnesses who had come to the UK to give evidence for them did not in the event testify, in one case because the witness was taken ill and in the other case because her evidence was not challenged by the MOD. The MOD adduced evidence at this trial from no fewer than 34 factual witnesses. Between them, the parties relied on evidence from 14 medical experts in eight different specialisms. Again, the relevant parts of the proceedings were simultaneously translated from and into Arabic.

30. Since the end of the second trial, the court has received a substantial volume of further evidence and submissions in writing. This material has included: (i) additional disclosure from the MOD and written submissions from both parties addressing various factual questions raised during the second trial; (ii) further disclosure from the MOD of records of prisoners detained at Camp Bucca and documents relating to conditions at Camp Bucca; (iii) further information from Leigh Day relevant to issues of limitation; and (iv) additional submissions on the doctrine of Crown act of state in the light of the order made by the Supreme Court in *Mohammed v Ministry of Defence* [2017] UKSC 1, [2017] AC 649, on 12 April 2017 (after the end of the second trial). On the latter issue, I have also heard further oral argument.

31. I have thought it right to take account of – and in some instances to request – this further material and argument because issues raised by these lead cases affect other claims in the litigation. In these circumstances it has seemed to me desirable to try to ensure that the basis on which the lead cases are decided is as accurate and complete as possible.

32. These cases have raised many procedural complications, as well as complex questions of fact and law. I would like to express my gratitude to all the counsel and solicitors instructed on both sides, and above all to the principal leading counsel, Mr Richard Hermer QC and Mr Derek Sweeting QC, for the constructive and efficient way in which the trials have been conducted and for the immense assistance that I have received from them at every stage.

Structure of this judgment

33. The main body of this judgment is arranged as follows. In the next part I will identify the key principles of English law applicable to these claims and in part III I will outline the relevant Iraqi law. I will then address in turn the claims of Mr Alseran (in part IV), MRE and KSU (in part V) and Mr Al-Waheed (in part VI), in each case making findings of fact and applying to those facts the principles of English and Iraqi law previously identified. In part VII I will consider the MOD's defence that the claims are time-barred. Finally, in part VIII I will identify what injuries the claimants have suffered for which damages should be awarded and will assess the amount of those damages.

II. THE LEGAL FRAMEWORK

34. I have mentioned already the two legal bases on which the claims have been advanced. In this part of the judgment I will identify in more detail the principles of law which the court must apply, taking first the law of tort and then the Human Rights Act 1998.

Claims in tort: the applicable law

35. Where a claim is made in the English courts seeking compensation for a wrong committed abroad, English rules of private international law determine what country's system of tort law the court must apply. Because the events with which these

proceedings are concerned took place before 11 January 2009,[4] the applicable rules of private international law are those contained in Part III of the Private International Law (Miscellaneous Provisions) Act 1995.

36. Pursuant to section 11(1) of that Act, the general rule is that the law to be used for determining issues relating to tort is the law of the country in which the events constituting the tort occurred. It is common ground that, in accordance with this rule and with the decision of the House of Lords in *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332, paras 40-43, the law applicable to claims in tort in this litigation is the law of Iraq.

37. Matters of foreign law are treated in English courts as matters of fact which must generally be proved by expert evidence. I consider the expert evidence of Iraqi law received in these cases and identify the relevant rules of Iraqi law in part III.

Crown act of state

38. When British troops are sent to invade a foreign country, it is hardly to be expected that the lawfulness of their use of force and of their capture and detention of prisoners should be judged in the courts of England and Wales by applying the local law of the country they have invaded. It is in the nature of a war between states that the participants will kill and injure each other's citizens and deprive them of their liberty in ways that are unlikely to be lawful under the local law of the enemy state. The law of the state whose armed forces carry out such actions may set constraints on what its armed forces may legally do. There are also constraints which operate at the international level established by the Geneva Conventions and other rules of the body of international law now known as international humanitarian law. But the need for such international law arises precisely because the courts of states on opposite sides of an armed conflict cannot be expected to enforce each other's domestic law in accordance with the ordinary rules of private international law which apply in peacetime.

39. After the occupation of Iraq ended and sovereign authority was transferred to an interim Iraqi government on 28 June 2004, the situation was one of "non-international armed conflict" in which there was fighting, not between states, but between multi-national armed forces present in the territory of the 'host' state, with its consent, and organised armed groups. In such a situation too the domestic tort law of the host state is unlikely to be apposite to the conduct of hostilities and the detention of suspected insurgents by foreign armed forces.

40. The doctrine of English law which sets limits to the enforceability of foreign tort law in the context of military operations abroad is known as the doctrine of Crown act of state. Its scope has been considered as a preliminary issue in this litigation and in a case arising out of the British military involvement in Afghanistan. In the latter case I found at first instance that British forces operating in Afghanistan had no right under Afghan law to detain suspected insurgents for more than 72 hours. The claimant (SM), who had been detained by British forces for a total of 110 days, argued that he

---

[4] Where the relevant events have occurred since that date, the choice of law is governed by Regulation (EC) No 864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II).

was entitled in these circumstances to recover damages in tort from the MOD. I rejected that argument on the basis that, on the assumed facts, the doctrine of Crown act of state precluded the enforcement of such a claim: see *Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB), paras 358-408; and see also *Rahmatullah v Ministry of Defence* [2014] EWHC 3846 (QB), paras 179-223. In the *Mohammed* case (at para 395) I said:

> "It is not the business of the English courts to enforce against the UK state rights of foreign nationals arising under Afghan law for acts done on the authority of the UK government abroad, where to do so would undercut the policy of the executive arm of the UK state in conducting foreign military operations."

41. The Court of Appeal reversed that decision, holding that the doctrine of Crown act of state would apply only if it could be shown that there were compelling grounds of public policy to refuse to give effect to the local tort law and that, on the assumed facts, there were no such grounds: see *Mohammed v Ministry of Defence* [2015] EWCA Civ 843, [2017] AC 649, paras 352, 364, 377(2). However, in the first of its decisions given on 17 January 2017, the Supreme Court allowed a further appeal by the MOD on this issue: see *Mohammed v Ministry of Defence* [2017] UKSC 1, [2017] AC 649.

The Supreme Court decision

42. The leading judgment in the Supreme Court was given by Baroness Hale. She did not doubt that there is a rule of law which prevents UK courts from reviewing certain decisions of high policy taken by the executive in the conduct of foreign relations. The question as she saw it was "whether a different type of rule, affording a tort defence even though the subject matter is entirely suitable for adjudication by a court, also exists": see the *Mohammed* case [2017] UKSC 1, [2017] AC 649, at para 22. Although she described its foundations as "very shaky" (ibid), Baroness Hale concluded that such a rule does indeed exist. She based this, first, on the fact that the existence of the rule "is long-established both in the case law and in academic commentaries and texts" and, second, on her view that there are good reasons for the rule, at least in the context of military operations abroad (para 31).

43. Baroness Hale derived those reasons from the nature of military operations and the need to apply different legal standards to acts done in the conduct of such operations to those which apply in conditions of peace. She cited an observation of Sir James Stephen that "the very essence of war is that it is a state of things in which each party does the other all the harm they possibly can" (para 32). Baroness Hale then reasoned that:

> "if act of state is a defence to the use of lethal force in the conduct of military operations abroad, it must also be a defence to the capture and detention of persons on imperative grounds of security in the conduct of such operations. It makes no sense to permit killing but not capture and detention, the military then being left with the invidious choice between killing the enemy or letting him go."

44. While holding that for these reasons there are some acts of a governmental nature, committed abroad, upon which the courts of England and Wales will not pass judgment, Baroness Hale thought it necessary to confine that category within very narrow bounds (para 33). In particular, she considered that the Crown act of state doctrine "cannot apply to all torts committed against foreigners abroad just because they have been authorised or ratified by the British Government"; that it cannot apply to acts of torture or to the maltreatment of prisoners (as the Government had accepted); and that the doctrine would not generally apply to the expropriation of property (para 36). She concluded (at para 37):

> "We are left with a very narrow class of acts: in their nature sovereign acts — the sorts of thing that governments properly do; committed abroad; in the conduct of the foreign policy of the state; so closely connected to that policy to be necessary in pursuing it; and at least extending to the conduct of military operations which are themselves lawful in international law (which is not the same as saying that the acts themselves are necessarily authorised in international law). For the purpose of these cases, we do not need to go further and inquire whether there are other circumstances, not limited to the conduct of military operations which are themselves lawful in international law, in which the defence might arise."

45. One of the requirements identified in this passage is that, to fall within the narrow class of acts covered by the doctrine, the act must be "so closely connected to [the foreign policy of the state] to be necessary in pursuing it." As explained by Lord Sumption, this requirement does not involve an assessment of whether there were alternative ways in which the policy could or should have been pursued. Rather, the relevant question is "whether an act of that character is inherent in what the Crown has authorised or ratified" (see para 92). Lord Sumption also summarised (at para 81) what he understood Baroness Hale to have identified as the essential elements of a Crown act of state as being:

> "(i) that the act should be an exercise of sovereign power, inherently governmental in nature; (ii) done outside the United Kingdom; (iii) with the prior authority or subsequent ratification of the Crown; and (iv) in the conduct of the Crown's relations with other states or their subjects."

Lord Mance (with whose judgment Lord Hughes agreed) approved this summary (at para 72) and I do not perceive any material difference between Lord Sumption's statement of the relevant requirements and that of Baroness Hale.

46. Like Baroness Hale, Lord Sumption located the justification for the Crown act of state doctrine in the nature of military operations, but he also linked it to the doctrine of the separation of powers which vests in the executive the power to deploy armed force in the conduct the UK's international relations. He said (para 88):

> "In the nature of things, the use of armed force abroad involves acts which would normally be civil wrongs not only under English law but under any system of municipal law. People

> will be detained or killed. Their property will be damaged or destroyed. It would be incoherent and irrational for the courts to acknowledge the power of the Crown to conduct the United Kingdom's foreign relations and deploy armed force, and at the same time to treat as civil wrongs acts inherent in its exercise of that power."

This rationale was endorsed by Lord Mance (with whom Lord Hughes agreed) at para 51 and by Lord Neuberger (with whom Lord Hughes also agreed) at para 104.

The form of the Supreme Court's declaration

47. When the judgments in the *Mohammed* case were handed down, the Supreme Court invited submissions on the precise form of the declaration which would be appropriate to give effect to the judgments (see para 46). The principal question addressed by the parties in these submissions was whether the declaration should include a requirement that the policy authorising the act in question must be "lawful" – a question on which Lord Mance had specifically invited further assistance (para 77).

48. In its order dated 12 April 2017, the Supreme Court made the following declaration:

> "In proceedings in tort governed by foreign law, HM Government may rely on the doctrine of Crown act of state to preclude the court passing judgment on the claim if the circumstances are such as stated in [the judgment of Baroness Hale at] paras 36 and 37. For the avoidance of doubt, the conduct and/or policy in question do not have to be lawful in international law."

49. That order had not yet been made when the second trial of these lead cases ended. In these circumstances permission was given at the end of the trial to make further submissions in writing to this court after the order of the Supreme Court had been promulgated.

Application to amend and further argument

50. When the claimants filed such further submissions, they also applied to amend their particulars of claim in each of the four lead cases to advance two arguments of principle regarding the scope of the Crown act of state doctrine. The first argument, which had been raised in closing submissions at the second trial, is that the doctrine does not apply to detention during a military operation overseas if that operation was unlawful under international law and that the invasion of Iraq was such an unlawful operation. The second argument, which had not been raised during the trials, is that the doctrine does not apply if the policy pursuant to which the detention took place was unlawful as a matter of English law.

51. Despite the very late stage at which the application was made, I thought it right to allow the claimants to amend their particulars of claim and to develop these arguments for the following exceptional reasons:

i) The declaration made by the Supreme Court, which could have resolved both the points argued by the claimants, was not settled until after the second trial had ended, and it was envisaged that this court would then receive further submissions on the doctrine of Crown act of state.

ii) The arguments raised by the claimants are pure matters of law. As such, they are arguments which the claimants would be permitted to raise on an appeal in any event.

iii) The aim of the present judgment is to address as many disputed issues which are of general relevance in the litigation as possible, in the hope that this will assist the resolution of the large number of outstanding claims.

52. Because of the importance of the new arguments raised by the claimants and because there had, for understandable reasons, been little attention given in the submissions made at either trial to the scope of the authority to detain conferred by the Crown on soldiers operating in Iraq, I requested further assistance on these aspects of the Crown act of state doctrine at an oral hearing. There were difficulties in listing the hearing but it ultimately took place on 16 October 2017. At this hearing the claimants were represented by the same counsel as before, led by Mr Richard Hermer QC. The MOD was represented on this occasion by Mr James Eadie QC and Ms Karen Steyn QC, as well as by its trial counsel.

53. I will deal at this stage with the two arguments of general principle raised by the claimants. Questions about whether or to what extent the Crown act of state doctrine precludes the court from passing judgment on the particular tort claims made by the claimants are addressed in the later parts of this judgment in which I discuss the individual claims.

Relevance of international law

54. As mentioned, the Supreme Court in its order made in the *Mohammed* case has expressly declared that, for the Crown act of state doctrine to apply, "the conduct and/or policy in question do not have to be lawful in international law". The claimants have argued that there is, despite this, a requirement that the military operation in which the act occurs must be lawful in international law. In support of this argument, counsel for the claimants pointed to the fact that in para 37 of her judgment (quoted at paragraph 44 above) Baroness Hale expressly declined to decide that the doctrine extends beyond "the conduct of military operations which are themselves lawful in international law". They argued that this leaves open the possibility that the doctrine does not apply to the conduct of military operations which are not themselves lawful in international law.

55. Counsel for the claimants submitted that there is no good reason of public policy why the government should reap the benefit of the Crown act of state doctrine when it was engaged in an unlawful military operation and that it would be inconsistent with the principles underlying the doctrine to extend it to such a situation. They further argued that the invasion of Iraq was unlawful in international law. In their written submissions counsel for the claimants developed the latter contention at some length, drawing on extra-judicial writings of Lord Bingham and Lord Steyn: see Tom

Bingham, *The Rule of Law* (2010) p123; J Steyn, "The legality of the invasion of Iraq" (2010) EHRLR 1.

56. I cannot accept the submission that the application of the Crown act of state doctrine is limited to the conduct of military operations which are themselves lawful in international law. It is true that Baroness Hale in her lead judgment in the *Mohammed* case (in one of the paragraphs expressly adopted in the subsequent order of the Supreme Court) thought it unnecessary to discuss this question. However, the question seems to me to have been decided by the express statement included in the order "for the avoidance of doubt" that "the conduct and/or policy in question do not have to be lawful in international law". I see no reason to read this statement restrictively. The word "conduct" is broader than "act" and, as I read it, encompasses not just the particular act complained of by the claimant, such as the act of detaining him, but the conduct of the military operation in the course of which that act occurred. Furthermore, the "policy in question" encompasses any policy pursuant to which the act was done – whether it be a detention policy applicable at a particular location, or more widely, or a policy decided at the highest level such as the policy decision to invade Iraq. Thus, I understand the Supreme Court to have declared that the application of the Crown act of state doctrine does not depend on establishing that either the allegedly wrongful act or the wider military operation of which the act formed part or the policy decision to engage in that operation was lawful in international law.

57. If I am wrong about this and the Supreme Court has not expressly decided that the military operation in which the act occurs does not have to be lawful in international law, I nevertheless think it clear that the Supreme Court has decided this by implication. That is because, once it is established – as on any view it is by the declaration of the Supreme Court – that an act which is unlawful in international law can be a Crown act of state, an act (which may itself be lawful) done in the course of an unlawful military operation seems to me to be *a fortiori* the case.

58. A distinction is drawn in international law between the law governing the conduct of armed conflict ("*ius in bello*") and the law governing the resort to armed conflict ("*ius ad bellum*"). International humanitarian law is concerned with the former and it is a cardinal principle of international humanitarian law that it applies in cases of armed conflict whether or not the inception of the conflict is lawful under *ius ad bellum*. This principle is reflected, for example, in the preamble to the First Additional Protocol to the Geneva Conventions, which reaffirms that:

> "The provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, <u>without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict</u>." [emphasis added]

Thus, establishing that the detention of an individual during an armed conflict is lawful in international law does not depend on whether the armed conflict or military operation in which the detention occurs is itself lawful. Since international law does not treat the legality of a military operation as relevant to whether detention during the operation is lawful, and since the Supreme Court has expressly ruled that even

detention which is unlawful in international law can be a Crown act of state, I cannot see how the question of whether the operation is lawful in international law can logically have any relevance to whether the detention is a Crown act of state.

59. Furthermore, whether the doctrine of Crown act of state is conceived as involving one rule or two (a question on which different opinions were expressed in the judgments of the Supreme Court), none of the justices was in doubt that the doctrine applies to decisions of high policy in the conduct of foreign relations, of which a paradigm example is a decision to invade another country. The only question regarded as controversial was whether the doctrine extends to the conduct of military operations abroad as well as to the high policy decision to engage in them. The court unanimously held that it does: see in particular paras 31, 33, 73, 91. Lord Mance was at one with Baroness Hale and Lord Sumption in holding (at para 73) that:

> "Crown act of state must be potentially applicable as much to acts in the execution of policy-makers' decisions as it is to the decisions themselves. It would not otherwise be a coherent doctrine."

60. The proposition that a decision of the UK government to engage in a military operation abroad is not reviewable in the courts was thus the starting-point for the Supreme Court's reasoning. It would be inconsistent with that approach for the court to embark on an examination of whether such a decision was lawful in international law. Yet that is what, if the claimants' argument were correct, it would be necessary to do in order to determine whether acts done in the execution of the decision to engage in the operation are Crown acts of state. Treating the Crown act of state doctrine as limited to the conduct of military operations which are themselves lawful in international law would thus render the doctrine incoherent as it would require the court to decide questions of the very kind which the doctrine requires it to abstain from deciding.

61. In these circumstances I decline to consider the question whether the invasion of Iraq was lawful in international law. On the view I take about the scope of the Crown act of state doctrine it is unnecessary to rule on that issue in order to determine whether the doctrine applies. Moreover, to do so would be contrary to what is (depending on the view taken) either the core principle or at the very least one of the principles on which the doctrine is based.

Relevance of English law

62. The second argument of principle advanced by the claimants is that the Crown act of state doctrine does not apply where the conduct and/or policy in question is unlawful under English domestic law. More specifically, counsel for the claimants submitted that the doctrine does not apply to detention pursuant to a policy which infringes basic common law principles of natural justice that require an impartial review of detention in accordance with a fair procedure.

63. As mentioned earlier, the question whether the policy pursuant to which the act was done must be "lawful" was left open in the judgments of the Supreme Court in the *Mohammed* case and was addressed in further submissions made by the parties regarding the appropriate form of order. In their submissions on this issue counsel for

the MOD, while arguing that the policy does not have to be lawful as a matter of international law, observed that a "difficult, and complex, question" arises in considering whether the act must be done pursuant to a policy which is lawful as a matter of English law. The MOD had conceded that some forms of unlawfulness (specifically, torture or maltreatment of prisoners or detainees) render the doctrine of Crown act of state inapplicable (see para 36 of the judgment of Baroness Hale). Counsel for the MOD submitted that it was not necessary or appropriate for the Supreme Court to determine where the various boundaries lie and that this question should be addressed as and when it arises in an appropriate case.

64. I infer that the Supreme Court accepted that submission, as the declaration made was silent on the question whether or in what circumstances the act must be done pursuant to a policy which is lawful as a matter of English law. Had it intended to resolve that question, I am sure that the Supreme Court would either have specified that this is a requirement of the Crown act of state doctrine or declared "for the avoidance of doubt" that there is no such requirement, as it did in relation to the question whether the conduct or policy in question have to be lawful in international law. Moreover, it is not surprising that the Supreme Court did not decide the point as it had not been argued at the hearing nor addressed in the judgments. I therefore infer that the Court acceded to the MOD's invitation to leave the question to be addressed as and when it arises in an appropriate case.

65. In the present cases, the question has been directly raised and argued, and it is therefore necessary to address it.

66. In doing so a distinction needs to be drawn between the lawfulness of the allegedly tortious act and the lawfulness of any authority granted by the Crown to perform the act complained of. As noted by Lord Sumption in a passage quoted earlier (see paragraph 46 above), the use of armed force abroad involves acts which would normally be civil wrongs under English law or any system of municipal law. In the old case of *Buron v Denman* (1848) 2 Exch 167, for example, there was no legal basis in English law or in any system of law for the acts of the defendant, Captain Denman, in destroying the claimant's property and freeing his slaves. However, the fact that the acts were ratified by the Crown was held to provide a defence. The same would have been true if the acts of the defendant had been authorised by the Crown in advance. It therefore cannot be an essential element of a Crown act of state that the act in question was lawful as a matter of English tort law.

67. However, this still leaves open the different question of whether it is a requirement of the doctrine that in authorising the detention (or other act) the Crown was acting lawfully. On behalf of the claimants, Mr Hermer QC submitted that, if the policy relied on as authority for the detention was unlawful, then on orthodox public law principles the policy has no legal effect and provides no valid authority at all. Therefore, the Crown act of state doctrine does not apply.

68. On behalf of the MOD, Mr Eadie QC submitted that the Crown act of state doctrine operates at an earlier stage. The very question whether the policy relied on as authority was lawful is, he submitted, within the area covered by the doctrine and is a question which the court will refrain from deciding. On this conception of the doctrine, once it is shown that the act in question was a sovereign act committed in the conduct of a military operation overseas and that the Government purported to

authorise (or ratify) the act, then the shutters come down and the court will not examine whether the authorisation was legally valid.

69. I do not accept the MOD's contention because it is, in my view, based on an incorrect appreciation of the rationale of the Crown act of state doctrine and is inconsistent with constitutional principle. While decisions of "high policy" such as whether to deploy armed force abroad are not judicially reviewable (unless an Act of Parliament requires it), the separation of powers under the UK's constitution does not in itself prevent courts from judging the legality of lower level policies adopted by the executive which apply to its treatment of foreign subjects abroad. Foreign policy is no longer regarded as a complete "no go" area for the courts and a court does not "turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction": *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42, 67 (Lord Bridge). There are many cases in which the lawfulness of such policies has been challenged and has been treated as a proper subject matter for the courts. Examples are the cases of *Hussein v Secretary of State for Defence* [2013] EWHC 95 (Admin); [2014] EWCA Civ 1087 and *R (Al Bazzouni) v Prime Minister* [2011] EWHC 2401 (Admin), [2012] 1 WLR 1389, referred to later in this judgment. Another example is *R (Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin), which involved a challenge to the operation of the UK government's policy of transferring persons detained by British forces in Afghanistan to the Afghan authorities. On the orthodox conception of public law, what a court is doing in such cases is determining whether the policy or practice in question is within the scope of the government's legal powers – whether those powers are conferred by statute or are powers which at common law are regarded as the prerogative of the Crown. Where the policy or act in question is found to be outside the scope of those powers (*ultra vires*), it is treated as having no legal effect.

70. The cases I have mentioned were claims for judicial review of governmental acts brought in the Administrative Court using the procedure set out in CPR r.54. However, it is well settled that, whether or not a decision of a public authority has been quashed in proceedings for judicial review, it is still open to a party to contest the validity of the decision where the issue arises as a collateral matter in a claim for infringement of private rights: see e.g. *Wandsworth London Borough Council v Winder* [1985] AC 461; *Roy v Kensington and Chelsea FPC* [1992] 1 AC 624; *Credit Suisse v Allerdale BC* [1997] QB 306; *Boddington v British Transport Police* [1999] 2 AC 143, 172 (Lord Steyn).

71. As discussed above, the justification given by the Supreme Court for holding that the Crown act of state rule extends not just to decisions on matters of "high policy" but to actions taken by the Crown's agents in the execution of those decisions is based on the nature of war and the fact that the conduct of military operations abroad naturally involves acts which would normally be civil wrongs. Thus, if the general law of tort was not qualified by the doctrine of Crown act of state, the English courts would be required to treat as civil wrongs acts which are inherent in the government's exercise of its power to conduct foreign relations and deploy armed force. But this principle of consistency does not preclude the courts from determining that a particular government policy of a kind which is judicially reviewable is unlawful and *ultra vires* and from treating as civil wrongs acts done pursuant to such a policy which are outside the scope of the government's powers. Torturing or mistreating prisoners, to

take an example considered in the *Mohammed* case, is not inherent in the use of armed force abroad. Not only is such a practice contrary to international humanitarian law but it is also incompatible with article 3 of the European Convention and therefore unlawful in English law pursuant to section 6 of the Human Rights Act. There is nothing incoherent or irrational about a court passing judgment on a claim in tort brought by an individual who alleges such mistreatment. Likewise, acknowledging that a government decision to engage in a military operation abroad entails the use of lethal force and detention on imperative grounds of security does not require the courts to accept that, for example, such lethal force may be deliberately targeted at civilians or that such detention is permissible when there are no imperative reasons of security capable of justifying it. As Baroness Hale observed, at para 36, "the Government of the United Kingdom can achieve its foreign policy aims by other means".

72. Lord Sumption expressly identified the role of English law in defining the limits of what acts can be authorised or ratified by the Crown. He expressed reservations about Baroness Hale's explanation that the torture or maltreatment of prisoners is not an inherently governmental act, pointing out that there are, unfortunately, well-documented modern instances across the world of the use of torture and other forms of maltreatment as an instrument of state policy authorised at the highest level (see para 96). In his view:

> "There is a more satisfactory answer to the hypothetical problem of governmental torture and deliberate governmental maltreatment. Given the strength of the English public policy on the subject, a decision by the United Kingdom government to authorise or ratify torture or maltreatment would not as a matter of domestic English law be a lawful exercise of the royal prerogative. It could not therefore be an act of state. Nor would there be any inconsistency with the proper functions of the executive in treating it as giving rise to civil liability."

This is an explicit endorsement of the claimants' contention that a policy of the UK government which is unlawful as a matter of English domestic law and therefore *ultra vires* cannot be a Crown act of state.

73. On behalf of the MOD, Mr Eadie QC emphasised that Lord Sumption was alone in expressing reservations about Baroness Hale's analysis and that her statement of the Crown act of state doctrine, including specifically para 36 of her judgment in which she explained why acts of torture or maltreatment of prisoners are not Crown acts of state, was agreed by the majority of the justices and expressly adopted in the declaration made by the Supreme Court. This is undoubtedly correct. But I am not convinced that there is in fact any material difference between the views of Lord Sumption and Baroness Hale on this point. When Baroness Hale stated that acts of torture and maltreatment of detainees are not "inherently governmental", I do not understand her to have been denying that such acts all too frequently occur in practice. As made clear at para 37 of her judgment, the concept of acts which are "inherently governmental" is not descriptive but normative, referring to "the sorts of things that governments properly do" (my emphasis). In the case of our own government, what it may properly do from the standpoint of an English court is established by the laws of this country.

74. Counsel for the MOD further submitted that, in referring to lawfulness as a matter of English domestic law, Lord Sumption was not invoking public law principles, but a higher level conception of acts which are so beyond the pale – so obviously contrary to fundamental aspects of public policy – as to fall outside the Crown act of state doctrine. They also submitted that, in referring to acts which are not "inherently governmental", Baroness Hale had a similar conception in mind.

75. I do not accept this. I see nothing in the judgments of Lord Sumption or Baroness Hale to indicate that they intended to invoke such a "higher level conception". I also question its coherence. English law does not distinguish between different degrees of illegality or regard some kinds of unlawful governmental act as more unlawful than others. There is only one standard of legality applied by our courts. Even if, however, the touchstone was not legality but a narrower conception of what is contrary to fundamental aspects of public policy, any such conception would have to include, amongst such fundamental principles, the right to liberty, which has for centuries been seen as a cornerstone of the British constitution. Even on this view of the Crown act of state doctrine, therefore, a policy which authorised the arbitrary detention of individuals in breach of article 5(1) of the European Convention would fall outside its scope. That would be sufficient for the claimants since the MOD relies on the Crown act of state doctrine in this litigation only as a defence to claims in tort seeking damages for allegedly wrongful detention. As was made clear in the *Mohammed* case, the MOD does not suggest that the doctrine precludes the courts from passing judgment on claims based on alleged mistreatment of claimants by British soldiers.

76. For the reasons given, however, I consider that the claimants' wider contention is correct and that in principle an act can only be a Crown act of state if it has been authorised (or ratified) by a government policy or decision which is a lawful exercise of the Crown's powers as a matter of English domestic law.

The Human Rights Act claims

77. The second legal basis for the claims made in this litigation is the Human Rights Act 1998, which incorporates into English law the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. The claimants allege violations of article 3 of the Convention, which prohibits torture and inhuman or degrading treatment or punishment, and of article 5, which guarantees the right to liberty and security of person. They contend that the MOD acted incompatibly with those rights and therefore in a way which was unlawful under section 6 of the Human Rights Act.

Territorial scope

78. There has been earlier litigation about whether – and, if so, when – the Human Rights Act applies to acts of UK public authorities done outside the United Kingdom. It is not obvious that Parliament, in enacting the Human Rights Act, intended it to apply to acts done abroad. In *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 15, which involved claims by Iraqi civilians shot or allegedly ill-treated by British soldiers in Iraq, the Secretary of State argued that the Act applies only within the territory of the UK. By a majority of 4 to 1, however, the House of Lords rejected that argument and held that the territorial scope of the Human Rights Act coincides

with the territorial scope of the European Convention. Thus, to the extent that the Convention applies to acts done abroad, so does the Human Rights Act.

79. The extent to which the European Convention (as an international instrument) applies to acts done by a state party outside its own territory is governed by article 1, which requires the contracting parties to secure to everyone "within their jurisdiction" the rights and freedoms defined in the Convention. The key question is what is meant by the words "within their jurisdiction". In *Al-Skeini v United Kingdom* (2011) 53 EHRR 18, paras 130-142, the European Court interpreted this phrase much more broadly than its previous case law had indicated and held that article 1 applies not only where a contracting state exercises effective control over foreign territory but also where the state exercises physical power and control over an individual who is situated on foreign territory. In justifying this decision, the Court departed from its previously expressed view that the Convention must be applied on an all or nothing basis and cannot be "divided and tailored". The Court held that, where a state exercises control over an individual, the state is required to secure those Convention rights which are relevant to the situation of the individual. In *Smith v Ministry of Defence* [2014] AC 52 the UK Supreme Court recognised the judgment of the European Court in the *Al-Skeini* case as providing a "comprehensive statement of general principles" for the guidance of national courts (see paras 27, 46).

80. The precise scope of the principle of control over individuals established by the *Al-Skeini* case remains controversial. But there is no issue about its application in the present cases. In this court the MOD has accepted that any individual detained by British forces in Iraq was, while they were so detained, within the jurisdiction of the UK for the purpose of article 1 of the European Convention such that the UK was bound to secure to that individual rights under articles 3 and 5. All the mistreatment alleged by the present claimants occurred while they were in the custody of coalition (or multinational) forces. The only disputes about whether acts fell within the scope of the European Convention, and therefore within the scope of the Human Rights Act, are disputes in the cases of Alseran, MRE and KSU about whether the armed forces responsible for their detention – and who allegedly mistreated them while so detained – were armed forces of the UK or the US. That is a question of fact.

The impact of international humanitarian law

81. Another fundamental legal question raised by the conflict in Iraq has been whether – and, if so, when and to what extent – human rights guaranteed by the European Convention are displaced or modified by rules of international humanitarian law.

82. This question is particularly acute as regards detention. Article 5(1) of the European Convention guarantees that no one shall be deprived of his liberty "save in the following cases and in accordance with a procedure prescribed by law". The "following cases" are set out in sub-paragraphs (a) to (f) of article 5(1). They include arrest or detention for the purpose of prosecution and detention after conviction by a competent court. But they do not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time. Such internment or preventive detention has always been regarded as legitimate in wartime – most obviously where enemy combatants are captured and made prisoners of war. The internment of prisoners of war during an international armed conflict is expressly authorised by article 21 of the Third Geneva Convention ("Geneva III"). In addition,

articles 42 and 78 of the Fourth Geneva Convention ("Geneva IV") confer powers to intern civilians where this is considered necessary for imperative reasons of security. The question therefore arises of whether – and, if so, how – such internment can be reconciled with article 5(1) of the European Convention.

83. A conflict between the two regimes can be avoided if a state which is a party to the European Convention exercises the power of derogation conferred by article 15. Subject to certain limitations, article 15 allows a contracting party "in time of war or other public emergency threatening the life of the nation" to take measures derogating from its obligations "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law". However, in relation to the conflict in Iraq the UK did not purport to derogate under article 15 from any of its obligations under article 5. And in *Hassan v United Kingdom* [2014] ECHR 946, para 101, the European Court of Human Rights recognised that the practice of contracting parties to the European Convention is not to derogate from their obligations under article 5 in order to detain persons on the basis of Geneva III and IV during international armed conflicts.

84. In the *Hassan* case the European Court rejected the primary argument of the UK government that the European Convention is displaced by international humanitarian law and hence does not apply in situations of international armed conflict. But the Court accepted the government's alternative argument that, in such a context, the provisions of article 5 must be interpreted in a manner which is consistent with international humanitarian law. The Court considered that this can be done compatibly with the fundamental purpose of article 5(1), which is to protect the individual from arbitrariness, by interpreting article 5(1) – notwithstanding its restrictive wording – as permitting deprivation of liberty pursuant to powers provided by the Geneva Conventions.

85. The Court applied a similar approach to the interpretation of the procedural provisions of article 5, and in particular article 5(4) which states:

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

The Court noted that articles 43 and 78 of the Geneva IV provide that internment must be subject to periodical review, if possible every six months, by a competent body. The Court recognised that 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" as generally required by article 5(4), but said (at para 106):

> "nonetheless, if the contracting state is to comply with its obligations under article 5 para 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."

Detention in non-international armed conflict

86. The *Hassan* case concerned an individual who was detained during the invasion and occupation of Iraq when the Geneva Conventions conferred powers of detention on the coalition states. After the occupation formally ended with the transfer of sovereign authority to a new Iraqi government on 28 June 2004, the situation (as mentioned earlier) became one of "non-international armed conflict" in which multi-national armed forces, present with the consent of the 'host' state, were fighting against organised non-state armed groups. The provisions of the Geneva Conventions which authorise detention do not apply to non-international armed conflicts.

87. The basis in international law on which the UK relied to detain people in Iraq after the occupation had ended was UN Security Council Resolution 1546 (referred to at paragraph 22 above). This authorised the MNF to "take all necessary measures to contribute to the maintenance of security and stability in Iraq," including (in accordance with the letters annexed to the resolution) "internment where this is necessary for imperative reasons of security". Again, however, the question has arisen of how, if at all, such internment can be reconciled with article 5 of the European Convention.

88. In *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332 the House of Lords held that Resolution 1546 overrode article 5. Their reasoning was that, on a proper understanding, the UK was not merely authorised but obliged by Resolution 1546 (and the obligation under article 25 of the United Nations Charter for member states to carry out decisions of the Security Council) to exercise the power of internment where this was necessary for imperative reasons of security. The House held that this obligation prevailed over article 5 of the European Convention by reason of article 103 of the UN Charter, which states:

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

The European Court, however, took a different view. They rejected the argument that Resolution 1546 imposed an obligation to detain persons where necessary for imperative reasons of security and held that it merely conferred a power to do so. There was therefore no conflict between the UK's obligations under the UN Charter and its obligations under article 5 of the European Convention: see *Al-Jedda v United Kingdom* (2011) 35 EHRR 23.

89. The subsequent decision of the European Court in *Hassan v United Kingdom* has paved the way for a different analysis. In *Mohammed (No 2) v Ministry of Defence* [2017] UKSC 2, [2017] AC 821, the Supreme Court has held that the reasoning in the *Hassan* case is not confined to a situation of international armed conflict but is also applicable in the context of a non-international armed conflict where detention is authorised in international law by a resolution of the UN Security Council made under powers conferred by the UN Charter. The Supreme Court has held that in these

circumstances article 5(1) of the European Convention cannot be taken to prevent the armed forces of a Convention state from detaining persons on the basis of a mandate from the Security Council which has authorised internment where necessary for imperative reasons of security.

90. One of the cases before the Supreme Court in the *Mohammed (No 2)* case was that of Mr Al-Waheed, one of the present claimants. In his case the Supreme Court held that: (1) for the purposes of article 5(1) of the European Convention, UK armed forces had legal power to detain Mr Al-Waheed pursuant to UN Security Council Resolution 1546 where this was necessary for imperative reasons of security; and (2) article 5(1) should be read so as to accommodate, as permissible grounds, detention pursuant to that power.

91. Lord Sumption, who gave the leading judgment, also drew from the *Hassan* case the proposition that the procedural provisions of article 5, in particular article 5(4), may require to be adapted where this is necessary in the special circumstances of armed conflict, provided that minimum standards of protection exist to ensure that detention is not imposed arbitrarily. The Supreme Court held that, in the context of a non-international armed conflict as well as in an international armed conflict, the minimum standards are those which the European Court in the *Hassan* case derived from articles 43 and 78 of Geneva IV: namely, that there should be an initial review of the appropriateness of detention, followed by regular reviews thereafter, and that the reviews should be conducted by an impartial body in accordance with a fair procedure (see paras 66-67 and 68(3)). The Supreme Court did not address the question whether those requirements were satisfied in Mr Al-Waheed's case: that is a question to be decided at this trial, and is addressed in part VI below.

III. IRAQI LAW

92. I have explained that the law applicable to the claims in tort in these cases is the law of Iraq. In this part of the judgment I set out my findings on the rules of Iraqi law which are to be used in determining those claims. I consider the Iraqi law of limitation separately in part VII.

93. The proper approach where an English court has to decide questions of foreign law is well established and has not been the subject of any dispute. In particular:

i) Matters of foreign law are treated in an English court as matters of fact which must generally be proved by expert evidence.

ii) Where the relevant foreign law is contained in a code or other legislation, the relevant question is how a court in the foreign jurisdiction would interpret the legislation.

iii) The primary evidence to be used in answering that question is evidence of the opinions of expert witnesses. As with any expert evidence, however, the court is entitled and may be bound to look at the sources on which the experts rely in order to decide what weight to give to their opinions.

The expert evidence

94. In these cases the court has received expert evidence on Iraqi law from two distinguished scholars: Professor Harith Al-Dabbagh and Professor Haider Ala Hamoudi. Professor Al-Dabbagh, who was instructed by the claimants, studied law at the University of Mosul in Iraq and practised as a lawyer in Iraq for seven years. He has further degrees, including a doctorate, from French universities and has taught law in Iraq, France and latterly in Canada where he is currently Professor of Comparative and Private International Law at the University of Montreal. Professor Al-Dabbagh is not a fluent English speaker and gave his evidence in French.

95. The defendant's expert, Professor Haider Ala Hamoudi, is an Associate Professor of Law at the University of Pittsburgh School of Law. Although based in the United States, he has spent time working in Iraq and has described his experiences there in an interesting memoir.[5]

96. This is now the fourth occasion on which I have had the benefit of Professor Hamoudi's opinions on questions of Iraqi law. As before, I have found his evidence well reasoned and helpful – save when he ventured on this occasion into the field of public international law in which, as he acknowledged in cross-examination, he has no real expertise. At that point (though not otherwise) I felt that his enthusiasm to assist the party instructing him led him to transgress the boundary between the roles of independent expert and advocate for that party's case.

97. I mean no disrespect to Professor Al-Dabbagh in saying that his evidence did not always seem to me to have to same clarity and focus as that of Professor Hamoudi. I was greatly impressed, however, by the depth of his scholarship and the breadth of his research, extending as it did to multifarious sources including even an unpublished dissertation submitted to the Baghdad University Law Faculty. He also took with unaccustomed and welcome seriousness the expert's duty to identify the range of professional opinion, rather than merely giving his own opinion, on the issues he addressed.

98. There was a substantial measure of agreement between the experts. Because their common language is Arabic, their joint statement was drafted in Arabic and certain differences emerged about precisely how some parts of it should be translated into English. Happily, nothing of importance seemed to me to turn on those nuances.

99. On issues where the experts disagreed, I have not treated either witness's opinion as of greater authority or entitled to greater respect than the other's but have sought to decide the issue by evaluating the reasons for their opinions with the help of their instruction in the methodology of Iraqi law.

The Iraqi Civil Code

100. Iraqi civil law is contained in a code which was enacted on 8 September 1951 and came into force on 9 September 1953. The Iraqi Civil Code is an amalgam of French law and Islamic law. The drafters drew heavily on the Egyptian Civil Code of 1948,

---

5 Haider Ala Hamoudi, "Howling in Mesopotamia: An Iraqi-American Memoir" (2008).

which in turn was largely inspired by French law. They also drew on Islamic sources including the Ottoman Civil Code (the Mecelle). The chairman of the drafting committee was Abdul Razzaq al Sanhuri, an Arab legal scholar of immense renown who was also responsible for drafting the Egyptian Civil Code and those of Jordan, Libya and Kuwait.

101. There is a published English translation of the Iraqi Civil Code, but it has no official status and the experts have given their own translations of relevant provisions. For the purpose of this judgment, I have adopted a hybrid approach, sometimes combining different translations or altering the language of a translation to reflect an explanation of its meaning given by one or both experts or to make it more idiomatic.

102. The experts agreed that in interpreting the Civil Code an Iraqi judge is not limited to the literal meaning of the text but tries to discover its spirit and intention. (This does not apply to the interpretation of criminal laws, including the Criminal Procedure Code, where a more literal approach is adopted.) Although the only binding source of law is the code itself, the experts also agreed that the opinions of jurists have an important role in its interpretation. Professor Al-Dabbagh attached more weight than Professor Hamoudi to the opinions of Egyptian scholars, although both agreed that the commentary of Sanhuri on the Egyptian Civil Code has particular authority. There is no doctrine of precedent in Iraqi law but the experts agreed that decisions of the Court of Cassation, which is the highest court in Iraq, may be persuasive – particularly where there is a consistent line of decisions or the decision is one of the full court.

Liability for unlawful acts

103. The provisions of the Civil Code which establish liability for torts are articles 202 and 204:

> "Article 202
>
> Every act which causes bodily injury to a person such as murder, wounding, battery or any other kind of assault renders the perpetrator liable to pay compensation.
>
> Article 204
>
> Other than the examples mentioned above, every wrong which causes harm to another person renders the perpetrator liable to pay compensation."

104. A key term in these provisions is the Arabic word "*ta'adi*", for which I have used the English translation "assault" in article 202 and "wrong" in article 204. As explained by Professor Hamoudi, the term is a general one capable of encompassing any kind of wrongful and injurious conduct and the closest English equivalent depends on the context: the leading Arabic-English law dictionary translates "*ta'adi*" as "assault (on persons), attack, trespass on property, invasion, encroachment, infringement (of copyright)." The experts agreed that such wrongful and injurious conduct only occurs where there is fault – meaning any deviation in behaviour, whether by way of act or omission, from the conduct of a reasonable person in the same circumstances. They further agreed that, to give rise to liability under articles 202 and 204, three elements

are required. These are an act or omission involving fault in this sense, harm, and a causal connection between the act and the harm.

105. Article 205(1) provides:

> "The right to compensation also covers moral injury: any wrongful interference ("ta'adi") with the freedom, moral standing, honour, reputation, social standing or financial position (creditworthiness) of another person renders the perpetrator liable to pay compensation."

The experts agreed that article 205 is not a separate basis of liability but merely makes it clear that the harm which can found liability under articles 202 and 204 includes moral harm.

106. Plainly, a physical assault which causes actual bodily harm gives rise to liability under article 202 of the Civil Code – unless there is an absence of fault because, for example, the perpetrator was acting in reasonable self-defence. It is equally clear that a sexual assault gives rise to liability under article 204, even if not article 202. As well as alleging that they were the victims of assaults, the claimants also complain about the conditions in which they were held during their detention. However, neither of the experts addressed the question whether detaining a person in conditions which fall below some standard of adequacy is capable of founding liability under article 204 of the Civil Code (and, if so, what the relevant standard is). In these circumstances counsel for the claimants accepted in the course of the second trial that the claimants have not established that holding a detainee in inhuman or otherwise inadequate conditions is a wrong which renders the perpetrator liable to pay compensation under Iraqi law.

Lawfulness of detention

107. The experts agreed that loss of liberty is a harm which may be compensated under Iraqi law, provided it has been caused by the fault of the defendant. As I understood the evidence and would in principle expect, to establish such fault it is sufficient to show that the defendant deliberately and unlawfully detained the claimant, and it is not necessary to show that the defendant knew or ought to have known that the detention was unlawful. Put another way, the reasonable person whose conduct is used as the measure of fault is expected to act in accordance with the law.

108. It is hardly to be expected that the domestic law of Iraq would have authorised the detention of Iraqi soldiers or civilians by a foreign invading army. The MOD argued, however, that it did. This argument was based on the evidence of Professor Hamoudi that the Geneva Conventions not only bind the state of Iraq as a matter of international law but also form part of the internal law of Iraq. On this basis the MOD contended that, where the Geneva Conventions authorise detention during an armed conflict, such detention is lawful under Iraqi law.

Are the Geneva Conventions part of Iraqi law?

109. Iraq has ratified the four Geneva Conventions of 1949 and Additional Protocol I (though not Additional Protocol II). The experts agreed that the Iraqi legal system is a

'dualist' system in the sense that a treaty ratified by Iraq is not part of the domestic law of Iraq unless it is enacted into domestic law by legislation. The experts also agreed in their joint statement – although Professor Hamoudi subsequently changed his position on this – that Iraq has not enacted any law which implements the provisions of the Geneva Conventions and Additional Protocols internally.

110. Professor Hamoudi nevertheless put forward a theory that the provisions of these treaties have acquired the status of peremptory norms of international law or *jus cogens*. He expressed the view that such norms are of mandatory application in domestic Iraqi law whether or not any law has been enacted to implement them internally. The MOD relied on this theory to argue that it was lawful as a matter of Iraqi law for British forces to detain Iraqi nationals (such as Mr Alseran, MRE and KSU) during the invasion and occupation periods provided that such detention was authorised by the Geneva Conventions.

111. So far as the evidence showed, Professor Hamoudi's view that the Geneva Conventions are part of Iraq's domestic law is not supported by any commentary, court decision or other scholarly opinion. It is inconsistent with his acknowledgement that the Iraqi legal system is a 'dualist' system. Moreover, his reliance on the concept of a peremptory norm / *jus cogens* seems to me to involve a category mistake. To classify a norm as a peremptory norm is to make a statement about its status within international law and not about whether it forms part of the domestic law of any state. As defined in article 53 of the Vienna Convention on the Law of Treaties:

> "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

The recognition that in international law states are bound by certain fundamental norms from which they cannot derogate does not signify that such norms automatically form part of a state's internal law without the need for positive enactment.

112. In any case, no attempt has been made to show, and it has not been shown, that every provision of the Geneva Conventions has the status of a peremptory norm / *jus cogens*. The International Law Commission has said:

> "The most frequently cited examples of *jus cogens* norms are the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination, apartheid and torture, as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self determination."[6]

I take the reference here to "basic rules of international humanitarian law applicable in armed conflict" to be a reference to prohibitions – for example, against the

---

[6] See ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CM.4/L.702 18 July 2006, para 33.

deliberate targeting of civilians, withholding medical treatment from the sick and wounded and so on – the violation of which constitutes a war crime. It is one thing to characterise such rules as *jus cogens* norms. It is another thing to suggest that, when the Geneva Conventions authorise certain conduct, such as the internment of civilians by an occupying power for imperative reasons of security under article 78 of the Fourth Convention, this is accepted and recognized by the international community of states as a fundamental norm from which no derogation is permitted. No authority or scholarly opinion was cited by Professor Hamoudi or by the MOD to support such a proposition.

113. Professor Hamoudi sought to draw support for his view from the Statute of the Supreme Iraqi Criminal Tribunal (Law No 10 of 2005), which established a special tribunal before which former members of Saddam Hussein's regime could be prosecuted for war crimes and crimes against humanity. Article 13 of this statute contains a definition of "war crimes" which includes "grave breaches of the Geneva Conventions of 12 August 1949" and "other serious violations of the laws and customs applicable in international armed conflicts, within the established framework of international law". Professor Hamoudi argued that, unless such violations of international humanitarian law were already crimes under Iraq's domestic law, prosecutions for war crimes under the statute would have been unlawful because Iraqi law prohibits criminal prosecution on an *ex post facto* basis.

114. Such an argument was discussed in an article written by a distinguished international lawyer, Professor Cherif Bassiouni, on which Professor Hamoudi relied.[7] However, that article drew from the argument the opposite conclusion to that drawn by Professor Hamoudi. In Professor Bassiouni's view, the Iraqi statute establishing the special tribunal violated principles of legality precisely because crimes defined in the statute were not part of Iraqi law when the acts in question were committed.[8] Professor Bassiouni mentioned an argument that international crimes, being *jus cogens*, "penetrate national law" and cannot be derogated from, but he did so in the course of drawing a distinction between the formal and substantive aspects of principles of legality. Professor Bassiouni argued that, even though the formal aspects were not satisfied, the Iraqi statute nevertheless satisfied the substantive aspects of the principles of legality because war crimes and crimes against humanity were international crimes of which members of the former regime could be taken to have had prior notice.[9] This argument expressly acknowledged that the Geneva Conventions, although they had been ratified by Iraq, were not part of Iraq's domestic law. Professor Bassiouni explained that Iraq "adheres to a rigid positivistic approach" and is also a dualist state, where treaties must be incorporated in national legislation and published in the Official Gazette before they can be considered applicable domestically.[10] Hence, far from supporting Professor Hamoudi's view that *jus cogens* norms of international law are automatically part of Iraq's domestic law, Professor Bassiouni's article directly contradicts that notion.

---

7 M Cherif Bassiouni, 'Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal', 38 Cornell International Law Journal 325 (2005).

8 Ibid, pp362-3, 365 (point 11), 373-4.

9 Ibid, pp374-6.

10 Ibid p375, fn 273 + 275.

115. In a supplemental report Professor Hamoudi came up with a further argument resulting from his discovery that Iraq's accession to Additional Protocol I ("AP I") was recorded in a law (Law 85 of 2001) published in the Iraqi Official Gazette. He argued that this legislation incorporated AP I into Iraqi domestic law – and by implication also incorporated the Geneva Conventions which it supplemented. The latter implication does not seem to me to follow. I cannot see how the enactment of an instrument which is intended to supplement another can obviate the need to enact the original instrument. Nor can I accept Professor Hamoudi's suggestion that AP I itself incorporates the Geneva Conventions merely because its preamble – which is not part of the substantive agreement – records the parties as "reaffirming further that the provisions of the Geneva Conventions ... must be fully applied in all circumstances to all persons who are protected by those instruments". In any event, Law 85 of 2001, by its terms, does no more than record Iraq's accession to AP I. It contains no words which purport to make the provisions of AP I – let alone the provisions of the four Geneva Conventions of 1949 – enforceable in Iraqi courts as part of Iraq's domestic law.

116. Accordingly, I am unable to accept Professor Hamoudi's contention that the Geneva Conventions, and in particular article 78 of Geneva IV, formed part of the domestic law of Iraq and thus provided a legal basis for the detention of Iraqi civilians by invading or occupying armed forces as a matter of Iraqi law.

Detention after the occupation of Iraq

117. Once Iraq was occupied by coalition forces, the occupying powers were able to, and did, change Iraqi law. The Coalition Provisional Authority ("CPA") assumed "all executive, legislative and judicial authority necessary to achieve its objectives" including the authority to issue legislative instruments which were intended to have the force of law "until repealed by the Administrator or superseded by legislation issued by the democratic institutions of Iraq": see sections 1(2) and 3(1) of CPA Regulation No 1 issued on 16 May 2003. In the exercise of these powers, the CPA could have issued a legislative instrument which gave authority under Iraqi domestic law to coalition forces to detain people for security reasons. There is an issue, however, as to whether the CPA did so. This issue is relevant in Mr Al-Waheed's case. The MOD, supported by the opinion of Professor Hamoudi, has argued that such authority was conferred on British forces (and on other forces which were part of the MNF) by CPA Memorandum No 3 entitled "Criminal Procedures" ("Memorandum 3").

CPA Memorandum 3

118. The position is complicated by the fact that there were two versions of Memorandum 3. The original version was issued on 8 June 2003. Section 1(2) of that instrument stated that "the provisions set out herein give effect to the requirements of international humanitarian law". Section 7 provided:

> "**Coalition Forces Security Internee Process**
>
> 1. Consistent with the Fourth Geneva Convention, the following standards will apply to all persons who are detained

> by Coalition Forces when necessary for imperative reasons of security (hereinafter "security internees"):
>
> (a) In accordance with article 78 of the Fourth Geneva Convention, Coalition Forces shall, with the least possible delay, afford persons held as security internees the right of appeal against the decision to intern them.
>
> (b) The decision to intern a person shall be reviewed not later than six months from the date of induction into an internment facility. …
>
> (c) The operation, condition and standards of any internment facility established by the Coalition Forces shall be in accordance with Section IV of the Fourth Geneva Convention…"

119. As mentioned earlier, sovereign authority was transferred from the CPA to a new Iraqi government on 28 June 2004. In anticipation of that event and following the adoption of UN Security Council Resolution 1546 on 8 June 2004, Memorandum 3 was revised. In the revised version, sections 1(2) and 7 were deleted and a new section 6 was inserted, headed "MNF Security Internee Process". This stated:

> "(1) Any person who is detained by a national contingent of the MNF for imperative reasons of security in accordance with the mandate set out in UNSCR 1546 (hereinafter 'security internee') shall, if he is held for a period longer than 72 hours, be entitled to have a review of the decision to intern him.
>
> (2) The review must take place with the least possible delay and in any case must be held no later than seven days after the date of induction into an internment facility.
>
> (3) Further reviews of the continued detention of any security internee shall be conducted on a regular basis but in any case not later than six months from the date of induction into an internment facility.
>
> (4) The operation, condition and standards of any internment facility established by the MNF shall be in accordance with section IV of the Fourth Geneva Convention.
>
> (5) Security internees who are placed in internment after 30 June 2004 must in all cases only be held for so long as the imperative reasons of security in relation to the internee exist …"

Section 8 said that "this Memorandum shall enter into force on the date of signature", which was 27 June 2004.

120. The position of the MOD is that, from that date, the revised version of Memorandum 3 (i) was part of the law of Iraq and (ii) gave British forces a power of detention for imperative reasons of security.

121. The claimants dispute both these propositions. First, they contend that the revised version of Memorandum 3 never became law. This contention is based on the agreed fact that the revised version of Memorandum 3 was never published in the Iraqi Official Gazette and the opinion of Professor Al-Dabbagh that such publication is essential before a new law can take effect. Second, the claimants deny that, even if effective, Memorandum 3 established or purported to establish a power of detention for imperative reasons of security.

122. The MOD took a preliminary point that the claimants are precluded from making these arguments by the decision of the Court of Appeal in *Al-Jedda v Secretary of State for Defence (No 2)* [2011] QB 773. In that case Mr Al-Jedda accepted that the revised version of Memorandum 3 took effect on 27 June 2004 and also that it conferred a power of detention for imperative reasons of security on British forces. Mr Al-Jedda argued that this power lapsed when Iraq's new Constitution came into force on 20 May 2006, either because Memorandum 3 was not preserved by the new Constitution or because the power under Memorandum 3 to detain for security reasons was inconsistent with a constitutional right not to be interned without trial. Underhill J rejected those arguments and found that the new Iraqi Constitution did not make Mr Al-Jedda's detention unlawful: see [2009] EWHC 397 (QB). He therefore dismissed the claim. That decision was affirmed by a majority of the Court of Appeal.

123. The present claimants, however, were not parties to that action and the decision of the Court of Appeal in *Al Jedda (No 2)* is not a binding authority in relation to the points of Iraqi law which the present claimants have raised, for two reasons. First, the doctrine of precedent which requires a lower court to follow a decision of a higher court in the English legal system applies only to decisions on matters of law and not to decisions on matters of fact; and, as mentioned earlier, questions of foreign law are treated in English courts as questions of fact. So findings made in a previous case, based on the evidence adduced in that case, that the revised version of Memorandum 3 had the force of law and conferred a power on British forces to detain for security reasons would not have the status of a binding precedent: see Dicey, Morris & Collins, *The Conflict of Laws* (15th Edn, 2012), vol 1, para 9.004; *Lazard Brothers & Co v Midland Bank* [1933] AC 289. Secondly, there were in any event no such findings made in the *Al Jedda (No 2)* case, as the points which the present claimants have raised were not raised in that case.

124. Thus, the fact that Mr Al Jedda did not dispute the validity or the effect of the revised version of Memorandum 3 cannot prevent the present claimants from doing so. I must therefore decide the issue on its merits.

Omission to publish in the Official Gazette

125. In their joint statement the Iraqi law experts agreed that the original version of Memorandum 3 took effect when it was published in the Official Gazette on 17 August 2003 and that it has never been repealed. They further agreed that, because it was not published in the Official Gazette, the revised version of the law did not

become effective in Iraq. A few days after the joint statement was agreed, however, Professor Hamoudi changed his mind on this point. In a supplemental expert report produced after the first trial had begun, he expressed the view that it was not necessary for the revised law to be published in the Official Gazette in order for it to have legal effect in circumstances where section 8 of the revised law expressly provided for its entry into force on 27 June 2004. Professor Al-Dabbagh did not accept this and adhered to the view expressed in the experts' joint statement.

126. Article 1 of the Law on Publication in the Official Gazette (No 78 of 1977) says:

> "Everything published in the Official Gazette shall be considered the official and valid text and shall enter into force on the date of publication unless stipulated otherwise."

A statement of "justifying reasons" appended to this Law explains:

> "Enabling the public to gain ready access to the legal rules which organise society is one of the conditions required to establish a modern democratic state. It is for this reason that the interim Constitution has determined that laws should be published in the Official Gazette and the date of publication considered as the date on which the law enters into force unless otherwise stated. From its beginnings in the early 1920s until today, the Official Gazette has fulfilled this important role as a single place of reference for any person wishing to consult any text (act, order, decree, regulation, circular, instruction) issued by the public authorities ..."

The reference in this statement to the interim Constitution is a reference to the 1970 interim Constitution of Iraq, which provided in article 64:

> "Laws shall be published in the Official Gazette and shall take effect on the date of their publication, unless stipulated otherwise."

Similar provisions were included in the Law on the Administration of the Iraqi State during the Transitional Period dated 8 March 2004 (the "Transitional Administrative Law") in article 30, and in the new Iraqi Constitution which came into force on 20 May 2006 in article 129.

127. These provisions all make it clear that a law which does not specify a date on which it will come into force cannot take effect unless and until it is published in the Official Gazette. But it is less clear what the position is when a law states (as Memorandum 3 did) that it is to enter into force on a particular date. Professor Hamoudi argued that there is nothing in article 1 of the Official Gazette Law nor in the old or new Iraqi Constitution to prevent a law from taking effect before it has been published in the Official Gazette if the law itself stipulates an earlier date for its entry into force. This shows, in his view, that publication in the Official Gazette is not a condition precedent to a law becoming effective.

128. While I can see that Professor Hamoudi's argument is consistent with a literal interpretation of the Official Gazette Law and the constitutional provisions mentioned, it seems to me that it would be contrary to the spirit and intention of those provisions and would deprive the constitutional requirement to publish laws of any real substance if a law which has not been published in the Official Gazette were to be recognised as valid. I thus accept Professor Al-Dabbagh's view that the words "unless stipulated otherwise" cannot sensibly be interpreted as dispensing with the requirement of publication which these provisions establish. Rather, that proviso is to be understood as merely qualifying the presumption that a law takes effect immediately upon its publication in the Official Gazette and as allowing a law to stipulate that it will come into force at a later date, where it is thought desirable to give citizens and the legal community some time to learn about the new law after it has been published but before it takes effect. Professor Al-Dabbagh gave a number of examples of laws which stipulated that they would come into force a specified time after their publication. These included the Civil Code, which (pursuant to article 1382) came into force two years after it was published in the Official Gazette, and the Criminal Code of 1969, which (pursuant to article 505) also came into force two years after its publication. By contrast, Professor Hamoudi did not identify any example (other than laws issued by the CPA) of a law which specified a date for its entry into force which preceded its publication.

129. Counsel for the MOD in their submissions drew attention to article 2 of the Official Gazette Law which purported to create an exception from article 1 where the President of the Republic decided that particular laws related to government security should not be published. Neither expert commented on this provision, however, and in any event I cannot see how it could affect the meaning of article 64 of the 1970 interim Constitution.

130. I accordingly find that Professor Al-Dabbagh is correct in his interpretation of article 1 of the Official Gazette Law and article 64 of the 1970 interim Constitution as establishing a rule of recognition whereby, unless and until a text is published in the Official Gazette, it does not count as law. I do not think it unfair to draw additional comfort that this interpretation is correct from the fact that it was also Professor Hamoudi's own initial understanding of the position. I also note that this conclusion accords with the view expressed in the article by Professor Bassiouni, referred to at paragraph 114 above.

Derogation by the CPA

131. Nevertheless, while I accept Professor Al-Dabbagh's view of the meaning and effect of article 1 of the Official Gazette Law and article 64 of the 1970 interim Constitution of Iraq, I think he was mistaken in saying that those provisions were applicable during the occupation period.

132. The manner in which the Coalition Provisional Authority exercised powers of government was defined by CPA Regulation No 1 (referred to at paragraph 117 above). Section 2 of that Regulation provided for laws in force in Iraq as of 16 April 2003 to continue to apply in Iraq "in so far as the laws do not … conflict with the present or any other Regulation or Order issued by the CPA." Section 3(1) provided that, in carrying out the authority vested in the CPA, the CPA Administrator (Mr Paul Bremer) would, as necessary, issue Regulations and Orders and that such Regulations

and Orders "shall take precedence over all other laws and publications to the extent such other laws and publications are inconsistent". Section 3(2) provided that any Regulation or Order "shall enter into force as specified therein, shall be promulgated in the relevant languages and shall be disseminated as widely as possible" (with the English text to prevail in the case of divergence). Section 3(3) provided for a register to be kept of CPA Regulations and Orders. Section 4 authorised the Administrator to issue Memoranda in relation to the interpretation and application of any Regulation or Order and stated that "the provisions of section 3 shall also apply to the promulgation of CPA Memoranda".

133. The effect of CPA Regulation No 1 was not addressed by the experts in their evidence given at the first trial. However, I subsequently requested and received their written opinions on this question. Having considered those opinions, I am satisfied that the position endorsed by Professor Hamoudi is correct and that CPA Regulation No 1 overrode, for instruments issued by the CPA, the requirement under the 1970 Iraqi interim Constitution and the Official Gazette Law for publication in the Official Gazette.

134. Read as a whole, the terms of CPA Regulation No 1 made it clear that its regime for the promulgation of CPA Regulations, Orders and Memoranda displaced any requirements for promulgation established by earlier laws. In particular, section 3(2) provided for any CPA Regulation or Order to enter into force "as specified therein", and this applied also to Memoranda by reason of section 4. As mentioned earlier, the revised version of Memorandum 3 specified (in section 8) that it would enter into force on the date of signature. In so far as article 64 of the 1970 Iraqi interim Constitution and article 1 of the Official Gazette Law would otherwise have prevented such an instrument from having legal effect unless and until it was published in the Official Gazette, those provisions were disapplied by sections 2 and 3(1) of CPA Regulation No 1 because they were inconsistent with sections 3(2) and 4 of CPA Regulation No 1 and with section 8 of the revised Memorandum 3.

135. Professor Al-Dabbagh argued that the publication requirement was a constitutional rule which, in accordance with the hierarchy of sources of law, prevailed over CPA Regulation No 1, which was not a constitution. However, Professor Hamoudi pointed out, and I accept, that the 1970 Iraqi interim Constitution was in fact enacted as an ordinary piece of legislation (Revolutionary Command Council Decree 792 of 1970). In any case, CPA Regulation No 1 was constitutional in nature in that it was plainly intended to prevail – and to establish that all laws issued by the CPA would prevail – over all earlier laws (constitutional or otherwise) to the extent of any inconsistency. It is clear that the 1970 interim Constitution was not exempt in that regard. Had the 1970 interim Constitution been treated as having a different and superior status to other existing laws, then – as Professor Hamoudi observed – every law issued by the CPA would have been invalid, since under the 1970 interim Constitution the Revolutionary Command Council alone had the power to enact laws and to select the President of Iraq (who was also, by article 56(a), the commander of the armed forces).

136. I have indicated that the Transitional Administrative Law which took effect on 28 June 2004 and the new Iraqi Constitution which was subsequently adopted also contained provisions requiring laws to be published in the Official Gazette. Professor Hamoudi is plainly right, however, that these provisions were intended to be prospective only. So far as the past was concerned, article 26(c) of the Transitional

Administrative Law provided in terms that laws issued by the CPA "shall remain in force until rescinded or amended by legislation". Article 130 of the new Constitution similarly provided for existing laws to remain in force, unless annulled or amended. As mentioned earlier, no law has been issued which repeals or amends the revised version of Memorandum 3.

137. The fact that, as Professor Al-Dabbagh has pointed out, two later legislative instruments have referred to the original rather than the revised version of Memorandum 3 shows only that – perhaps because it was not promulgated in the Official Gazette – the revised version was overlooked, and not that it was held to be invalid.

138. I conclude that the omission to publish the revised version of Memorandum 3 in the Official Gazette did not prevent that law from entering into force on the date of its signature on 27 June 2004. The experts are agreed that, if it came into force, the revised version of the law has remained in force thereafter.

Did Memorandum 3 create a power to detain for security reasons?

139. Although I have found that it was superseded with effect from 27 June 2004, I will first consider whether the original version of Memorandum 3 created a power of detention for imperative reasons of security. I think it clear that it did not. In resolving disputes about the meaning of Memorandum 3 (in both versions) I feel greater confidence than I otherwise might in giving effect to the plain words of the instrument because in the case of laws issued by CPA the English text is the official text: see section 3(2) of CPA Regulation No 1.

140. I have already rejected Professor Hamoudi's contention that the Geneva Conventions, and in particular article 78 of Geneva IV, formed part of the domestic law of Iraq. I regard his further suggestion that section 1(2) of Memorandum 3 had the effect of incorporating into Iraqi law the entire corpus of international humanitarian law as untenable. It is plain from its wording that section 1 of Memorandum 3 was in the nature of a recital explaining the purpose of the instrument. It was not itself executing that purpose. Section 7 was doing that by giving effect in Iraqi law to certain requirements of Geneva IV. However, the provisions of Geneva IV to which it gave effect did not include the power of internment for security reasons contained in article 78.

141. Section 7 set out standards that "will apply to all persons who are detained by Coalition Forces when necessary for imperative reasons of security". Its provisions assumed that article 78 of Geneva IV gave coalition forces a legal power to detain people but did not purport to incorporate article 78 into Iraqi domestic law or otherwise to create a power of detention.

142. The same applies, if anything even more clearly, to section 6 of the revised version of Memorandum 3 (quoted at paragraph 119 above). Section 6 of the revised law did not purport to create a power to detain people for imperative reasons of security. As its heading indicates, section 6 was concerned only with process. Like section 7 of the original version of the law, it is drafted on the assumption that a power to detain for imperative reasons of security already exists – in this case pursuant to UN Security Council Resolution 1546 – and is not capable of being read as itself conferring such a

power. Section 6 of the revised law may be contrasted in this regard with section 5, which provides:

> "A national contingent of the MNF shall have the right to apprehend persons who are suspected of having committed criminal acts and are not considered security internees (hereinafter "criminal detainees") who shall be handed over to Iraqi authorities as soon as reasonably practicable."

143. It was not suggested by Professor Hamoudi nor by the MOD that Resolution 1546 became part of the law of Iraq by any means other than the enactment of the revised version of Memorandum 3. Since Memorandum 3 in its revised form cannot, in my view, be read as enacting the power of internment for security reasons set out in Resolution 1546 into Iraqi law, it follows that under the internal law of Iraq (as opposed to international law) national contingents of the MNF had no right to detain people for reasons of security. Their only power of detention under Iraqi law was the power conferred by section 5 of Memorandum 3 to detain persons suspected of having committed criminal acts who were not considered security internees.

144. Professor Hamoudi argued that, if section 6 of the revised law is to make any sense at all, it must be understood to create an implicit power to intern for imperative reasons of security. I agree that section 6 is obviously drafted on the assumption that such a power exists and that, if this assumption is wrong, compliance with the requirements of section 6 would be ineffectual in that it could not render lawful internment which had no legal basis. But I do not accept that section 6 is capable of being interpreted as creating a power to intern, particularly in view of the literal approach to interpretation which applies in the field of Iraqi criminal law. Put shortly, the fact that Memorandum 3 was drafted on a false premise cannot make the premise true.

145. I conclude that neither the original nor the revised version of Memorandum 3 enacted into Iraqi law a power to intern persons for imperative reasons of security. It follows that, as a result of what appears to have been an error on the part of the CPA, throughout the time that coalition forces and then the MNF were operating in Iraq, although British forces were authorised under international law to intern people for imperative reasons of security, such internment was unlawful as a matter of the domestic law of Iraq.

IV. MR ALSERAN'S CLAIM

146. Turning now to the facts of the four lead cases, I will consider first the claim of Mr Alseran, who was captured and detained by coalition forces soon after the invasion of Iraq (code-named Operation Telic) began on 20 March 2003.

The evidence adduced

147. In addition to Mr Alseran himself, three other men who were captured and detained at the same time as him were called as witnesses at the trial: Hussein Waheed, Hasan Al-Aidan and Najeh Mhalhal. Mr Alseran's mother also came to London to attend the trial but ultimately was not required to testify as her witness statement was not challenged by the MOD.

148. The MOD found very few records of Mr Alseran's detention and was not able to locate any document recording his capture or showing where he was held before he was taken to Camp Bucca (the theatre internment facility near Umm Qasr).

149. The only witness of fact called by the MOD in Mr Alseran's case who served in Iraq was Mr Christopher Parker. In March 2003 he held the rank of Major in the British Army and was the Chief of Staff for the 7th Armoured Brigade. Mr Parker was clearly a very able officer and his evidence provided some helpful insights into relevant military practices. But the geographical area for which he was responsible did not include the location where Mr Alseran was captured and it was not suggested that his Brigade was involved in Mr Alseran's capture and detention. He was therefore not in a position to address Mr Alseran's specific allegations.

150. Mr Alseran's claim was issued on 27 March 2013, a decade after the relevant events occurred. I will consider later, in the context of limitation, the MOD's contention that it has been materially prejudiced by delay in bringing the claim in terms of its ability to locate witnesses. In this part of the judgment, I will simply consider what conclusions it is possible to reach on the evidence which has been adduced. The burden of proof is of course on the claimant to establish the facts which he alleges.

Mr Alseran's background

151. Mr Alseran lives on the outskirts of Abu Al-Khasib, a town which lies to the south east of the city of Basra. Abu Al-Khasib is bounded to the north by the Shatt al-Arab waterway, which forms the international border with Iran. South of the town, running roughly parallel with the waterway, is a major road which links the city of Basra to the Al-Faw peninsula in the south. Mr Alseran's family home is located close to this road on the edge of a fertile area. On the other side of the road stretch vast barren mudflats.

152. Mr Alseran was born on 6 September 1980, though he has a poor grasp of dates and cannot remember his date of birth without checking his national identity card. He was thus 22 years old at the time of his detention in March 2003. He is the oldest of ten children. His father fought in the Iraqi army in the war with Iran and suffered severe injuries including the loss of an arm, which limited his ability to work. The family was poor. They lived in a house with only two bedrooms on a small piece of farmland inherited by Mr Alseran's mother. On this land they had planted date palm trees, grew vegetables and kept cows, chickens and ducks.

153. Mr Alseran attended primary school but then started working to assist his family. He was employed in various low paid manual jobs. For three years between the ages of 18 and 21 he did compulsory military service, which he mostly spent working as a police customs guard. He then returned to the family home and to whatever work he could find, such as washing cars and selling gas canisters on the street with his brother.

154. Mr Alseran's family had an old black and white television. From watching this, they learnt in March 2003 that the Americans and British were invading Iraq. They were pleased and excited at the prospect of Saddam being overthrown.

155. Mr Alseran's family lived only a few kilometres from the headquarters of the Iraqi Army 51st Tank Division. When the war began, a tank unit set up camp among the palm trees close to their home. In the first days of the war they often saw military warplanes flying low overhead and there were air strikes nearby. Coalition planes also dropped leaflets in Arabic warning people to leave the area for their own safety. After a few days Mr Alseran's family decided to move out and went to stay with relatives in another part of Abu Al-Khasib. Mr Alseran, as the oldest son, stayed behind to look after the animals and the family home.

Capture

156. In the early hours one morning Mr Alseran awoke to the sound of heavy vehicles followed by footsteps outside the house. Soldiers burst into the bedroom and pointed rifles at him. He sat up on his mattress but was kicked and pushed to the floor and made to lie flat on his stomach. His hands were cuffed behind his back. He was then taken outside and made to sit on the ground at the junction of a nearby street with the main road. The soldiers gestured and shouted at him to keep his head down and not to look left or right. Over the next hour or so other men from the surrounding area were brought to the same place. They included Mr Alseran's cousin, Hussein Waheed, whose family lived on the neighbouring farm and who, like Mr Alseran, had stayed behind to look after his family home when the rest of his family left the area. Mr Waheed is about a year younger than Mr Alseran. The other prisoners also included a more distant relative, Hasan Al-Aidan, and Hasan's father, who lived on a similar smallholding about 1½ to 2 kilometres away. Hasan Al-Aidan was only 17 years old at the time. Both he and Hussein Waheed were called as witnesses at the trial.

157. Mr Alseran alleges that, while he was sitting by the side of the road with the other prisoners, he sometimes tried to look around and was then kicked in the back or on the side of his body by the soldiers guarding him. Hasan Al-Aidan gave similar evidence.

Detention at Al-Seeba camp

158. After several hours the prisoners were collected by a military lorry. It was joined by other lorries which proceeded in convoy eastwards along the main road away from Basra in the direction of Al-Faw. The lorries travelled slowly, stopping along the way to pick up more prisoners.

159. The lorries carrying the prisoners finally came to a halt at a military encampment in the area of Al-Seeba less than 15 kilometres from Mr Alseran's home. Mr Alseran and Mr Waheed recognised the place as an old military base used by the Iraqi army during the war with Iran. There is a shrine nearby called Abdullah bin Aqeel which Mr Waheed had often visited and which Hasan Al-Aidan's father also knew. The old military base has no buildings and is distinguished from the surrounding mudflats only by man-made mounds on the four corners of the base and a slightly raised dirt area around it. It was evidently being used by the coalition forces as a temporary camp and contained some tents and military vehicles.

160. Mr Alseran was detained with many other prisoners. As well as Mr Waheed and Mr Al-Aidan, they included Najeh Mhalhal who did not know Mr Alseran before they were detained but got to know him at Camp Bucca. Mr Mhalhal was also called as a

witness at the trial. At the time of his detention he was 33 years old and worked in a tile factory. He was stopped at the Abu Al-Khasib market as he was walking to work early one morning by soldiers who had surrounded the area. Mr Mhalhal said that he tried to resist boarding the lorry which took him to Al-Seeba and was struck in the face with a rifle butt, which broke his nose. On arrival at the Al-Seeba camp he received medical treatment for his injury in a military medical vehicle.

161. Throughout the time that they were detained at Al-Seeba, the prisoners had to sit on the dirt ground. They were arranged in rows, a few feet apart. They were told not to speak to each other and were kicked or hit if they were seen doing so. At night it was cold but they had to sleep on the bare ground with their hands cuffed behind their backs and were not given any blanket or other covering. The next morning the plastic handcuffs were removed but the prisoners had to stay in the same spot. All the witnesses said that on the day of their capture they were given no food, only water. On the following day they received a carton of food as well as bottled water. To relieve themselves, they were taken a few at a time to an area outside the perimeter which was used as a toilet area and then returned to the same place.

162. Mr Alseran alleges that he was detained at Al-Seeba in these conditions for four or five days. I will consider later whether this claim is accurate.

The alleged assaults

163. The mistreatment alleged by Mr Alseran which represents his principal grievance about his detention by coalition forces is said to have occurred at the Al-Seeba camp. It was described by all four witnesses who were detained there. The substance of what they described was as follows. The prisoners – who, as mentioned, were sitting in rows – were ordered to lie flat on their stomachs. Soldiers then took it in turns to run over the prisoners' backs, using them as stepping stones as they ran along the line in their heavy military boots. According to Mr Alseran and the other witnesses, the soldiers were laughing while this took place and some were taking pictures. Mr Alseran said that this abuse occurred on two occasions and that he felt pain in his back for several days afterwards; but much worse than the pain was the humiliation that he felt at being treated in this way.

Internment at Camp Bucca

164. During the night on what Mr Alseran thinks was the fourth or fifth day of his detention the prisoners were again loaded onto military lorries. They were transported on these lorries and then on buses to Umm Qasr, near the border with Kuwait. Here a prisoner of war internment facility had been established, which was initially known as Camp Freddy and was later renamed Camp Bucca when US forces took over the running of the camp.[11] For simplicity, I refer to the facility in this judgment by the sole name of Camp Bucca.

165. The buses arrived at Camp Bucca just before daybreak and the prisoners had to wait in a holding area outside the camp until it opened at 7am. (The time can be identified because Mr Mhalhal recalls hearing a soldier saying loudly to another "7 o'clock":

[11] The camp was so named after a New York City fireman, Ronald Bucca, who died on 9/11.

Mr Mhalhal did not understand what this meant but later asked an interpreter who explained it to him.) When the camp opened, the prisoners were taken in turn into a tent where there were soldiers sitting at desks behind a row of computers. Here they went through the registration process.

166. The administrative process for registering prisoners brought to Camp Bucca involved entering their details on a computer database known as AP3 Ryan. As part of the process, a digital photograph was taken of the prisoner and the prisoner was allocated an "Internment Serial Number". As well as being recorded on the database, this number was printed on a plastic bracelet which the prisoner was required to wear on his wrist. Each prisoner was also given a "prisoner of war identity card" bearing his photograph as well as his name and Internment Serial Number. Mr Alseran has kept his identity card, as have Mr Waheed, Mr Al-Aidan and Mr Mhalhal. All their cards show the "date issued" as 1 April 2003, and in each case this is also the date of issue of the Internment Serial Number recorded in the AP3 Ryan database. I regard this as solid evidence that 1 April 2003 was the date on which they were admitted to Camp Bucca.

167. Mr Alseran complains about the conditions in which he was held at Camp Bucca. Similar complaints are made by the claimants at the second trial, MRE and KSU, and I will address these complaints later in this judgment when I consider their claims (see paragraphs 502–518 below).

168. It is Mr Alseran's case that he was detained at Camp Bucca until 17 May 2003.

Life since release

169. Since his release, once the initial euphoria of being freed and returning home subsided, Mr Alseran has suffered from anxiety and depression, as well as outbursts of anger and other symptoms of trauma. This has not prevented him from working in similar manual jobs to those he did before his detention. He got married in February 2004 (in a marriage arranged by his family) and has four children. He now lives with his wife and children in a separate house built on the same plot as his parents' home.

170. The distinguished expert psychiatrists instructed by the claimants and by the MOD in his case, Professor Katona and Professor Sir Simon Wessely, agreed that Mr Alseran suffered psychiatric injury as a result of his experiences at the hands of coalition forces. They assessed Mr Alseran's current psychiatric symptoms as mild or moderate in their severity and agreed that there appeared to be some recent improvement in his trauma symptoms, probably due to psychological treatment that he has recently commenced. Professor Katona, also carried out cognitive testing and found Mr Alseran to have significant cognitive impairment. The experts agreed that this is not related to his detention and may be the result of a head injury which he sustained in a road traffic accident in 2012.

Factual issues

171. Four questions of fact arise in relation to Mr Alseran's claim which I will address in the following order:

    i) Which nation's armed forces captured Mr Alseran?

ii) On what date was he captured?

iii) Was he mistreated as alleged?

iv) On what date was Mr Alseran released?

Who captured Mr Alseran?

172. The MOD has not admitted, and has therefore required Mr Alseran to prove, that the soldiers who captured him were British soldiers.

173. Mr Alseran and the three other men detained with him who were witnesses in his case all described seeing the British flag on the uniforms and vehicles of the soldiers who detained them. However, identification evidence of this kind, particularly when given so long after the relevant events, needs in my view to be treated with very great caution. The witnesses' descriptions of what they claimed to have recognised as the British flag were in any case vague. For example, Mr Alseran described it as a cross which was orange or red, and Mr Waheed gave a similar description. Counsel for the MOD suggested that the symbol which they recall may be the red cross emblazoned on the side of military medical vehicles. Furthermore, the evidence from both trials – including the recollections of soldiers who testified at the second trial, many photographs, and several hours of video recordings from the archives of the Imperial War Museum put in evidence by the MOD – has shown that very few British soldiers who took part in the invasion of Iraq had the Union Jack displayed on their uniforms or their military vehicles. In particular, the evidence indicates that the Royal Marines did not have the Union Jack on their uniforms. As I am about to describe, the British forces who were operating in the area where Mr Alseran was captured were Royal Marine Commandos (supported by two squadrons of armoured vehicles). In the circumstances I attach no weight to the evidence of the witnesses who claimed to have recognised the British flag.

174. *Prima facie* evidence of which country's armed forces captured Mr Alseran is provided by the Internment Serial Number issued to him on arrival at Camp Bucca, which was "UKDF024319IZCM". The MOD admitted in its defence that this number indicates that the person issued with it was captured by UK forces. The MOD's Joint Warfare Publication 1-10 on Prisoners of War Handling, March 2001 edition, which was applicable at the time, explains how to interpret the number. The initial letters "UK" signify that the capturing nation was the United Kingdom. The next two letters "DF" stand for Detention Facility. There is then a unique number allocated to the prisoner. The letters "IZ" mean that the prisoner owes his allegiance to Iraq. The final letters "CM" stand for "Civilian Male". The Internment Serial Numbers issued to Mr Waheed, Mr Al-Aidan and Mr Mhalhal likewise all began with the letters "UKDF" and ended with the letters "IZCM".

175. I have indicated that Mr Alseran and his witnesses were part of a large group of prisoners all of whom were captured in the area of Abu Al-Khasib, held temporarily at Al-Seeba and were then transported in lorries and buses to Camp Bucca. It seems improbable that, when such a large group of prisoners arrived together and were registered on arrival at Camp Bucca, a mistake was made in identifying the capturing nation.

176. There is also evidence that the area around Abu Al-Khasib where Mr Alseran was captured was one in which British forces were operating at the relevant time. In the absence of any disclosure bearing on this question from the MOD, the claimant relied on a public document, "Operations in Iraq: Lessons for the Future", published by the MOD in December 2003, which states (at p.25) in relation to 3 Commando Brigade, Royal Marines:

> "3 Cdo Brigade advanced towards Basrah from the south, fighting to secure the town of Abu Al Khasib (population 100,000), 10km to the south east. In some areas the Brigade met very stiff resistance and was engaged in protracted firefights including hand to hand combat over the period 30 March to 3 April before the area was secured."

The video recordings from the Imperial War Museum archive mentioned earlier include interviews with members of the Royal Marines involved in this operation and extensive footage of British military vehicles travelling along the main road from Al-Faw towards Basra and among the villages along the Shatt-al-Arab.

177. Much more detail can be found in a book called "*Target Basra*",[12] which tells the story of Royal Marine Commandos who landed on the Al-Faw peninsula on 20 March 2003 and arrived a few days later on the outskirts of Basra. "*Target Basra*" describes (at p.253) the advance of "A" Company of 40 Commando along the main road from Al-Faw towards Basra and refers to how on 26 March their commanding officer:

> "located a defensive position that appeared to be a hangover from the Iran/Iraq war, and decided to occupy it. This time a fleet of requisitioned Iraqi eight-ton trucks moved them to their new position about 30 kilometres east of Basra."

The description and location of this position exactly match the old Iraqi military base at Al-Seeba to which Mr Alseran and the other witnesses were taken after they were captured.

178. "*Target Basra*" also describes (at pp.260-1) how on 27 March 2003:

> "3 Commando Brigade Reconnaissance Force (BRF) were positioned at the leading edge of 40 Commando's area of responsibility, facing a suburb of Basra, Abu al-Khasib, that stretched south for several kilometres between a major road and the Shatt al-Arab waterway."

179. On 30 and 31 March 2003 an operation code-named Operation James took place to secure Abu Al-Khasib. Around 600 Royal Marines took part in the operation, advancing from the main road into the town on a broad front. As shown in a map reproduced in "*Target Basra*" (at p.262), this front was around seven kilometres long and included (in an area of operation assigned to "A" Company of 40 Commando) the place where Mr Alseran's family home is situated. The book describes how the

[12] The author is Mike Rossiter and the book was first published in 2008.

attacking force moved to their assembly points on the evening of 29 March 2003 in requisitioned Iraqi trucks. In the case of "A" Company, the advance began shortly before dawn on Sunday, 30 March 2003. By the end of the day the eastern part of the whole operational area, which included "A" Company's individual area of operations and the town of Abu Al-Khasib itself, had been secured (p.289). "*Target Basra*" specifically refers to "the large number of prisoners they had taken" (p.288).

180. Information about Operation James contained in "*Target Basra*" has since been confirmed by documents disclosed by the MOD in connection with the claims of MRE and KSU. Those documents include the May/June 2003 edition of *The Globe & Laurel*, the official journal of the Royal Marines. In a diary of key events during Operation Telic published in that issue, the entry for Sunday, 30 March describes how the assault on Abu Al-Khasib began in the early hours of that day and says:

> "A 15-hour battle ensued during which 40 Cdo took over 200 enemy prisoners of war…"

181. The MOD's witness, Mr Parker, explained that it is standard procedure to collect prisoners in a temporary holding area located next to a regimental aid post, which is the first point of medical treatment. The same place would also normally be used as a logistic exchange point, to which supplies are brought. The descriptions given by Mr Alseran and his witnesses of the temporary camp at Al-Seeba where they were initially held are consistent with it serving these functions.

182. To suggest that it might have been US soldiers and not British soldiers who captured Mr Alseran, counsel for the MOD clutched at two straws. The first was the fact that one witness, Mr Waheed, described seeing a "Hummer" with the soldiers who detained him. When shown a picture of a military Humvee on counsel's smart phone during cross-examination, Mr Waheed agreed that this was the type of vehicle that he meant. Mr Parker confirmed that only US forces had Humvees and that British forces did not. However, Mr Parker also confirmed that 3 Commando Brigade of the Royal Marines would have been accompanied by a US Air Naval Gun Fire Liaison Company ("ANGLICO") for calling in air support and that the ANGLICOs used Humvees. "*Target Basra*" contains several references to US Humvees accompanying the Royal Marines.

183. As well as mentioning a Humvee, Mr Waheed also described seeing Land Rovers at Al-Seeba. So did Mr Alseran. Mr Parker confirmed that only British forces, and not US forces, had Land Rovers.

184. Secondly, the MOD sought to rely on a statement made by Mr Parker during his cross-examination that, before the advance on Abu Al-Khasib, there were some raids being conducted by the Royal Marines "as well as the US Marine Corps who were advancing ahead and with us during that period before they started to move away to the north towards Baghdad." Mr Parker did not recall, however, precisely when the last US Marines disappeared from his area (which was some 25km to the south-west of Abu Al-Khasib on the other side of the Shatt Al Basra waterway) and moved north. He did not suggest that any US forces (apart from ANGLICOs) took part in Operation James, and "*Target Basra*" and other sources indicate that the operation was wholly British. The MOD adduced no documentary or other evidence to suggest that US

forces (apart from ANGLICOs) were or might have been operating on the outskirts of Abu Al-Khasib in the last few days of March 2003, let alone at Al-Seeba.

185. I find it proved that British forces captured Mr Alseran and detained him at Al-Seeba before transporting him to Camp Bucca.

The MOD's detainee records

186. In trying to establish how long Mr Alseran and other prisoners were detained for and the exact dates on which they were (a) captured, (b) admitted to Camp Bucca and (c) released, a key source of information is the contemporaneous records of detainees kept by the MOD. Two main types of record were created. First, as already mentioned, when prisoners arrived at Camp Bucca, their details were entered in a computer database known as AP3 Ryan. The information about a detainee held in this database would be updated subsequently, in particular to record details of the person's release. The second main type of record created by the MOD comprises spreadsheets containing lists of detainees generated on various dates. These lists record details such as the Internment Serial Number, name and date of birth of each listed detainee and include the detainee's date of capture and (if applicable) date of release. The MOD has been unable to explain how these spreadsheets were compiled.

187. Regrettably, when the MOD stopped using the AP3 Ryan system in 2008, inadequate steps were taken to preserve the records held on it, despite the fact that this litigation was already in prospect. Some copies of the raw data were kept but it appears that only one laptop which runs the AP3 Ryan software was retained. Until recently this laptop was in the possession of the Iraq Historic Allegations Team ("IHAT") and it is now held by an organisation which has taken over the remaining caseload of the IHAT called Service Police Legacy Investigations. When disclosure of documents was given in these proceedings, the MOD did not disclose the existence of the data stored on this laptop and disclosed only print-outs of data which had come from the AP3 Ryan database but is now held on a system called the Defence Archive System ("DAS"). Because the DAS does not run the AP3 Ryan software, the data stored on the DAS is displayed in a different format which is much harder to interpret and has some fields missing.

188. It was only during closing submissions at the trial of MRE and KSU that the inadequacy of the MOD's disclosure of these records began to emerge. After the end of the trial, I circulated a note to the parties seeking answers from the MOD to a number of questions regarding its records of detainees held at Camp Bucca. This led to the provision of further information and ultimately, in July 2017, to the restoration by the MOD of a working version of the AP3 Ryan database. This was created with the assistance of Mr Kerry Maddison who had been the System Administrator of AP3 Ryan from 2003 until it was decommissioned in 2008. It was constituted by loading data held on the DAS into the appropriate version of the AP3 Ryan software, which Mr Maddison had retained. From the restored database screenshots were taken and disclosed by the MOD of the records of each of the detainees who has given evidence or featured in the evidence given at these trials. The claimants made further written submissions regarding this material.

On what date was Mr Alseran captured?

189. Based on the date when his prisoner of war card was issued, I have already found that Mr Alseran was admitted to Camp Bucca on 1 April 2003. Lists of detainees compiled on various dates confirm that Mr Alseran and the other witnesses who were interned at the same time as him were "held from" 1 April 2003 at "Umm Qasr". (It is apparent that "Umm Qasr" was used in the records to denote Camp Bucca which was situated in the vicinity of Umm Qasr).

190. The same lists of detainees also show the "place of capture" of Mr Alseran and the other witnesses as "Umm Qasr" and show their "date of capture" as 28 March 2003. The place of capture is obviously wrong. As for the date, it is striking that for the first several hundred detainees on these lists the "date of capture" is given as 28 March 2003 in every single case. No earlier date of capture is shown. These detainees include MRE and KSU, the claimants in the second trial, who (as discussed in part IV below) were registered at Camp Bucca on 26 March 2003. The same lists also show the detainee's "date of release", where applicable, and in some cases the date of release shown is earlier than 28 March 2003, with the earliest date of release being 25 March 2003. Thus no reliance can be placed on the date of 28 March 2003 where this is shown as the date of capture in these lists.

191. The information fields in the AP3 Ryan database include one for "capture event". For Mr Alseran and each of the other three witnesses in his case who were detained with him, the number of their "capture event" is recorded as "1" and the title of the event as "UK capture 1". A screenshot from the recently reconstituted version of the AP3 Ryan database shows that 1,754 detainees were recorded under this capture event and that no date has been entered for it. Furthermore, the "place of capture" shown for this capture event is Umm Qasr. It is clear that "capture event 1" does not refer to an actual event in which hundreds of prisoners were all captured at or about the same time in Umm Qasr. As noted in part IV, KSU and two others captured with him were recorded under this capture event although they were captured on a different date and at a totally different location from Mr Alseran. In the section for "capture information" within the "detainee personnel details" recorded for Mr Alseran and for each of the other three witnesses interned with him (and for KSU and the two others captured with him), the "capture date" has been left blank; but in each case the details of where they were held show a date and time of capture of 28 March 2003 at 23:41 with a reference under "Event ID" to capture event 1. I think it reasonable to infer that, in the first few days after Camp Bucca was opened, all or at least a very large number of detainees whose capturing nation was recorded as the UK were entered under "capture event 1" on the computer system, without attempting to establish their actual date and place of capture, and that where dates of capture are shown for individuals recorded under this "event", they were all given an essentially arbitrary date of capture of 28 March 2003. But whether this theory is correct or not, no reliance can reasonably be placed on the "date of capture" shown for Mr Alseran in the MOD's records. It is therefore necessary to determine his date of capture from other evidence.

192. I have mentioned that Mr Alseran himself thinks that he may have been detained at Al-Seeba for four or five days before being taken to Camp Bucca. However, although I consider his evidence to have been honest, the relevant events occurred many years ago and his memory of times and dates is poor. A specific indication that the period

he spent at Al-Seeba may have been much shorter than he thinks is that he has a memory that he was only provided with one meal while he was there. He said that he was given no food on the day of his capture, but on the following morning he was provided with a carton containing canned food, water, juice, biscuits and some other food stuffs. Mr Alseran said that, once he had finished eating, soldiers collected the food cartons and that this was the only time that food was provided during his detention at Al-Seeba. If this is right, it suggests that, unless the prisoners were subsequently starved, Mr Alseran may in fact only have been at the Al-Seeba camp for two days.

193. Of the other witnesses, Mr Waheed estimated that he was held at Al-Seeba for five or six days. However, he did not appear to have any specific recollection of anything that happened there after the second day and was not sure, for example, whether he was made to sit cross-legged after that time. Mr Al Aidan said that he cannot remember the exact period of detention at Al-Seeba but thinks that it was two or three days. Both he and Mr Waheed also recalled that the prisoners were not given any food until the second day. Mr Al Aidan said that on the afternoon of the second day he was taken with a group of other detainees to clean the camp by picking up empty bottles of water and food cartons and putting them in a bag. His evidence seemed to suggest that the prisoners were transported to Camp Bucca that night.

194. Mr Alseran said that, while he was sitting on the ground at Al-Seeba, a group of five or six prisoners was brought to the camp, including one who had blood around his nose. Mr Alseran did not know this man at the time but said that he later got to know him when they were detained in the same compound at Camp Bucca and that this man was Mr Mhalhal. Mr Mhalhal gave evidence that he stayed at Al-Seeba for what he thinks was around five days before the prisoners were taken to Camp Bucca. Although Mr Mhalhal is not a claimant in this litigation, in December 2014 he instructed Public Interest Lawyers to bring a claim on his behalf in the Administrative Court seeking an investigation of allegations that he had been ill-treated. In connection with that claim, Public Interest Lawyers prepared a factual summary of his case based on a telephone conversation with him (conducted through a translator). This factual summary describes Mr Mhalhal's capture and his being hit on the nose with a rifle butt in similar terms to his evidence given in this case. However, it also states that, after being hit, he lost consciousness and woke up "in the hospital" at what he was told was Camp Bucca.

195. Mr Mhalhal said that this factual summary was inaccurate and that he in fact woke up in a military medical vehicle at the Al-Seeba camp, and not in a hospital at Camp Bucca. I accept that the factual summary was a superficial document, based only on one (translated) telephone conversation. It contains a number of patent inaccuracies. I also accept that Mr Mhalhal must have been detained at the Al-Seeba camp – and in all probability received treatment in a military medical vehicle at that camp – before being transported to Camp Bucca. Nevertheless, his failure to recall the Al-Seeba camp at all when the factual summary was prepared suggests to me that he is unlikely to have spent nearly as long there as he now claims.

196. Although it is possible that Mr Alseran was captured before Operation James, there is no evidence to suggest that any houses were cleared or prisoners taken before the start of that operation. Moreover, I am satisfied from their evidence that Mr Alseran, Mr Waheed and Mr Al Aidan were part of a large group of prisoners who were captured

in various locations over the course of several hours on the same morning and then taken in lorries to the Al-Seeba camp. Mr Alseran recalled there being three lorries which stopped along the way to pick up more prisoners and estimated that there were between 60 and 70 prisoners in all three lorries. Even if that estimate is not very accurate, the number of prisoners brought to the Al-Seeba camp was plainly large. In my view, the explanation which makes best sense of the evidence is that Mr Alseran, Mr Waheed and Mr Al Aidan were all captured on the first day of Operation James, which was Sunday 30 March 2003. Mr Mhalhal must have been captured the following morning, 31 March 2003, because I see no reason to doubt his evidence that he was captured in the market at Abu Al-Khasib as he was walking to work, and the description of the assault on Abu Al-Khasib in *"Target Basra"* indicates that 31 March was the first morning on which British forces were in control of the town. I have already found that the prisoners were transported from the prisoner collection point at Al-Seeba to Camp Bucca on the night of 31 March/1 April 2003.

197. I conclude that Mr Alseran was captured on 30 March 2003 and detained for one night at Al-Seeba before being taken to Camp Bucca the following night, arriving there at daybreak on 1 April 2003.

Was Mr Alseran mistreated as alleged?

198. As mentioned earlier, the MOD did not call any witness who had any direct knowledge of the capture of prisoners during the assault on Abu Al-Khasib and their detention at Al-Seeba. Mr Parker nevertheless expressed the opinion in his witness statement that he would be extremely surprised if British soldiers had mistreated Mr Alseran and the other prisoners as alleged by running over their backs. Mr Parker said that he had never heard of any allegations of such conduct and that there is no way that soldiers would have got away with it. He explained how mistreatment of prisoners was outlawed and that any report or complaint of mistreatment (or failing to stop mistreatment by others) would be investigated and subject to disciplinary action.

199. In cross-examination Mr Parker was referred to some particular incidents of proven mistreatment of detainees by British soldiers in Iraq. One which occurred in May 2003 involved physical and sexual abuse perpetrated by soldiers from the 7th Armoured Brigade (for which Mr Parker was the Chief of Staff) at Camp Breadbasket. Soldiers involved were ultimately convicted at a court martial, but the abuse only came to light when one of the soldiers took photographs to be developed at a shop in his local town after returning to the UK. Another incident, which occurred at Al-Amarah in 2004, involved a vicious beating of children by a number of soldiers which was filmed by a soldier who was shouting encouragement to beat the children as he did so. This incident only came to light in 2006 when it was discovered by a British national newspaper. Despite these examples, Mr Parker maintained his view that it is almost impossible for misconduct by soldiers to be kept secret as sooner or later word of it will get out and there will then be an investigation. In the light of the way in which the two incidents to which Mr Parker was referred came to light, I am bound to say that this view seemed to me to rest on nothing more solid than understandable professional pride and a measure of wishful thinking.

200. An allegation of mistreatment, such as that made by Mr Alseran, is a serious matter which requires convincing proof. It must, however, be examined on its individual merits and I do not think it right to approach the allegations made in this litigation

with any preconception or presumption that allegations of misconduct by British soldiers are inherently unlikely (or likely) to be true.

201. There were some differences and inconsistencies between the witnesses' accounts. In particular, Mr Waheed said that the form of mistreatment I have described first occurred in the street immediately after he was taken prisoner, as well as on each of the first two evenings at Al-Seeba (each time at around sunset). Mr Alseran said that the abuse occurred on the first day at Al-Seeba (during the afternoon) and again on the second day. Mr Al-Aidan said he thought it happened about four times during the first night – each time with a different soldier – and then again a number of times on the second night. And Mr Mhalhal said that the abuse happened once while he was at Al-Seeba, around an hour after his arrival there.

202. These (and other more minor) inconsistencies were, in my judgment, of the kind to be expected when different people recall something that happened 13 years ago. The fact and manner of being assaulted are much more likely to be remembered accurately, even long after the event, than exactly when (or even how many times) it occurred. It was not suggested in cross-examination to Mr Alseran or any of the other witnesses that they had fabricated any of their evidence and – with the possible exception of Mr Mhalhal – I am satisfied that they had not. I find it more probable than not that mistreatment of the kind alleged did occur. My reasons include the following:

i) If the witnesses had colluded to make false allegations of mistreatment, I would expect them to have told a common story about when the incidents occurred. As it was, the discrepancies between their accounts were (as I have indicated) of the kind to be expected of witnesses giving their independent recollections of traumatic events after a long passage of time.

ii) Mr Mhalhal gave evidence that, throughout the time when he was detained at Al Seeba, he was seated close to Mr Alseran (with only two detainees between them) and saw Mr Alseran being kicked and hit. I am sceptical of this evidence which I think that he may well have made up to try to assist Mr Alseran. But if there had been collusion between them or if Mr Alseran had fabricated his allegations of mistreatment, I would expect Mr Alseran to have made similar claims. As it is, Mr Alseran said that he did not recall being kicked or hit as described by Mr Mhalhal.

iii) The particular form of mistreatment alleged (making the detainees lie face down and then running over their backs) is not a kind of behaviour that I think that someone who made false claims of being assaulted would be likely to concoct. At the same time I do not find it implausible that highly adrenalised young men, placed in a position of power over captives who were sitting in rows, might – if not properly supervised – have devised and engaged in such an activity as a cruel form of amusement.

iv) Mr Alseran's evidence about the humiliation that he felt at being treated in such a contemptuous way, which clearly affected him much more than the physical pain, had the ring of psychological truth and helps to explain the lasting distress and hurt which he undoubtedly feels as a result of his experiences at the hands of coalition forces.

203. I find that the abuse of prisoners by running over their backs did take place, probably in the late afternoon or early evening of the day when Mr Alseran, Mr Waheed and Mr Al-Aidan were brought to the Al-Seeba camp. Although it is possible that it was repeated on the second day, I do not consider the witnesses' recollections of exactly when and how many times this abuse occurred sufficiently reliable to prove that it happened more than once.

On what date was Mr Alseran released from Camp Bucca?

204. Mr Alseran did not keep any record of how long he spent at Camp Bucca and in his evidence was understandably vague about the length of time for which he was detained, which he estimated as "approximately maybe two months or less". He said that on at least two occasions during his detention he was taken to a tent for questioning. From the nature of the questions he remembers being asked, it is apparent that the main purpose of the questions was to determine whether he was a member of the Iraqi army or had any links to the Saddam regime. When his particulars of claim were originally served in 2013, Mr Alseran's recollection was that he was interviewed on three occasions – the first around ten days after his arrival at the camp, the second after about a month and the third immediately before he was released. However, when he made his witness statement which was signed on 28 April 2016, he thought that he was only questioned twice, once after about ten days and the second time just before his release from detention. At the end of the latter interview, Mr Alseran was told that he would be released. He recalled that his cousin, Hussein Waheed, was released at the same time as him. They were taken by bus to Basra and each given $5 to pay for a taxi home.

205. Of the other detainees who were called as witnesses, Mr Waheed estimated that he was held at Camp Bucca for between a month and 45 days but was not sure of the exact length of time. He believed that he was questioned four times before his release. Mr Waheed confirmed that he and Mr Alseran were released at the same time and were taken to Basra on the same bus. Hasan Al-Aidan said that he was released after only one interview, which he recalled as taking place on about the tenth day of his detention. Najeh Mhalhal stated that he could not be sure how long he was detained at Camp Bucca but thought he was questioned around three times before he was released. Mr Mhalhal recalled that on the last occasion the soldier in charge (whom he referred to as "the General") looked at him and said "tomorrow happy bus baby". The interpreter then told him that he would go home the next morning. Mr Mhalhal said that he was released with Mr Alseran, although Mr Alseran does not now recall whether or not Mr Mhalhal was released at the same time as him.

206. Mr Alseran's case that he was released on 17 May 2003 was based on a letter issued to him by the International Committee of the Red Cross dated 13 June 2004 which states that, "according to the detaining authorities, he was released on 17 May 2003". It is not apparent, however, what the source of this information was. The equivalent letter issued to Mr Al-Aidan said only that he was released "in April 2003". Similarly, the letter issued by the Red Cross to Mr Waheed stated that he was released "in May 2003" without giving a more precise date. The letter issued to Mr Mhalhal said that he was released on 5 July 2003, which is plainly incorrect.

207. In my view, the only evidence of the date of release on which reliance can be placed consists of the contemporaneous records kept by the MOD. I have described the two

main types of record kept, which comprised information entered in the MOD's AP3 Ryan database and spreadsheets generated on various dates containing lists of detainees. Records of both types confirm that Hasan Al-Aidan was released within days of arriving at Camp Bucca and show that Mr Alseran and the two other witnesses were detained for another month.

208. The information about his date of release recorded on the reconstituted AP3 Ryan database for Mr Al-Aidan contains an internal inconsistency. On the tab labelled "capture/hold/release", in his "detainee personnel details", the release date shown is 16 May 2003. However, the details of where and when he was held shown on the same tab and on the tab labelled "prisoner location history" record that Mr Al-Aidan was released on 7 April 2003 and give the "event ID" as "18". The tab for "prisoner release event 18" shows a release date of 16 May 2003 but the "release description" states that "this release event is now no longer in use!!!!!!". The number of prisoners released in release event 18 is shown as 28 and their details are recorded.

209. It is unlikely that Mr Al-Aidan's recollection is so inaccurate that, although he thinks that he was released after about ten days, he was in fact detained at Camp Bucca for nearly seven weeks until 16 May 2003. An additional reason to doubt the reliability of this date is the error message in the description of release event 18 on the reconstituted database. On the other hand, the date of 7 April 2003 shown in the details of where Mr Al-Aidan was held broadly fits with his recollection. The accuracy of this information is also supported by the fact that lists of detainees created on 15 and 20 April 2003 record Mr Al-Aidan's date of release as 7 April 2003. It is unlikely that lists would have been compiled on those dates showing that Mr Al-Aidan had been released a few days earlier if he was in fact still detained. I accordingly find on the balance of probability that Mr Al-Aidan was released in "release event 18" on 7 April 2003.

210. Data entered on the AP3 Ryan database for Mr Alseran show his release date as 7 May 2003. The details of where and when he was held also indicate that he was released on this date and give the "event ID" as "48". The tabs for "prisoner release event 48" show the date of this event as 7 May 2003, the number of prisoners released as 306, the "release reason" as "end of hostilities" and the "release mode" as "by coach". In this case – unlike in the case of release event 18 – there is no error message in the description of the event and I infer that the details of the event contained in the reconstituted database are accurate, as they are consistent with other information. I also note that this release event is 30 numbers after release event 18 in which Mr Al-Aidan was released and that its date is 30 days after 7 April 2003, which I have found was the release date of Mr Al-Aidan. It seems plausible that a new release event was created on the system for detainees released on each day during the relevant period. Lists of detainees created on 8 May, 22 May and 27 June 2003 do not show any date of release for Mr Alseran. However, lists created on 27 July 2003 and during the next few months show his date of release as 7 May 2003.

211. Data entered on the AP3 Ryan database for Mr Waheed also record that he was released on 7 May 2003 in "release event 48", i.e. the same "release event" as Mr Alseran. As with Mr Alseran, Mr Waheed's name continued to appear without any date of release shown on the lists of detainees created on 8 May, 22 May and 27 June 2003, suggesting that there had been a failure to update his details on those lists.

Again, however, lists created on 27 July 2003 and during the next few months record his date of release as 7 May 2003.

212. The same lists show the date of release of Mr Mhalhal as 14 May 2003 and data entered on the AP3 Ryan database record him as having been released on 14 May 2003 in "prisoner release event 55" (i.e. seven days and seven events after Mr Alseran and Mr Waheed). However, in the record for release event 55 the description of the event states: "12 PWs released on AP3 following 100% check of internment facility. PWs found not to be in facility." A witness statement made in connection with the *Hassan* case in October 2007 by Mr Kerry Maddison, the System Administrator for AP3 Ryan from 2003 to 2008, considered a similar entry made on the database for the detainee who was the subject of that case, Tarek Hassan. Mr Maddison explained why the entry should be interpreted as meaning that the detainee was recorded on AP3 Ryan as having been released on the date shown on the system as the release date. Thus, it appears likely that Mr Mhalhal was in fact released before 14 May 2003 but, presumably as a result of an administrative error, this information was not entered on the AP3 Ryan database at the time and it was only when he was found to be absent when a check was carried out on 14 May 2003 that his release was recorded on AP3 Ryan. Mr Mhalhal could well have been released, therefore, on the same day as Mr Alseran, as he claims that he was.

213. I conclude that the most reliable evidence of Mr Alseran's release date is the information contained in the MOD's records and that he was released on 7 May 2003.

Responsibility for detention at Camp Bucca

214. In its defence to Mr Alseran's claim the MOD initially put in issue whether the UK was responsible for his detention and reserved the right to contend that his detention "or continued detention" was attributable to the United States. Some three months before the start of the trial, however, on 16 March 2016 an amended defence was served which deleted this reservation of rights and admitted that "the detention of the claimant was attributable to the United Kingdom". The extent of this admission was not entirely clear, as the MOD elsewhere in its defence continued to put Mr Alseran to proof that he was captured by UK forces, but on any view the admission encompassed Mr Alseran's detention at Camp Bucca. At the start of the trial the MOD applied for permission under CPR 14.1(5) and 17.1(2) to amend its defence in order to withdraw this admission. The application was opposed by the claimant and it was agreed that, to avoid interrupting the evidence, the application should be decided at the same time as the substantive issues in the case.

215. The MOD's application to withdraw its admission was made on the basis that new evidence came to light when the claimant's witness statements were served consisting of documents given to Mr Waheed and Mr Mhalhal when they were released from Camp Bucca. These documents, which were exhibited to their witness statements, are in identical form. They are each headed "Release Form for Detained Civilians". They state that the named individual "was detained and processed into the US Prisoner of War Internment Facility Umm Qasr, Iraq" and continue:

> "When initially processed he claimed to be a civilian and to have been detained in error.

> In order to determine the validity of his claim, a board was convened to conduct a preliminary investigation into the claim.
>
> The Board conducted a preliminary examination of the individual in order to determine whether there was a cause to question the detainee's status before a full Tribunal convened under the requirements of Article 5 of the Third Geneva Convention 1949.
>
> In the case of the above individual, the Board reached the conclusion that there was no evidence to doubt that the person was a civilian status [sic], and there was no evidence to support an assertion that he had committed a belligerent act against coalition forces. It was further satisfied that there were no further realistic investigations that could be undertaken in respect of this individual's case.
>
> In these circumstances, there is no reason for the continued detention of the individual, and further investigation into the case by way of formal tribunal is not required.
>
> The release of the above individual is hereby authorized. "

The form is signed in each case by "Colonel Ecke, Camp Commandant". It is not in dispute that Colonel Ecke was a US army officer.

216. The MOD argued that, as Mr Alseran was released at exactly the same time as Mr Waheed and at or about the same time as Mr Mhalhal, it is likely that Mr Alseran was issued with a similar release form. It was submitted that this provides compelling evidence that the United States was responsible for Mr Alseran's release and, by implication therefore, his prior detention.

217. Counsel for the MOD also sought to rely on other evidence to support this inference. They noted that the report of the Baha Mousa inquiry found that Camp Bucca was handed over to US control on 7 April 2003 and that thereafter "only a small UK element remained at the [camp] to deal with the interest of the UK captured prisoners held there".[13] The MOD also relied on the fact that at some point during his detention, though he could not remember when, Mr Alseran was given a second wristband bearing the number "US9IZ-103819EPW". The initial letters indicate that this Internment Serial Number was issued by the US.[14] The wristband bears the date 25 April 2003, which is the best evidence of when the number inscribed on it was issued. Mr Alseran said that he never wore the wristband and it is clear from inspecting it that the wristband has never been worn.

218. The question whether the UK was responsible for the detention of UK-captured prisoners who were held at Camp Bucca after the facility was handed over to the US in April 2003 was considered in depth in *Hassan v United Kingdom* [2014] ECHR

---

13 See the report of the Baha Mousa inquiry, Vol II, Part VIII, Ch 1, para 8.25.

14 The final letters "EPW" stand for "Enemy Prisoner of War". According to the MOD, the US classified all detainees at Camp Bucca as prisoners of war.

946, mentioned earlier. In that case the applicant's brother, Tarek Hassan, was found to have been captured by British forces on 23 April 2003. He was detained at Camp Bucca and released early in May 2003 (probably on 2 May). The applicant alleged that his brother's detention violated article 5 of the Convention. One of the defences raised by the UK government was that Tarek Hassan was not within the jurisdiction of the UK after he was admitted to Camp Bucca. The European Court rejected that contention and found that, having regard to the arrangements operating at Camp Bucca, the UK retained authority and control over all aspects of the detention relevant to the applicant's complaints under article 5 (see para 78), even though the Court found that Camp Bucca "officially became a United States facility … on 14 April 2003" (see para 14).

219. The amendment which the MOD applied for permission to make at the start of the trial did not seek to plead any positive case that Mr Alseran's detention, for either the whole or a particular part of the period for which he was detained at Camp Bucca, was attributable to the United States. It merely sought to withdraw the admission previously made and replace it by a non-admission which would put the claimant to proof that British forces were responsible for his detention.

220. I do not consider that this approach is reasonably available to the MOD. The evidence shows unequivocally that Camp Bucca was set up by the UK and that the UK was solely responsible for administering and operating the facility at the time when Mr Alseran was admitted to it on 1 April 2003. In these circumstances I do not see on what basis the MOD can properly withdraw its admission of responsibility for Mr Alseran's detention in its entirety. Moreover, to justify seeking to limit its admission to part of the period of his detention, it seems to me that the MOD would need to put forward a positive case that on or before some particular date responsibility for Mr Alseran's detention passed to the US authorities.

221. Although such a case was never properly formulated, it appeared from the submissions made that the MOD did wish to advance a positive case that Camp Bucca was transferred to the control of US forces on 7 April 2003, with the consequence that the US was responsible for Mr Alseran's detention after that date. Even if such a case had been pleaded, however, having regard to the factors set out in CPR 14PD, para 7.2, I would not think it right to permit the MOD to withdraw its admission that responsibility for Mr Alseran's detention lay (throughout) with the UK. In particular:

    i) When the admission was made, the MOD was obviously aware of the evidence considered by the Baha Mousa inquiry and the information which it had itself provided to the European Court in *Hassan v United Kingdom* about the handover of Camp Bucca to the US authorities in April 2003.

    ii) The only relevant evidence of which the MOD was not aware when it made the admission of responsibility consisted in the release forms disclosed by two of Mr Alseran's witnesses as mentioned above. I do not accept that sight of those documents could have made any material difference to the MOD's understanding of the facts.

    iii) In any case those documents were provided with the claimants' witness statements on 29 April 2016. If and in so far as they were thought to justify a change of case, it was unreasonable for the MOD to delay until its skeleton

argument for the trial was served on 7 June 2016 before giving notice that it wished to withdraw its admission of responsibility for Mr Alseran's detention.

iv) The late stage at which the MOD sought to change its case prejudiced Mr Alseran whose representatives had been entitled to assume in preparing for the trial that it was unnecessary to adduce any evidence to prove that the UK was responsible for his detention at Camp Bucca.

222. In any event, based on the evidence adduced at Mr Alseran's trial and also evidence subsequently adduced at the trial of MRE and KSU, I find that the MOD's admission was rightly made and that the whole period of Mr Alseran's detention was attributable to the UK.

223. The evidence in these proceedings confirms the finding made in the report of the Baha Mousa inquiry that command of Camp Bucca was transferred to US forces on 7 April 2003. The Commander's Diary kept by the Commanding Officer of the Queen's Dragoon Guards, who had been responsible for setting up the facility, records that orders for their redeployment were received on 3 April 2003. They were replaced at Camp Bucca by a battalion of the US Military Police. The hand over was completed on 7 April 2003 when a US officer (Colonel Ecke) took command of the facility. However, although US forces assumed responsibility for guarding and maintaining all the prisoners detained at Camp Bucca, a small UK contingent remained at the camp whose responsibilities included deciding whether UK captured prisoners should be released or continue to be detained.

224. The arrangements which governed the release of UK prisoners after Camp Bucca was handed over to the US military authorities are documented in a draft report dated 7 May 2003, prepared by Major David Christie, a British army lawyer with responsibility for prisoner of war handling. The draft report was sent to his commanding officer, Lieutenant Colonel Nicholas Mercer, who was probably the author of some amendments shown in tracked changes on the copy disclosed by the MOD. This report describes the system that was established by the UK authorities for screening prisoners at Camp Bucca to assess whether they were civilians who should be released. (I will explain this system in more detail later when I consider Mr Alseran's claim that his detention was unlawful.) The report states that, after the US arrived to take over the camp, the UK retained the lead for the screening process, although US personnel were "integrated ... into the process". The US then adopted the idea and the process was expanded to allow more processing to occur each day.

225. Major Christie's report makes it clear that, although there was liaison between them, the UK and the US each operated their own policy with regard to the screening and release of prisoners. The policies diverged when on 24 April 2003 the US announced that it would be commencing the release of military prisoners of war on a parole scheme while continuing the screening process for people claiming civilian status. To minimise the potential for disruption and unrest among the detainees which it was feared would otherwise result from the operation of different national policies, the UK decided to commence its own programme of early release. An internal email sent within the MOD on 25 April 2003 indicates that this included a relaxation of the screening process for detainees who claimed to be civilians whereby an initial assessment was to be made on the papers only to see whether there were reasonable

grounds to suspect that the individual was a security threat or a criminal; only if such grounds were identified would a screening interview be conducted.

226. The practical arrangements for the release of prisoners under this programme were set out in an order issued from the HQ of the UK Joint Forces Logistics Component on 27 April 2003 entitled "FRAGO 001/03 to OPO 04/03 – Release and Repatriation of Prisoners of War (PWs)". In this order the "scheme of manoeuvre" for the release of prisoners (other than those to be retained as security internees or criminal detainees) was described as follows:

> "The PWs will be processed by the US MP Bn and provided with an HRE/Personal Effects. At this stage PWs identified as UK PWs will be passed to the PW Admin Unit (PWAU) and their PW number checked against the PW database record. If the photograph on record matches the individual and his record is not annotated for detention or internment he will be directed to a holding area. There will be 4 holding areas, one for each release location. … Prisoners to be released will be loaded onto contracted buses with a guard and taken to their destination."[15]

It appears from a memorandum seeking ministerial approval for the programme of early release dated 25 April 2003 that the programme commenced on 28 April 2003.

227. From this evidence I conclude that, although after 7 April 2003 US forces were responsible for guarding and maintaining the prisoners detained at Camp Bucca including those captured by the UK, the UK authorities retained responsibility for deciding whether UK captured prisoners should be released. Under the arrangements in place at the time of Mr Alseran's release the processing of prisoners for release was being conducted by US military police and it is likely that he was issued with a release form similar to the forms given to Mr Waheed and Mr Mhalhal. Nevertheless, I am satisfied that the decision whether to release him remained with the UK authorities and that the MOD was right to admit that Mr Alseran's detention at Camp Bucca until 7 May 2003 was attributable to the UK.

Mr Alseran's Human Rights claims

228. I explained in Part II that, while he was in the custody of British forces, Mr Alseran had Convention rights enforceable under the Human Rights Act which included (1) the right under article 3 not to be subjected to torture or to inhuman or degrading treatment and (2) the right under article 5 not to be deprived of his liberty except in accordance with law. I also referred to case law which has established that those rights – interpreted in the light of international humanitarian law – apply even in the active hostilities phase of an international armed conflict. I turn now to consider in more detail the application of articles 3 and 5 and whether, on the evidence, violations of these rights occurred.

---

[15] See para 3(a)(2) of the order. According to the MOD, the letters "HRE" probably refer to a Humanitarian or Halal meal Ready to Eat.

Article 3

229. Mr Alseran claims that (i) at the time of his capture, (ii) when he was detained at Al-Seeba, and (iii) when he was interned at Camp Bucca, he was subjected to inhuman and/or degrading treatment in breach of article 3.

230. To fall within article 3, ill-treatment must attain a minimum level of severity. Whether this level is reached "depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim": see e.g. *Jalloh v Germany* (2007) 44 EHRR 32, para 67; *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25, para 196; *Bouyid v Belgium* (2016) 62 EHRR 32, para 86. The purpose for which the treatment was inflicted and the motivation behind it are also potentially relevant factors: ibid. Treatment has been held by the European Court to be "inhuman" because (amongst other things) it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. Treatment has been held to be "degrading" when it was such as to arouse in its victims feeling of fear, anguish and inferiority capable of humiliating and debasing them: see *Jalloh v Germany* (2007) 44 EHRR 32, para 68; *A v United Kingdom* (2009) 49 EHRR 29, para 127. In *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396, at para 7, Lord Bingham summarised the test as being that treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being.

231. In the recent case of *Bouyid v Belgium*, *supra*, the judgment of the majority of the Grand Chamber of the European Court contains the following observation (at para 88):

> "In respect of a person who is deprived of his liberty or, more generally, is confronted with law enforcement officers, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is, in principle, an infringement of the rights set forth in article 3."

In *Yousif v Commissioner of Police for the Metropolis* [2016] EWCA Civ 364 at paras 59-60, the President of the Queen's Bench Division, Sir Brian Leveson, with whom the other members of the Court of Appeal agreed, emphasised that this observation should be seen as directed to the facts of the *Bouyid* case, which involved the culmination of a campaign of deliberate police misbehaviour. The President also warned of the potential adverse consequences of lowering the level of severity required to establish a breach of article 3. That warning is salutary. Human rights are intended to protect individuals against serious invasions of fundamental interests shared by every human being. Consistently with this idea, the European Court has repeatedly stressed the fundamental importance and absolute nature of the prohibition in article 3, stating that it "enshrines one of the most fundamental values of democratic societies": see e.g. *Assenov v Bulgaria* (1998) 28 EHRR 652, para 93; *Ramirez Sanchez v France* (2007) 45 EHRR 49, para 115; *A v United Kingdom* (2009) 49 EHRR 29, para 126; *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25, para 195; *Bouyid v Belgium* (2016) 62 EHRR 32, para 81. It would not be consistent with the nature and status of article 3 to treat any unlawful

use of force by a state agent, however minor, as a violation of the right which it protects.

Application to Mr Alseran's case

232. In *Bouyid v Belgium* the European Court also mentioned that regard must be had to the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions (para 86). In the present case the context of Mr Alseran's capture and detention was a war. That context cannot excuse cruelty or brutality but account needs to be taken of the acute stress and constant danger under which soldiers are operating in combat conditions. In that context, kicks and blows inflicted on Mr Alseran at the time of his capture may have involved more violence than was strictly necessary to detain him. But the evidence does not justify a finding that the force used was motivated by any purpose other than to prevent his escape and protect the soldiers' safety. The treatment was not prolonged and there is no evidence that it caused any injury or intense suffering. In the circumstances I reject the claim that there was a breach of article 3.

233. By contrast, the incident at Al-Seeba in which soldiers deliberately ran over the backs of prisoners clearly crossed the threshold level of severity to amount to a breach of article 3. Those assaults involved the gratuitous infliction of pain and humiliation for the amusement of those who perpetrated them. They have caused Mr Alseran deep and long-lasting feelings of anger and mental anguish and were an affront to his dignity as a human being. I find that they constituted both inhuman and degrading treatment. They also constituted a clear breach of the Geneva Conventions, which require prisoners at all times to be humanely treated: see article 13 of Geneva III and article 27 of Geneva IV.

234. Mr Alseran also complains that the conditions of his detention at Al-Seeba amounted to inhuman and/or degrading treatment which violated article 3. Had I accepted the evidence that Mr Alseran and those detained with him were kept at Al-Seeba for four or five days, sitting or lying on the dirt ground, without adequate food and with no protection against the cold at night, then I would have considered this complaint well founded. But I have found that they were in fact held at the Al-Seeba camp for no more than around 36 hours, as they were brought there in the middle of the day on 30 March and evacuated to Camp Bucca during the night of 31 March / 1 April 2003. The failure to feed the prisoners on the first day and to provide them with blankets during the night was regrettable and potentially in breach of article 20 of Geneva III, which requires that the evacuation of prisoners of war "shall always be effected humanely and in conditions similar to those for the forces of the Detaining Power". But there is no evidence to suggest that these deprivations were the result of anything other than logistical difficulties encountered in the rapid advance on Basra. In the circumstances I reject the contention that they involved a breach of article 3.

235. I will address Mr Alseran's claims that the conditions in which he was held at Camp Bucca amounted to inhuman and degrading treatment later in this judgment in conjunction with the similar claims made by MRE and KSU (see paragraphs 502–518 below).

Article 5

236. As outlined in part II, the question whether Mr Alseran's detention was consistent with article 5 of the European Convention depends, first of all, on whether there was a legal basis for it and, secondly, on whether he had an effective means of challenging his detention. Dealing first with whether Mr Alseran's detention had a legal basis, I have found in part III that the invading coalition forces had no right to capture and detain people under Iraqi law. It is common ground, however, that Mr Alseran was detained during an international armed conflict and occupation to which the Geneva Conventions applied. As discussed in part II, the decisions of the European Court in *Hassan v United Kingdom* [2014] ECHR 946 and of the UK Supreme Court in *Mohammed (No 2) v Ministry of Defence* [2017] UKSC 2, [2017] AC 821, have established that, in such a situation, international law may provide a sufficient legal basis for detention for the purposes of article 5.

237. The MOD argued that there was a legitimate basis in international law for detaining Mr Alseran either as a prisoner of war under Geneva III or as a person whose internment was necessary for imperative reasons of security under Geneva IV. Mr Alseran denied that there was any power to detain him on either basis. Resolving this dispute requires consideration of the scope of the powers to detain both combatants and non-combatants under international humanitarian law.

The power to intern prisoners of war

238. Geneva III authorises the internment of prisoners of war during an international armed conflict (article 21) until active hostilities have ceased – at which point such prisoners must be released without delay (article 118).

239. Prisoners of war are defined in article 4A of Geneva III as persons belonging to specified categories who have fallen into the power of the enemy. The principal categories are:

> "(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."

240. Although it is not explicitly stated in article 4A that members of the regular armed forces of a party to the conflict must satisfy the four conditions specified in sub-paragraph (2) in order to be recognised as prisoners of war, that is generally understood to be the intention. The four specified conditions – having a person in command, a fixed distinctive sign, carrying arms openly and observing the laws of war – are characteristics of regular armed forces which members of other militias and organised resistance movements must possess in order to be accorded equivalent status. As the influential ICRC Commentary of 1958 explains (at p.63) in relation to sub-paragraph (3):

> "These 'regular armed forces' have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1): they wear uniform, they have an organized hierarchy and they know and respect the laws and customs of war. The delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated in sub-paragraph (2) (a), (b), (c) and (d)."

Thus, in *Osman Bin Haji Mohamed Ali v Public Prosecutor* [1969] 1 AC 430 the Privy Council held that saboteurs who were wearing civilian clothes when captured were not entitled to be treated as prisoners of war under Geneva III.

241. Article 4 of Geneva III is modified by articles 43 and 44 of AP I, which make it clear that members of the armed forces of a party to an international armed conflict are combatants who are entitled to be prisoners of war if they fall into the power of an adverse Party, provided they distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.[16]

242. It was not in dispute at the trial that Mr Alseran was in fact a civilian non-combatant who did not fall within any of the categories of person specified in article 4A of Geneva III. The MOD nevertheless contended that the soldiers who captured Mr Alseran could reasonably have believed him to be a person who could be detained as a prisoner of war.

243. As indicated earlier, Mr Alseran's house was in a strategically significant location, close to the main road on the outskirts of Abu Al-Khasib and not far from where an Iraqi tank unit was based. Mr Alseran and his mother both recalled that in the days after the invasion began Iraqi soldiers from the tank unit had run away and tried to hide in the area, removing their army uniforms. Mr Alseran said that some of these soldiers were detained along with him. There was also evidence from Mr Parker that, because of the superiority of the coalition forces, a likely battle plan of Saddam Hussein was expected to involve reliance on the Fedayeen ("men of sacrifice"), a paramilitary group of irregular fighters loyal to Saddam Hussein. The Fedayeen did not wear military uniforms and adopted guerrilla tactics. The MOD argued that, against this background, there was no way of knowing for sure whether a young man

[16] There is an exception where, owing to the nature of the hostilities, an armed combatant cannot so distinguish himself: see article 44(3). But that does not apply here.

of military age found on his own in a house in the area where Mr Alseran was captured was an Iraqi soldier who had deserted, a member of the Fedayeen or (as was in fact the case with Mr Alseran) a civilian who had stayed behind when others had fled.

244. I accept this analysis of the facts, but reject the MOD's contention that Mr Alseran could reasonably have been detained as a prisoner of war. It is clear that, when Mr Alseran was captured, he was alone in bed in a civilian dwelling. He was not wearing a uniform or any distinctive sign indicating that he was combatant. Nor was he armed. In these circumstances, even if he was reasonably suspected to be a member of the Iraqi armed forces or of a militia, Mr Alseran could not have been detained as a prisoner of war. As discussed, in order to have that status, combatants must distinguish themselves as such.

245. Accordingly, there was in my view no legitimate basis on which Mr Alseran could have been detained as a prisoner of war under Geneva III.

Powers to intern civilians

246. The subject of Geneva IV is "the protection of civilian persons in time of war". The persons protected by the Convention are defined in article 4 as:

> "those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

Article 4 goes on to exclude from this definition certain categories of person, including persons protected by Geneva III (i.e. prisoners or war).

247. From the time of his capture until he was released from Camp Bucca, Mr Alseran found himself in the hands of a Party to the conflict or Occupying Power of which he was not a national. On the basis that he was not protected by Geneva III, he therefore fell within the scope of article 4 of Geneva IV and was a person protected by that Convention.

248. Article 79 of Geneva IV states:

> "The parties to the conflict shall not intern protected persons, except in accordance with the provisions of article 41, 42, 43, 68 and 78."

Article 79 makes it clear that the provisions specified in it form the only legal bases for internment of persons protected by Geneva IV in situations of international armed conflict and occupation, and that internment on any other basis is contrary to international humanitarian law.

249. Of the provisions mentioned in article 79, articles 41 to 43 of Geneva IV permit the internment or placing in assigned residence of protected persons, if the security of the detaining power makes this absolutely necessary and subject to certain procedural protections. However, articles 41 to 43 are contained in section II of part III of the

Convention, which is entitled "aliens in the territory of a party to the conflict". This title, as well as some of the substantive provisions of section II,[17] make it clear that section II applies only to the treatment by a party to the conflict of protected persons (who by definition must be of foreign nationality) in its own territory.[18] Thus, articles 41 to 43 apply only to persons present in the territory of the state which wishes to intern them and do not apply to persons in territory which is invaded or occupied by that state. The correctness of this interpretation is confirmed by many commentaries and is reflected in the MOD's Joint Doctrine Publication 1-10 on Captured Persons (CPERS) (3rd Edn, 2015), para 142(a). Although reliance was placed on articles 41 and 42 of Geneva IV in the MOD's pleaded defence to Mr Alseran's claim,[19] counsel for the MOD accepted in argument that those provisions are not applicable.[20]

250. The other permissible bases for internment listed in article 79 are articles 68 and 78. Both of these articles are contained in section III of part III of Geneva IV, which is entitled "occupied territories". Article 68 authorises the internment or simple imprisonment of protected persons who commit certain criminal offences which are solely intended to harm the occupying power. It has not been suggested that this provision was applicable in Mr Alseran's case. That leaves article 78, on which the MOD has sought to rely.

Article 78 of Geneva IV

251. Article 78 of Geneva IV states:

> "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment."

Article 78 goes on to provide for decisions regarding such internment to be made according to a regular procedure to be prescribed by the Occupying Power, which must include a right of appeal.

252. The evident difficulty which the MOD faces in seeking to rely on article 78 of Geneva IV in the present case is that Mr Alseran was detained while fighting was taking place and article 78 applies only where a party to an international armed conflict has become an occupying power. It is the MOD's own case, as pleaded in its defence to Mr Alseran's claim, that the UK became an occupying power in Iraq within the meaning of Geneva IV as from 1 May 2003 when major combat operations were

---

17 E.g. article 38 requires general continuity with the regulation of aliens in time of peace, which implies that the protected aliens are in the state's own territory; and article 39 requires protected persons who have lost their gainful employment as a result of the war to be granted the opportunity to find paid employment, which could only sensibly apply to persons in a state's own territory (since occupied territory is dealt with in section III).

18 Since nationals of neutral states who find themselves in the territory of a belligerent state and nationals of co-belligerent states are excluded from the definition of protected persons, Section II is effectively confined to enemy aliens.

19 See Re-Amended Defence, paras 36 and 45(a)(i).

20 In *Hassan v United Kingdom* [2014] ECHR 946 at para 109, it appears to have been mistakenly assumed that article 42 of Geneva IV was applicable; but this assumption did not affect the result of the case.

declared complete.[21] That was only a few days before Mr Alseran was released and therefore does not cover most of the period of his detention.

The Pictet theory

253. In their closing submissions in Mr Alseran's trial, however, counsel for the MOD advanced an argument based on what is referred to by scholars in the field as the "Pictet theory" after Jean S Pictet who first expounded the theory in the ICRC commentary on the Geneva Conventions published in 1958. A leading contemporary proponent of the theory is Professor Marco Sassòli, who has advocated it in a debate published in the International Review of the Red Cross and elsewhere.[22] The essence of the Pictet theory is that invasion and occupation are not distinct phases of an international armed conflict and that the rules of Geneva IV which relate to occupation apply as soon as troops invade foreign territory and are in contact with the civilian population there. In Pictet's words:

> "There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the [Geneva] Conventions in its dealings with the civilians it meets."[23]

254. The main impetus for the Pictet theory is the perceived need to interpret Geneva IV in a way which avoids a gap in its protection of civilians. As mentioned, the persons protected by the Convention are defined very widely: with certain specified exceptions, they comprise all those "who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals" (article 4). This language seems deliberately broad. Amongst other things, the definition of protected persons is not limited geographically in any way and would appear to embrace any person who is in the physical power of a party to the conflict wherever that person is situated.[24]

255. However, the specific provisions of the Convention focus on two classes of protected person: (1) enemy nationals (and certain other "aliens") in the national territory of a party to the conflict; and (2) all persons in "occupied territory" (apart from nationals of the occupying power and of any "co-belligerent" state[25]). This division is reflected in the structure of part III of Geneva IV, which deals with the "status and treatment of protected persons". Section I of part III contains "provisions common to the territories of the parties to the conflict and to occupied territories". Section II, as already mentioned, applies to "aliens in the territory of a party to the conflict", while

---

21 See Re-Amended Defence, para 13(b)(iii).

22 See "Is the law of occupation applicable to the invasion phase?", International Review of the Red Cross, Vol 94, No 885 (2012), pp42-50; and "The Concept and Beginning of Occupation" in Clapham, Gaeta and Sassòli, *The 1949 Geneva Conventions, A Commentary* (2015) ch 67, paras 41-51.

23 See Commentaries on the Geneva Conventions of 1949, vol IV, ICRC, Geneva, 1958, p60.

24 In the French text, which is equally authentic, the phrase corresponding to "in the hands" is "au pouvoir".

25 Article 4 excludes nationals of a co-belligerent state from the definition of protected persons provided that the state of which they are nationals has normal diplomatic relations with the state in whose hands they are.

section III applies to "occupied territories". There is no separate section that applies to persons in territory of an adverse party to the conflict when such territory is not occupied. Professor Sassòli argues that, on a systematic interpretation of Geneva IV, sections II and III are sub-divisions of section I which are intended, between them, to cover the whole ground.[26] Hence some provisions of part III apply within a belligerent state's own territory (section II); some apply in occupied territory (section III); and some are common to both (section I); but no other territory is covered.

256. The same bifurcation between a belligerent state's own territory and occupied territory can be seen elsewhere in Geneva IV. For example, it appears in article 5, which permits certain derogations. The first paragraph of article 5 addresses a situation where a protected person in the territory of a party to the conflict is suspected of or engaged in activities hostile to that state's security. It is therefore concerned with a belligerent state's own territory. The second paragraph addresses a situation involving a protected person detained in occupied territory. No other case is referred to.

257. This territorial focus on a belligerent state's own territory and on occupied territory raises the question whether, and if so how, the Convention can be interpreted as providing the protection which it seems to promise to civilians in territory that is neither owned nor occupied by the state in whose hands they find themselves. In particular, how does Geneva IV protect civilians who fall into the hands of foreign troops in territory which is invaded but not yet occupied?

258. The Pictet theory solves this problem by giving an expanded meaning to "occupation" so that any protected person who falls into the hands of an invading army is treated *ipso facto* as in occupied territory and in the hands of an occupying power. Professor Sassòli justifies this interpretation by arguing that, in order to exercise control over a person, invading soldiers must necessarily control, and can be regarded as occupying, the piece of territory where that person is situated.[27]

259. An objection to this interpretation is that some of the rules of Geneva IV applicable to "occupied territories" could not possibly be respected by invading forces before they have established the ability to exercise governmental powers in the territory in question. For example, article 50 requires the occupying power to facilitate the proper working of all institutions devoted to the care and education of children. This includes an obligation, should local institutions be inadequate for the purpose, to make arrangements for the education of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend. It seems unrealistic to require an invading army to fulfil such an obligation during the active combat phase of an armed conflict and unreasonable to interpret the Convention as imposing on state parties obligations which they cannot fulfil.

260. To this objection, defenders of the Pictet theory give two answers. One is to argue that the positive obligations of Geneva IV applicable in occupied territories are not

---

[26] See "Is the law of occupation applicable to the invasion phase?", International Review of the Red Cross, Vol 94, No 885 (2012), p43.

[27] Ibid, p45.

obligations of result but of means. They point out that some of the obligations of the occupying power set out in section III of part III – in particular, those under article 55 to ensure food and medical supplies for the population and under article 56 to maintain public health and hygiene – are qualified by the words "to the fullest extent of the means available to it". Professor Sassòli argues that similar qualifications are implicit in the language of other provisions – for example, in article 50 when it uses the terms "facilitate" and "make arrangements". Hence section III does not impose obligations which it is impossible to comply with.

261. The second answer, put forward either in the alternative or in addition to the first, is to propose a "functional" understanding of occupation whereby at a given time territory may be regarded as "occupied" for the purpose of some provisions but not others depending on the degree of control exercised by the invading forces. On this approach obligations bite as and when it becomes materially possible to comply with them.[28]

262. I do not think it necessary to discuss the merits of these arguments, because there is another objection to the Pictet theory which seems to me insurmountable. This is that it interprets "occupation" as bearing a meaning in the Geneva Conventions which is inconsistent with the established meaning of that term in international law.

Article 42 of the Hague Regulations

263. The international law of occupation was codified in section III (articles 42 to 56) of the Regulations annexed to the Hague Convention (II) of 1899 respecting the Laws and Customs of War on Land and then annexed in revised form to the Hague Convention (IV) of 1907. Article 42 of the 1907 Regulations states (in the most widely adopted English translation of the authentic French text):

> "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."

264. Although the wording of this definition is far from clear, it is generally understood to mean that, for territory to be considered occupied, foreign armed forces must have established effective control over the territory through their (non-consensual) presence which enables them to exercise authority in place of the local government.[29] This test is supported by international jurisprudence, including decisions of the US Military Tribunal in Nüremberg, the International Court of Justice, and the International Criminal Tribunal for the former Yugoslavia: see the *Hostages* case, Law Reports of Trials of War Criminals, vol VIII, UN War Crimes Commission (1949) p55; *Armed Activities on the Territory of the Congo (DRC v Uganda)*,

---

[28] Ibid; and see M Siegrist, "The Functional Beginning of Occupation", The Graduate Institute, Geneva, thesis submitted on 8 February 2010.

[29] See T Ferraro, "Determining the beginning and end of occupation under IHL", International Review of the Red Cross, Vol 94, No 885 (2012) pp133-63; P Spoerri, "The Law of Occupation" in A Clapham and P Gaeta, *The Oxford Handbook of International Law in Armed Conflict* (2014) p188; E Benvenisti, *The International Law of Occupation* (2012) pp43-51; Y Dinstein, *The International Law of Belligerent Occupation* (2009) pp42-45; D Fleck, *The Handbook of International Humanitarian Law* (2013) sections 526-7.

judgment of 19 December 2005, para 173; *Prosecutor v M Naletilić and V Martinović*, Judgment, Case No IT-98-34-T, Trial Chamber, 31 March 2003, paras 216-218. There is an ambiguity in some formulations of the test as to whether the actual exercise of authority by the invading forces is necessary or whether the ability to exercise authority is sufficient. The former interpretation would be unsatisfactory, as it would allow a state which invades territory to avoid the duties of an occupying power by declining to exercise authority within the territory. Not least for that reason, the general view appears to be that, once invading forces are present, it is their ability to exercise authority in the territory that matters and not the actual and concrete exercise of such authority.[30] As a working test, it would seem difficult to improve on the UK Manual of the Law of Armed Conflict (JSP 383, 2004 Edn), which states (at para 11.3):

> "To determine whether a state of occupation exists, it is necessary to look at the area concerned and determine whether two conditions are satisfied: first, that the former government has been rendered incapable of publicly exercising its authority in that area; and secondly, that the occupying power is in a position to substitute its own authority for that of the former government."

265. It is clear that the question whether a particular area of territory is occupied at any given time is one of fact: *R (Al-Saadoon) v Secretary of State for Defence* [2016] EWCA Civ 811, [2017] QB 1015, para 47. There is nothing which prevents occupation from being limited geographically to a very small piece of territory. Nor need it be of long duration. But a certain level of stabilisation in the situation is necessary. Thus, it is apparent that the test of occupation would not be satisfied if a patrol penetrates into enemy territory without any intention of staying there (to take Pictet's example) or if the area is one in which fighting between hostile armies is going on. Nor can it be said to follow simply from the fact that a person of enemy nationality is taken prisoner that this person is in occupied territory. Hence the Pictet theory is inconsistent with the concept of occupation established by the Hague Regulations.

The meaning of "occupation" in Geneva IV

266. This was recognised by Pictet, whose response was to argue that the term "occupation", as used in Geneva IV, has a wider meaning than it has in article 42 of the Hague Regulations. I cannot accept, however, that this is a tenable interpretation of Geneva IV.

267. The Geneva Conventions do not define the terms "occupation" or "occupied territory". But the wording of article 4 of Geneva IV, quoted earlier, appears inconsistent with the Pictet theory, as in defining persons protected by the Convention it treats the existence of an occupation as a separate requirement from the requirement that persons find themselves in the hands of an occupying power. In other words, the

---

[30] See eg ICRC Report of Expert Meeting on Occupation and Other Forms of Administration of Foreign Territory held in Geneva on 29-30 October 2009, p10.

occupation does not come about through the fact that persons find themselves in the hands of a power.

268. More importantly, when the Conventions were drafted, the test of occupation stated in the Hague Regulations of 1907 represented customary international law. That was the view in 1946 of the Nüremberg International Military Tribunal. It was argued before that Tribunal that the Hague Regulations did not apply, for example to the German occupation of Czechoslovakia, because of the "general participation" clause in article 2 of the Hague Convention of 1907, which provides that the Regulations apply only if all the belligerents are parties to the Convention. Several of the belligerents in the Second World War were not parties to the Hague Convention. The Tribunal did not regard that fact as relevant, however, on the basis that "by 1939 [the Hague Regulations] were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war": see International Military Tribunal, Judgment of 1 October 1946, pp79-80. The International Military Tribunal for the Far East expressed the same view in 1948. It has since been endorsed twice by the International Court of Justice, with specific reference to article 42: see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, para 89; and *Armed Activities on the Territory of the Congo (DRC v Uganda)*, judgment of 19 December 2005, para 172.

269. Against that background, when the Geneva Conventions state in common article 2 that they apply to "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance", the natural inference is that the term "occupation" is being used in its established and customary sense – subject only to the clarification that there can be an occupation even without a prior armed conflict. That inference is reinforced by article 31(3)(c) of the Vienna Convention on the Law of Treaties, which requires a court to take into account in interpreting a treaty "any relevant rules of international law applicable in the relations between the parties". In interpreting the Geneva Conventions, article 42 of the Hague Regulations is manifestly such a relevant rule. Nor is there anything in the *travaux préparatoires* to indicate an intention to depart from the previously established definition of occupation.[31]

270. Moreover, the text of Geneva IV positively indicates that no such departure was intended and that the intention was to build on the Hague Regulations. That is indicated by article 154 of Geneva IV, which provides that, in relations between states bound by the Hague Conventions and who are parties to Geneva IV, the latter Convention "shall be supplementary" to sections II and III of the Hague Regulations.

271. This interpretation is further supported by the judgment of the Supreme Court of India in *Rev Mons Sebastio Francisco Xavier dos Remedios Monteiro v The State of Goa*, All India Reporter, 1970 SC 329, and by the judgment of the International Court of Justice in *Armed Activities on the Territory of the Congo (DRC v Uganda)*, *supra*. In the former case the Supreme Court of India referred to article 154 of Geneva IV and

---

[31] See M Zwanenburg, "Is the law of occupation applicable to the invasion phase?", International Review of the Red Cross, Vol 94, No 885 (2012), p33; and T Ferraro, "Determining the beginning and end of an occupation under international humanitarian law", International Review of the Red Cross, Vol 94, No 885 (2012) p136.

held that, to identify the meaning of "occupation" in the Geneva Conventions, it is necessary to turn to the definition in article 42 of the Hague Regulations, since "the Regulations are the original rules and the Conventions only supplement the Regulations". In the latter case the International Court of Justice, having found that the Ugandan army was in occupation of territory in the DRC in the sense of article 42 of the Hague Regulations, took it as read that this determined whether Uganda owed the obligations of an occupying power under Geneva IV in this territory.

272. For these reasons, I think it clear that section III of part III of Geneva IV does not apply to territory in which fighting is taking place but which is not yet occupied within the meaning of article 42 of the Hague Regulations.

The scope of section I of part III

273. It does not follow, however, that there is a gap in the protection afforded to civilians by Geneva IV. As noted earlier, the object of the Convention, expressed in article 4, is to provide protection to "those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict ..., in the hands of a Party to the conflict ... of which they are not nationals". That object is achieved by reading section I of part III of Geneva IV as applicable to all such persons, wherever situated. I have mentioned that section I is entitled "provisions common to the territories of the parties to the conflict and to occupied territories". It is not necessary to interpret this description as restricted to actions done by parties to the conflict within their own national territories and in occupied territories (as suggested by Professor Sassòli). In its natural meaning the description encompasses all protected persons who are in the territory of a party to the conflict whether they are protected because they "find themselves" in the hands of that party or of an adverse party. Nor is there anything in the content of the provisions of section I to indicate that it is intended to be of narrower scope. To interpret it more narrowly would, on the other hand, defeat the object of protecting all those persons who are defined in article 4 as "persons protected by the Convention".

274. In my opinion, there is therefore no gap in the protection afforded to civilians by Geneva IV because persons who find themselves in the hands of a foreign invading force in territory which is not yet occupied have the basic protections set out in section 1 of part III. I am reinforced in this opinion by the fact that it is held by many scholars.[32]

Detention before territory is occupied

275. Within section I, the fourth paragraph at article 27 provides that:

> "the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war."

---

[32] See eg ICRC Report of Expert Meeting on Occupation and Other Forms of Administration of Foreign Territory held in Geneva on 29-30 October 2009, p10; E Benvenisti, *The International Law of Occupation* (2012) pp51-52; D Fleck, *The Handbook of International Humanitarian Law* (2013) sections 528.4, 543, 576; Nishat Nishat, "The Structure of Geneva Convention IV and the Resulting Gaps in that Convention" (2012) pp 1080-1.

Despite the broad wording of this provision, it cannot be read as authorising internment in territory which has been invaded but not yet occupied because article 79 of Geneva IV has the effect of prohibiting a party to an armed conflict from interning protected persons other than on its own territory or in occupied territory (see paragraphs 248–252 above). Nevertheless, there are good reasons why an invading force might consider it necessary to take civilians into its custody before it has established sufficient control over territory to become an occupying power: for example, to evacuate them from an area for their own safety or to detain civilians who are participating directly in hostilities or otherwise pose a threat to the security of the invading force. It would not make sense for the Convention to forbid such measures, whilst allowing them in occupied territory.

276. The solution seems to me to be that the forcible removal of people from an area and their temporary detention for this purpose do not constitute internment. That is implicit in Geneva IV, which contains separate provisions dealing with forcible transfers, deportations and evacuations of protected persons from those relating to internment (see in particular article 49). Furthermore, although the term "internment" is not defined in the Geneva Conventions, the "regulations for the treatment of internees" contained in section IV of part III of Geneva IV, as well as the ordinary meaning of the term, imply that it is a form of detention which is potentially of some significant duration. For example, article 92 requires medical inspections of internees to be made at least once a month; article 94 provides for the encouragement of intellectual, educational and recreational pursuits, sports and games amongst internees; article 98 states that all internees shall receive regular allowances, sufficient to enable them to purchase goods and articles; article 101 confers rights to present petitions and complaints with regard to the conditions of internment; and article 102 provides for the election by secret ballot every six months of a committee to represent the internees. Such provisions are incapable of application to detention of an inherently transient nature. In addition, article 83 prohibits the detaining power from setting up places of internment in areas particularly exposed to the dangers of war. It is consistent with that principle that internment should not be permitted in territory over which an invading army has not yet established sufficient control for the territory to be considered occupied.

277. Thus, although Geneva IV does not authorise internment in territory which has been invaded but not yet occupied, I see no reason why the measures authorised by article 27 should not include taking people into custody, where it is necessary to do so for their own safety or because they pose a threat to security, and transporting them to occupied territory. Once in occupied territory, they may be interned if the requirements of article 78 are met.

The evidential standard

278. No authority was cited which discusses what evidence that a person poses a risk to security is needed to justify detaining the person either at the point of capture or when deciding whether to intern them. It seems to me, however, that the standard of evidence required must take account of the context in which the relevant decision has to be made. A soldier who has to decide whether to capture an individual found in a combat zone cannot afford to take risks which may imperil the safety of his own side's forces. Nor will the soldier often have the leisure to interrogate the individual (nor the ability to do so if they do not speak the same language). Soldiers in this

situation must in principle be entitled to take a precautionary approach. If there is reason to suspect that the individual, although not wearing military uniform, might nevertheless be an enemy combatant or might otherwise present a security risk if left in the location where they are found, then that must, in my view, be a sufficient basis for exercising the power of detention provided by article 27 of Geneva IV.

279. I draw support for this conclusion from *Hassan v United Kingdom* [2014] ECHR 946, mentioned above. In that case, the European Court decided (at paras 109-110) that Mr Hassan's capture and initial detention were consistent with the powers available to the UK under the Geneva Conventions on the basis that:

> "the United Kingdom authorities had reason to believe that he might be a person who could be detained as a prisoner of war or whose internment was necessary for imperative reasons of security ..."

This formulation confirms that at the point of capture a reasonable suspicion is enough.

280. I would also repeat the admonition that I expressed in *R (Al-Saadoon) v Secretary of State for Defence* [2015] EWHC 715 (Admin), [2017] QB 1015, para 111, that courts should recognise their lack of institutional competence to make fine judgments about decisions taken on the battlefield or when seeking to maintain security in dangerous and hostile conditions and should, accordingly, afford a wide latitude to those who were on the ground when assessing the legality of their actions.

Application to Mr Alseran's case

281. It is implicit in the test of occupation in international law discussed above that, when a country is invaded, part of its territory may be considered occupied at any given time while other parts are not. It is evident that US and UK forces were in a position to exercise authority over areas of territory in Iraq from very soon after the invasion began. Thus, I think it clear that the area where Camp Bucca was situated was already occupied territory when the camp was set up. On the other hand, it cannot on the evidence be said that the area in which Mr Alseran lived was occupied territory within the meaning of article 42 of the Hague Regulations and section III of part III of Geneva IV at the time when he was captured.

282. In the circumstances mentioned at paragraph 243 above, I accept that it was necessary for security reasons to clear the houses in the area where Mr Alseran lived and that, to do this, it was necessary to detain men of military age found alone in the houses, even if they were not carrying arms openly or wearing a uniform. Those men included Mr Alseran. Accordingly, on the basis discussed, there was in my view power under article 27 of Geneva IV to detain Mr Alseran and remove him from the war zone to the internment facility which had been established in territory that was already occupied by coalition forces.

Screening at Camp Bucca

283. UK doctrine set out in JWP1-10, "Prisoners of War Handling" (March 2001 edition), and repeated in instructions issued before the invasion, emphasised the importance of

documentation of prisoners. At the time of capture or as soon as possible afterwards, a capture tag was meant to be completed for each prisoner recording the date, time and place of capture, the capture unit and the circumstances of capture. A second key document was a capture report which was also required to be completed by the capturing unit and retained by the soldiers who escorted the prisoner until their arrival at the prisoner of war camp. However, according to the draft report dated 7 May 2003 prepared by Major Christie, most prisoners arrived at Camp Bucca without any documentation indicating where they had come from, who had captured them and in what circumstances the capture occurred. Major Christie estimated that capture tags were present in only perhaps 10% of cases, and that most of these tags were left blank or filled in with too little information to be useful.

284. In addition to the problems caused by lack of documentation, large numbers of prisoners arrived at Camp Bucca in civilian clothing and claiming to be civilians. According to Major Christie's draft report, the proportion of prisoners who claimed to be civilians was approximately one third of the total. The Commanding Officer of Camp Bucca, in his evidence to the Baha Mousa inquiry, stated that because many combatants were not wearing uniforms, they were difficult to distinguish from civilians. That said, the prisoners arriving at the camp included old men and young boys, who to his mind were highly unlikely to be combatants. Major Frend, an army lawyer who also gave evidence to the Baha Mousa inquiry, said that it soon became clear that many of those being brought into Camp Bucca were not prisoners of war but were just in the wrong place at the wrong time as troops pushed forward.

285. When they were registered, detainees were classified either as prisoners of war or as civilians. Mr Alseran, Mr Waheed, Mr Al-Aidan and Mr Mhalhal were all classified as civilians. However, as explained by Major Christie in evidence given at the second trial, the registration process was a purely administrative one: the personnel who entered the details of detainees on the AP3 Ryan system had no authority to determine their status and would simply have recorded what the individual told them. Thus, if someone arrived in civilian clothing and claimed to be a civilian, they would be registered as a "civilian".

286. It was quickly recognised that a mechanism was needed to screen detainees who claimed civilian status and decide whether they should be kept in detention or released. The procedure devised was to conduct informal hearings by panels who interviewed detainees and sought to determine their status from their answers to questions and any other available information. The panels generally consisted of an army lawyer, an intelligence officer and another officer or warrant officer. There were large numbers of detainees who needed to be screened and efforts were made to do so chronologically based on their date of arrival at Camp Bucca.

287. The approach followed by the panels was set out in a statement of "screening methodology" which was annexed to the order issued from the HQ of the UK Joint Forces Logistics Component on 27 April 2003 entitled "FRAGO 001/03 to OPO 04/03 – Release and Repatriation of Prisoners of War (PWs)". This stated that:

> "Screening interviews will be conducted with all those claiming civilian status to determine if they are innocent civilians (on the basis of their account and any other information held in respect of the individual). This is a 2 stage process:

a. Determine whether they are civilian;

b. Determine if they are innocent (i.e. a senior non-mil[itary] Ba'ath party member would not be released as he could potentially be retained as an internee)."

Although evidence referred to earlier indicates that the process was shortly afterwards relaxed, I think it clear that the statement of the screening methodology annexed to the order of 27 April 2003 set out the approach which was being followed when the order was issued and which had been followed since the screening process was devised.

The legal requirements

288. There are certain situations in which the Geneva Conventions explicitly require the legal basis for internment to be determined by a competent tribunal. In relation to combatants, article 5 of Geneva III states:

> "Should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy belong to any of the categories enumerated in article 4 [i.e. prisoners of war], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

To similar effect, article 45(1) of AP I provides:

> "A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status ... Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal."

The significance of these provisions is twofold. First, in the case of a detainee who has committed a belligerent act or taken part in hostilities, they require any doubt about whether the detainee is entitled to prisoner of war status to be determined by a competent tribunal. Second, they provide that such a person is entitled to the protections conferred by that status until the determination has been made.

289. Detainees who are not prisoners of war are entitled under Geneva IV to have a decision to intern them reviewed by a competent body. Thus, the second paragraph of article 78 Geneva IV – which, as discussed above, applies to the internment of protected persons in occupied territory – states:

> "Decisions regarding … internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This

> procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power."

Article 43 of Geneva IV makes similar provision for the other situation in which internment of persons protected by Geneva IV is in principle permitted – namely in a state's own territory.

290. These provisions do not cover the whole field. In particular, there is no express requirement in the Geneva Conventions or Additional Protocols for any doubt about whether a person is a combatant (who may or may not be entitled to prisoner of war status under Geneva III) or a non-combatant protected by Geneva IV to be determined by a competent tribunal. As discussed in part II of this judgment, however, it is now established by the decision of the European Court in *Hassan v United Kingdom* [2014] ECHR 946 and the decision of the Supreme Court in *Mohammed (No 2) v Ministry of Defence* [2017] UKSC 2, [2017] AC 821, that the duty of review imposed by articles 43 and 78 of Geneva IV represents a minimum standard which must be met in all cases in the context of an armed conflict in order to comply with article 5 of the European Convention. As further established by those cases, this minimum standard requires: (1) an initial review shortly after the person is detained, followed by further reviews at frequent intervals; and (2) that the reviews should be conducted by an impartial body in accordance with a fair procedure.

291. Again, no authority was cited which discusses the standard of evidence required on such a review to justify internment. As one commentator has observed:

> "An unresolved issue is the evidentiary standard to be applied in the initial challenge to detention. Clear and convincing evidence? A preponderance, or a mere 'reason to suspect'? There is no agreed upon standard."

See Gary D Solis, *The Law of Armed Conflict* (2nd Edn, 2016), para 22.6.2. That said, state practice in relation to determinations of prisoner of war status under article 5 of Geneva III appears to support a balance of probability test: see Canada, Prisoner of War Status Determination Regulations, SOR/91-134, article 13(g)(i); US Army Regulation 190-8 (1997), section 1.6(e)(9).[33] Such a test also seems appropriate in principle when the context is not a decision made at the point of arrest or capture but a determination by a tribunal made after the individual concerned has been detained and taken to a place of internment.

Adequacy of the screening process

292. The claimants have criticised the screening process which was put in place at Camp Bucca and argued that it failed to satisfy the minimum standard of fairness required

[33] See also Y Naqvi, "Doubtful Prisoner of War Status", International Review of the Red Cross, Vol 84, No 847 (2002), p571; M-L Tougas, "Determination of prisoner of war status" in Clapham, Gaeta and Sassòli, *The 1949 Geneva Conventions, A Commentary* (2015) ch 64, para 58.

by international humanitarian law and article 5 of the European Convention. Any consideration of the adequacy of the process must, however, take into account the context in which the determinations had to be made. That context was that, in the first days and weeks after the invasion of Iraq began, several thousand prisoners were taken, many of whom (as already mentioned) claimed to be civilians. A report of a visit to Camp Bucca by Colonel Mercer and others on 19 and 20 April 2003 noted that, of 2,200 "UK captured PWs", about 900 claimed to be civilians and were having to be screened. This problem had not been encountered in previous conflicts, such as the Gulf War, and had not been foreseen. The problem was compounded by the fact that, as mentioned earlier, prisoners typically arrived at Camp Bucca with little or no documentation. Nor was it feasible to carry out investigations and collect evidence within a reasonable timescale in a country where law and order had broken down.

293. In these circumstances the system that was quickly implemented of convening panels to interview detainees and make the best determination they could based on answers to questions and any other evidence available seems to me to have been a practical and fair one. It had the advantages of speed and simplicity. It also gave the detainee an opportunity to be heard and to address any matters which appeared to justify their detention. It is true that the panels were composed entirely of soldiers (albeit that one member was an army lawyer). In the *Mohammed (No 2)* case a majority of the Supreme Court held that the system for reviewing detention in Afghanistan failed for this reason to provide sufficient guarantees of impartiality. However, Lord Sumption (who gave the leading judgment) accepted that "it may be unrealistic to require military detention in a war zone to be reviewed by a body independent of the army" (para 105). In my view, that was the position during the invasion and occupation periods of the conflict in Iraq. Having heard and read in the course of these trials extensive evidence about the conditions and logistical difficulties encountered by UK forces during those periods, I am satisfied that to have sought to impose such a requirement would not have been realistic – particularly given the numbers of detainees involved.

294. With regard to the timing of the process, the requirement to hold the first review "shortly after the person is taken into detention" and without "undue delay" – as it was expressed in the *Hassan* case (at para 106) – has some inherent flexibility which can take account of circumstances such as the number of detainees needing to be processed. I note that in the *Hassan* case itself the applicant's brother was released nine days after he was captured and the European Court did not find that the process of screening him and then arranging his release had involved undue delay. But equally there must come a point at which detaining a prisoner without assessing whether there is a lawful basis for doing so renders the detention arbitrary whatever the extenuating reasons for the delay. It is hard to say exactly where that point is. But I draw some guidance from the ICRC Commentary on article 75(3) of Additional Protocol I, which discusses the similar requirement to inform a person who is detained "promptly" of the reasons for his detention. In the view of the ICRC, "it is difficult to determine a precise time limit, but ten days would seem the maximum period." A period of ten days from arrival at the camp likewise seems to me a reasonable maximum time limit to apply to the reviews of internment at Camp Bucca.

295. No records have been found of the dates when Mr Alseran and the other witnesses who were detained with him were questioned. On the basis of their recollections,

however, it appears that Mr Alseran, Mr Waheed and Mr Mhalhal were interviewed on at least two occasions. Mr Alseran's recollection that his first interview took place around ten days after his arrival at Camp Bucca cannot by itself be treated as reliable. But the likelihood that he was interviewed within that timescale is supported by the fact that Hasan Al-Aidan, who was detained at the same time as him, was – as I have found – released on 7 April 2003, and therefore after six days at Camp Bucca.

296. I conclude that on the balance of probability a review of Mr Alseran's internment took place with sufficient promptness to comply with article 5(4).

The flaw in the screening process

297. Nevertheless, there was, in my opinion, a flaw in the screening process. The flaw arose from a misreading or mistaken application of article 5 of Geneva III (quoted at paragraph 288 above). The entire screening methodology was based on this error.

298. As mentioned earlier, the first stage of the process was to determine if the individual claiming civilian status was in fact a civilian. The approach taken at this stage, however, was not simply to decide this question on the available evidence but to decide whether, on all the evidence available to the interviewing panel, there was any doubt about whether the individual was a civilian. If there was thought to be a doubt, the policy was to keep the individual in detention until such time as a formal tribunal hearing could be convened to resolve the question. As summarised in Major Christie's draft report dated 7 May 2003:

> "Where there was a doubt as to the individual's account he was retained pending further investigation and a formal Art 5 tribunal if necessary. If there was no reason to doubt the account the individual was accepted as being a civilian and duly released."

299. This approach was set out in the statement of "screening methodology" annexed to the order dated 27 April 2003, referred to above. Stage 1 of the process was as follows:

> "On all the evidence available to the interviewing panel, they must determine if there is any doubt as to the status of the individual. If there is a doubt then the UK is bound to determine that doubt in accordance with Art 5 Geneva III. If there is no reason to doubt the claim of the individual then there is no requirement to hold a formal tribunal.
>
> There are 3 possible determinations:
>
> a. The individual is a PW – RETAIN
>
> b. There is doubt as to the status of the individual – RETAIN FOR POSS A5
>
> c. There is no reason to doubt the individual's claim as a civilian – GO TO STAGE 2."

Stage 2 involved determining whether there were reasonable grounds to suspect that the individual was a security risk or a criminal. If there were no such grounds, the individual was to be released.

300. The rationale for the test applied at the first stage of the process has been explained by the senior army legal officer, Lieutenant Colonel Mercer (now the Reverend Mercer) in a later essay:

> "In accordance with the wording of article 5, if the panel had *any doubt* as to the status of the individual, they retained him as a POW. The status of POW, and the privileges it conferred, could only be relinquished if there was *no* doubt that the individual was a civilian. The rationale was that POW status was protected under international law and could not be lightly relinquished." [emphasis in original] [34]

301. With respect to the Reverend Mercer, it is, I think, apparent that there is something wrong with this rationale. It would have been difficult to explain to a detainee at Camp Bucca who was interviewed by a screening panel that, because the panel had a doubt about whether he was indeed a civilian, he was not going to be released since he could not be allowed to relinquish the privilege of being imprisoned regardless of whether he posed any security risk. It seems to me that what went wrong was to overlook the premise which must be satisfied before the presumption in article 5 comes into play. To recap, the second paragraph of article 5 begins:

> "Should any doubt arise as to whether persons *having committed a belligerent act* ... belong to any of the categories enumerated in article 4, ..." [emphasis added]

It is only, therefore, where a person has committed a belligerent act that the presumption in article 5 operates in case of doubt about the person's status. Similarly, article 45(1) of AP I begins:

> "A person *who takes part in hostilities* and falls into the power of an adverse Party shall be presumed to be a prisoner of war …" [emphasis added]

302. The treaties do not define a "belligerent act" nor what constitutes taking part in hostilities. Some assistance is provided by interpretive guidance published by the ICRC in 2009 following a series of expert meetings on the notion of direct participation in hostilities under international humanitarian law. This is interpreted as requiring a specific act which meets three cumulative criteria: (i) the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); (ii) there must be a direct causal link between the act and the harm likely to result either from that act, or from a

---

[34] Mercer, "The future of Article 5 tribunals in light of the experiences in the Iraq War 2003" in Contemporary Challenges to the Laws of War – Essays in Honour of Peter Rowe (Cambridge University Press (2014), p156.

coordinated military operation of which that act constitutes an integral part (direct causation); and (iii) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus). It is arguable that, as article 45(1) of AP I refers only to participation and not to "direct" participation in hostilities, the requirement of a direct causal link between the act and the likely harm is not applicable. But it seems to me that on any reasonable view the notion of taking part in hostilities must involve doing an act which is likely and intended to cause harm of the kind described in this guidance.

303. Such an act, if done by a non-combatant who does not have the right to participate directly in hostilities, could in principle be treated as a criminal offence for which such a person when detained could be prosecuted by the detaining power. By contrast, under customary international law a combatant entitled to prisoner of war status has immunity from such prosecution (see also article 43(2) of AP I). The commission of a belligerent act would in any event be likely to justify the individual's internment for imperative reasons of security under article 78 of Geneva IV, if the individual was not classified as a prisoner of war. There is therefore a benefit, where a person has participated directly in hostilities, in being treated as a prisoner of war in case of doubt about the person's status.

304. If article 5 of Geneva III had been properly applied, the first question for the interviewing panel should therefore have been to consider whether there was evidence that the individual had committed a belligerent act. If the answer was "yes", it would have been right for the panel to proceed in accordance with the guidance given. But if the answer was "no", keeping the individual in detention could only be justified if there was either (a) positive reason to believe that the individual was a combatant or (b) other evidence that the person's internment was necessary for imperative reasons of security.

305. There is a second, practical reason why the reliance placed in the screening methodology on article 5 of Geneva III was flawed. The presumption under article 5 in favour of treating an individual as a prisoner of war applies only "until such time as their status has been determined by a competent tribunal". Yet the only form of "competent tribunal" that was ever established by the MOD for individuals captured during the invasion of Iraq was the system of screening panels. When the system was devised, the intention was that, where a panel had a doubt about the status of an individual, their status would be determined by a full army board of inquiry at which evidence would be adduced. Thus, the screening panels were intended only to make an initial assessment pending a fuller review. (For this reason they were referred to at the time by some of those involved as "article 4½" tribunals.) However, no boards of inquiry were ever held. The reason was that the logistical difficulties involved in investigating cases and collecting evidence proved insuperable. The difficulties are described in the statement of screening methodology annexed to the order dated 27 April 2003 itself:

> "It should be noted that the Service Police Investigation Team are currently working on 80 'retained' cases. These cases are proving extremely difficult to investigate due to a lack of any paperwork relating to the individual PW and difficulties in making enquiries in the home area claimed by the individual.

> Basra is under UK control, however, it contains a number of 'out of bounds' (OOB) areas and without detailed local knowledge (which may not be available) the 'door to door' investigation of the cases may … be impossible."

306. In his later essay, the Reverend Mercer has elaborated on these difficulties:

> "… even where the identity of a prisoner had been established, this was only the start of the problems. Depending on the account given, in order to investigate the claim the investigators would normally be required to travel to interview witnesses or organisations (such as an employer or records office). There was the primary problem of language and the lack of translators. Each investigator required not only an interpreter but an interpreter who could be trusted. Secondly, any investigation was potentially hazardous. It could take the military police to a remote location where there might be a danger of ambush or kidnap and they would therefore need full security in order to carry out the investigation. Those who have visited Basra know that there are parts of Basra you should not visit for long, and certainly not without proper security. Alternatively, it might be the wrong or a false address or indeed the witness might not agree to speak for fear of reprisal. There was also the possibility of revenge against a family given the ignominy of capture. Added to this was the geographical spread of Iraqi forces, and those captured reflected this trend. Many of Saddam's forces in the south of Iraq were drawn from the north of Iraq. … Iraq is larger than France and, given the distances involved and the security problems, it was almost impossible to travel from the south to the north of Iraq. In such circumstances, it is hard to envisage how any such claims might be properly investigated at all."[35]

307. The result was that those prisoners whose status was considered by a panel to be in doubt did not have an effective opportunity to challenge their detention as required by article 5. In their case there was no determination of the question whether their detention had a lawful basis. Instead, they were kept in detention on the strength of an assessment that their detention might have a lawful basis pending a determination which never took place. Such detention was manifestly arbitrary.

Article 50 of AP I

308. I would add for completeness that article 50 of AP I, on which the claimants relied, is not in my view relevant in this context. Article 50 defines a civilian as any person who does not belong to one of the categories referred to in article 4A(1), (2), (3) and (6) of Geneva III and article 43 of AP I. It then further provides:

---

35 Mercer, "The future of Article 5 tribunals in light of the experiences in the Iraq War 2003" in Contemporary Challenges to the Laws of War – Essays in Honour of Peter Rowe (Cambridge University Press (2014), p154-5.

> "In case of doubt whether a person is a civilian, that person shall be considered to be civilian."[36]

Counsel for the claimants argued that the MOD's screening policy was inconsistent with this provision.

309. The chief significance under international humanitarian law of being considered to be a civilian is that civilians are protected against direct attack. Thus, the purpose of article 50 of AP I is to indicate that, in case of doubt whether a person can be targeted, the assumption should be made that the person is entitled to protection. Article 50 is not intended to be used to resolve doubt about whether a person who falls into the hands of an adverse party to the conflict is a prisoner of war.[37] If that were the case, there could potentially be a direct contradiction, where the person has taken part in hostilities, between articles 50 and 45(1) of AP I (and with article 5 of Geneva III). Such a contradiction does not arise because being a civilian is not the obverse of being a prisoner of war. (As illustrated by the cases of MRE and KSU, considered below, a person can be both.)

The status of Mr Alseran

310. If Mr Alseran's status had been determined by a panel applying the correct test, a court would be slow to differ from the panel's conclusion – particularly when considering the matter many years after the assessment was made without detailed knowledge of the information available to the panel. For the reasons given, however, the screening panel which, as I have found, interviewed Mr Alseran within ten days of his arrival at Camp Bucca and decided not to authorise his release adopted a flawed approach and applied an incorrect test. The same would have been the case if, as is possible, Mr Alseran was questioned on any further occasion prior to 7 May 2003.

311. I have found (at paragraphs 225–226 above) that, by the time of Mr Alseran's release on that date, the UK had changed its approach and had decided to release all those claiming civilian status unless there was evidence that they were a security threat or had committed a criminal offence. This may account for why a different decision was reached at that time not only for Mr Alseran but also for Mr Waheed and Mr Mhalhal, which resulted in their release.

312. I do not doubt that if, on the first occasion when Mr Alseran was questioned, the panel had applied the correct test and had asked itself whether he was (a) an enemy combatant or (b) a non-combatant who posed a threat to security, the panel would have concluded that there was no evidence that he fell into either category and he should therefore immediately be released. As already discussed, Mr Alseran was captured at night while in bed in a domestic dwelling which was in fact his own home. He was not armed and was not wearing a uniform. Although there were reasonable grounds for suspicion at the time of his capture, there was no evidence that he was a member of the Iraqi armed forces or of any militia. (In his evidence one of

---

[36] On ratifying AP I, the UK recorded its understanding that this presumption does not override the commander's duty to protect the safety of troops under their command or to preserve their military situation, in conformity with other provisions of AP I: see Reservations and Declarations dated 28 January 1998, para h.

[37] See the ICRC Commentary of 1987 on AP I, para 1920; and the Official Records of the Diplomatic Conference, Part XV, p239, CDDH/50/Rev 1, para 39.

his complaints was that he had in his wallet a card which showed that he had completed his national service and therefore confirmed that he was not a member of the Iraqi army.) Nor was there any evidence that he had committed any belligerent act or taken part in hostilities. Nor did he claim or appear to be entitled to the status of prisoner of war. In these circumstances there was no basis on which Mr Alseran could properly have been interned as a prisoner of war. Equally, there were no facts which could be said to make it necessary to intern Mr Alseran for imperative reasons of security and there is no evidence to suggest that any such reasons were positively believed to exist at the time of his screening interviews.

Conclusion

313. I have found that under international humanitarian law it was lawful for the advancing British forces to remove Mr Alseran forcibly from his family home and to detain him, but that there was no lawful basis for his internment at Camp Bucca. Had the correct legal test been applied, he would probably have been cleared for release when his detention was first reviewed. I have found that the first review should have taken place, and probably did take place, within ten days of his admission to the camp. I conclude that his detention between 10 April 2003 and the date of his release from Camp Bucca on 7 May 2003 – a period of 27 days – was arbitrary and violated article 5 of the European Convention.

Mr Alseran's Iraqi law claims

314. I found in part III that the coalition forces who invaded Iraq did not have any right under Iraqi law to detain people. The argument to the contrary put forward by the MOD and its expert on Iraqi law, Professor Hamoudi, depended on the contention that the Geneva Conventions formed part of Iraqi domestic law, but that contention was not made out. It follows that under Iraqi law the capture and detention of Mr Alseran by UK forces was unlawful and rendered the MOD liable to pay him compensation under article 204 of the Iraqi Civil Code.

Crown act of state

315. I explained in part II, however, that the enforceability of such a claim in the English courts is limited by the doctrine of Crown act of state. As has now been authoritatively established by the decision of the Supreme Court in *Mohammed v Ministry of Defence* [2017] UKSC 1, [2017] AC 649, the essential elements of a Crown act of state are: (i) an exercise of sovereign power, inherently governmental in nature; (ii) done outside the United Kingdom; (iii) with the prior authority or subsequent ratification of the Crown; and (iv) in the conduct of the Crown's relations with other states or their subjects (at least where this conduct involves a military operation). Where those elements are present, the court is precluded from passing judgment on the claim.

316. The detention of Mr Alseran was undoubtedly an exercise of sovereign power, inherently governmental in nature, done outside the United Kingdom in the conduct of a military operation. The only question is whether it was authorised by the Crown. To answer that question, it is necessary to determine the scope of the authority to capture and detain people conferred by the Crown on the UK forces who took part in the invasion of Iraq (Operation Telic). I have held in part II at paragraphs 62–77 that

it is also a requirement of the doctrine that the authority relied on was a lawful exercise of the Crown's powers.

Scope of the authority to detain

317. The MOD's Joint Warfare Publication 1-10 on Prisoners of War Handling, March 2001 edition, which was the main doctrine applicable at the time, did not deal directly with the circumstances in which the UK's armed forces were authorised to capture and detain prisoners during an international armed conflict. The publication made it clear, however, that the capture, handling and treatment of prisoners had to be conducted in accordance with the UK's international obligations contained in the Geneva Conventions and Additional Protocols. This was spelt out in a guidance document on prisoner of war handling entitled "PJHQ J1 Deployed Ops Instruction Prisoner of War (PW) Handling (DOI 005)", issued on 27 January 2003. The introduction stated:

> "1. All operations must be planned and conducted within the constraints of the Law of Armed Conflict (LOAC), which means commanders at all levels must know exactly what their responsibilities for Prisoner of War (PW) handling are. This plan provides guidance to Component Commanders and his subordinates on Prisoner of War (PW) handling and has been constructed using the policy laid down at Reference A." [Reference A was JWP 1-10]

318. The authorisation for military operations in Iraq is found in an executive directive issued by the Chief of Defence Staff (CDS OP TELIC Directive Edition 2) dated 18 March 2003. In respect of the conduct of operations, this directive stated:

> "**Law of Armed Conflict.** All military operations by UK forces and from UK territory are to be conducted in accordance with the UK's obligations under Law of Armed Conflict (also known as international humanitarian law) and UK national law. Further guidance on these legal obligations is contained in Annexes B and H,[38] and legal advice will be available at all times when required."

319. The same language regarding the conduct of operations was used in a Mission Directive dated 19 March 2003 issued by the Chief of Joint Operations, Lieutenant General Reith, to the National Contingent Commander, Air Marshall Burridge. In a section headed "Coordinating Instructions", the Mission Directive also included the following provision regarding prisoners of war and detainees:

> "25. PW and Detainees. The processing of PWs and detainees is to be in accord with the provisions of the Law of Armed Conflict. You have a legal liability to acquaint yourself with the Geneva Conventions and Protocols and you are responsible for ensuring that all members of UK contingents

[38] Annexes B and H contained, respectively, Rules of Engagement and rules dealing with targeting.

> and components comply with them. Any PW and detainee handling by UK forces is to be conducted strictly in accordance with the provisions of JWP 1-10."

320. Authority and instructions for Operation Telic were transmitted down the chain of command in a series of further directives and orders. At the next level down, the National Contingent Commander issued a directive dated 21 February 2003 to commanders who included the commanders of the air, land and maritime contingents. Broadly, this directive required commanders to ensure that operations of all UK assigned forces were in accordance with both international humanitarian law and domestic law. In relation to detention, the directive stated:

> "PW and Detainees. You have a legal liability to acquaint yourself with the Geneva Conventions and the First Additional Protocol in relation to the taking and handling of PWs (your Legal Advisor, or NCHQ Legal Advisor will provide detailed advice), and you are responsible for ensuring that all members of UK Contingents and Components involved in PW and Detainee handling comply with the Third Geneva Convention and [are] guided by the provisions of JWP 1-10 'Prisoner of War Handling'."

321. The main operation order covering the early stages of the warfighting was issued by the commanding officer of the 1st (UK) Armoured Division, General Robin Brims, and was entitled Base OpO 001/03 (3rd edition) dated 15 February 2003. This order covered operations on the Al Faw peninsula, the seizure of Umm Qasr, the relief in place of the US 1st Marine Division and the subsequent expansion of battlespace as US forces moved north. The order contained two annexes relevant to prisoner handling. The first was Annex R, the Legal Annex, which (amongst other things) reiterated the obligation to comply with the Law of Armed Conflict. The second, Annex W, contained more specific directions for dealing with prisoners of war in accordance with Geneva III.

322. Further operational guidance on prisoner of war handling was contained in 1 UK Armd Div Op Directive 010 dated 4 March 2003. The introduction to this directive emphasised the correct handling of prisoners and commanders' legal responsibilities and included the following:

> "2. The method of PW handling is mandated by the [Geneva Conventions] and monitored by the International Commission for the Red Cross (ICRC). A capturing force effectively takes ownership of its PW and is responsible for their protection, shelter, feeding, med and welfare needs. All commanders are to ensure that those under their command are aware of their legal responsibilities under the GC."

323. On behalf of the MOD, Mr Eadie QC submitted that the many references in the directives and orders issued for Operation Telic to the law of armed conflict / international humanitarian law, including the clear instructions I have quoted that all military operations by UK forces, specifically including detention operations, were to be conducted in accordance with the Geneva Conventions, should be read as

essentially hortatory and not as limiting the authority given to the soldiers carrying out the operations. He submitted that the effect of the authorisation given for military operations in Iraq was that UK soldiers conducting front line operations were authorised to capture and detain anyone they considered it necessary to capture and detain in order to achieve the military aim of the operation irrespective of whether such capture and detention was permitted by international humanitarian law. Alternatively, he argued that it was sufficient that those conducting front line operations honestly believed that they were acting in accordance with international humanitarian law, and that it could not have been intended that, should it later be held by a court that there was no lawful basis under international humanitarian law for detaining an individual, this would mean that the soldiers who detained him lacked authority from the Crown to do so.

324. I cannot see any merit in these arguments. There is nothing in the wording of the relevant directives and orders which provides any support for them. Indeed, it is difficult to conceive how the directives and orders authorising Operation Telic could have articulated any more clearly the instruction that all military operations, including detention operations, must be conducted in accordance with international humanitarian law. The statements to this effect could not reasonably be understood as mere words of ambition or encouragement. They are couched in the language of command and obligation and were plainly intended to limit the authority of those conducting operations on the ground. Nor did the relevant directives and orders say anything to suggest that British soldiers were authorised to act in a way which they believed was in accordance with international humanitarian law even if in fact it was not. To the contrary, emphasis was placed on the need for commanders to acquaint themselves with the Geneva Conventions and Additional Protocols, taking legal advice if necessary, to ensure accurate compliance.

325. There is nothing surprising in this. It is only to be expected that the UK government and military authorities would seek to ensure compliance with the UK's obligations under international law as well as with obligations under domestic law in the conduct of military operations. As discussed above, the Geneva Conventions and Additional Protocols specify and limit the circumstances in which during an international armed conflict or period of occupation a party to the conflict or occupying power is permitted to detain people, whether as prisoners of war or as civilian internees or as criminal detainees. It would be most surprising if the MOD had authorised British soldiers to detain people in circumstances where such detention was not permitted by international law, and equally surprising if the MOD had authorised British soldiers to detain people provided only that the soldiers thought that international humanitarian law permitted such detention even though on a proper understanding it did not.

326. The main plank of the MOD's argument was that soldiers in combat conditions cannot be expected to undertake a legal analysis in deciding whether to detain someone whose status is unclear and must be entitled to adopt a precautionary approach. Some support for this can be found in the guidance on prisoner of war handling given in the "Deployed Ops Instruction" referred to at paragraph 317 above. After providing a definition derived from Geneva III and AP I of personnel who fall into the category of prisoner of war, this stated:

> "If captors are unsure whether personnel fall into the above definitions then they should be treated as PW and their status

> will be determined later by the Prisoner of War Handling Organisation (PWHO)."

I do not read this, however, or anything else said in any of the relevant directives, guidance documents and orders, as purporting to authorise detention in circumstances where detention was not permitted by international humanitarian law. Rather, I interpret this and other statements as intended to give guidance that was consistent with international humanitarian law (including article 5 of Geneva III discussed earlier). Furthermore, in so far as the guidance authorised soldiers at the point of capture to take a precautionary approach, it was in my opinion based on a correct understanding of international humanitarian law (see paragraphs 278–280 above).

327. I conclude that the relevant authority from the Crown during the invasion and military occupation of Iraq authorised detention only when and to the extent that it was permitted by international humanitarian law.

328. Even if the government had purported to authorise British forces to detain people in circumstances where this was contrary to international humanitarian law, such detention would as already discussed have been incompatible with article 5 of the European Convention and thus unlawful under the Human Rights Act. In accordance with my conclusion in part II (see paragraph 76 above), the grant of such authority would have been invalid as it would have involved an unlawful exercise of executive power.

Was Mr Alseran's detention authorised?

329. I have found that the capture and initial detention of Mr Alseran was authorised under Geneva IV. It follows that these acts were within the scope of what was authorised by the Crown and were therefore acts of state which cannot give rise to liability in tort.

330. The position in relation to Mr Alseran's subsequent detention at Camp Bucca is less straightforward. I have found that there was no lawful basis for interning Mr Alseran under international humanitarian law. But I have also found that Mr Alseran's continued detention at Camp Bucca from 10 April 2003 until he was released on 7 May 2003 was the result of decisions taken by assessment panels. As described earlier, the system of review through assessment panels and the process followed by the panels was established on the advice of army legal officers and later embodied in an order dated 27 April 2003 issued from the HQ of the UK Joint Forces Logistics Component. On the face of things, therefore, decisions made by such panels following the approved "screening methodology" were made on the authority of the Crown.

331. I have found, however, that the decision process followed by the panels did not comply with international humanitarian law (see paragraphs 297–307 above). The upshot of my analysis is that, when such non-compliance led to decisions to keep individuals in detention, as it did in Mr Alseran's case, the consequent detention of those individuals in violation of international humanitarian law (and hence also of article 5 of the European Convention) was not within the scope of the authority conferred by the Crown and was therefore not a Crown act of state. Accordingly, Mr Alseran had a right to sue the MOD for damages in tort as well as under the Human

Rights Act in respect of his detention at Camp Bucca between 10 April and 7 May 2003.

Ill-treatment claims

332. My conclusion that Mr Alseran's capture and initial detention was authorised by the Crown necessarily extends to the force used to capture and detain him, unless such force went beyond the level which British soldiers were authorised to use. It has not been shown that the force used in connection with Mr Alseran's capture exceeded the limits of what was permitted in fighting a war. His claim in tort based on that use of force is therefore precluded by the Crown act of state doctrine. On the other hand, the MOD did not suggest that the mistreatment of prisoners, such as I have found took place at the Al-Seeba camp, was authorised by the Crown. To the contrary, such mistreatment was wholly inconsistent with UK military policy and with the directives for Operation Telic, mentioned earlier, which repeatedly emphasised the requirement to treat prisoners humanely. Accordingly, the assault sustained by Mr Alseran at the Al-Seeba camp gave rise to a claim in tort which is not barred by the Crown act of state doctrine.

Conclusions

333. In summary, subject to the issue of limitation addressed in part VII, I have reached the following conclusions in Mr Alseran's case:

i) Although unlawful under Iraqi law, the capture and initial detention of Mr Alseran by UK forces was in accordance with Geneva IV, compatible with article 5 of the European Convention and within the authority to detain conferred on UK forces. A claim in tort in respect of Mr Alseran's capture and initial detention is therefore barred by the doctrine of Crown act of state.

ii) However, there was no lawful basis under international humanitarian law for Mr Alseran's subsequent internment at Camp Bucca. In these circumstances Mr Alseran should have been released when his case was reviewed, and his detention from 10 April until he was in fact released on 7 May 2003 violated article 5 of the European Convention. His detention during that period was also not within the scope of the authority to detain conferred on UK forces by the Crown and therefore gave rise to liability in tort.

iii) Shortly after he was captured, Mr Alseran was assaulted by British soldiers who made him (and other prisoners) lie face down on the ground and ran over their backs. This assault gave rise to liability in tort and was inhuman and degrading treatment which violated article 3 of the European Convention. Mr Alseran's other allegations of mistreatment have not succeeded.

V. CLAIMS OF MRE AND KSU

334. Like Mr Alseran, MRE and KSU were both detained shortly after the invasion of Iraq began during what was at that stage an international armed conflict. At the time of their capture, MRE and KSU were employed on a commercial cargo ship which was moored in the Khawr Az Zubayr ("KAZ") waterway, several miles north of the port of Umm Qasr. As explained in part I of this judgment, because they allege

mistreatment of a sexual nature which carries a heavy stigma in Iraq, an order has been made for the names of these claimants (and of their relatives and fellow crew members) to be anonymised. To preserve their anonymity, I will refer to the ship on which they worked simply as "the cargo ship" rather than by name.

The claimants' backgrounds

335. MRE was born in Old Basra in November 1965. He was therefore 37 years old at the time of the invasion and 51 years old at the time of the trial. He was the youngest of 11 children. His father worked in local government and he describes his family as middle class. He stayed in high school until he was about 23 years old, prolonging his schooling so as to avoid having to serve in the Iraqi army during the war with Iran. He obtained a vocational qualification in mechanics. After leaving school and doing some military service after the war with Iran had ended (though less than he was meant to do), he worked as a mechanic and then for a company that restored and maintained boats. In around 2000, MRE was hired to work as a mechanic on a ship. This job only lasted for around two months as the ship was sold after only one voyage. But as a result of this experience he fell in love with the sea and he then managed to find full-time employment as an engineer on the cargo ship. During the two years or so that MRE worked on the cargo ship, the ship only made two voyages – both to the Emirates. For the rest of the time, the cargo ship was at anchor in Iraq because the owner had no work for her. MRE was not married and lived on board the ship, apart from occasional visits to see his brother in Old Basra. His responsibilities when the ship was at anchor were to carry out maintenance, cleaning and repairs.

336. KSU is ten years younger than MRE. He was born in South Basra in July 1975 and was therefore 27 years old at the time of the invasion and 41 years old at the time of the trial. His father was a self-employed electrician and handyman, and KSU was the youngest of five children. His family was poor and he only completed one further year of education after primary school before he had to leave school to earn his living. He first worked in a restaurant and then joined the police force as an alternative to military service. After seven years in the police working mostly as a guard, he left because the pay was so low. By this time KSU was married and had a wife and children as well as his parents to support. He started working as a construction worker but found this work too tiring. He then bought two big water tanks and scraped a living selling purified drinking water to people in his neighbourhood.

337. Just two or three months before the invasion, KSU got a job working on the cargo ship. He was recommended to the owner by his wife's cousin, TUV, who was already employed on the ship. KSU worked shifts of approximately ten days at a time alternating with ten day periods at home with his family. He and TUV were employed as guards, to protect the ship against thieves. When KSU was living on the cargo ship, he also did the cooking. There was a fourth permanent crew member, GRX, who was the owner's nephew and who worked as a cleaner and oiler. At the time of the invasion TUV was 25 years old and GRX was 24 years old.

The claimants' evidence

338. MRE and KSU both attended the trial and gave oral evidence. In addition, MRE's brother came to England to give oral evidence but was taken ill, with the result that he could not attend court and his written statement was instead relied on as hearsay

evidence. KSU's wife, sister and brother-in-law also travelled to England with a view to giving oral evidence, but in the event counsel for the MOD chose not to cross-examine them so that they did not need to be called. MRE's wife was originally due to give evidence over a video link from Basra, but this was cancelled as her evidence too was ultimately not contested.

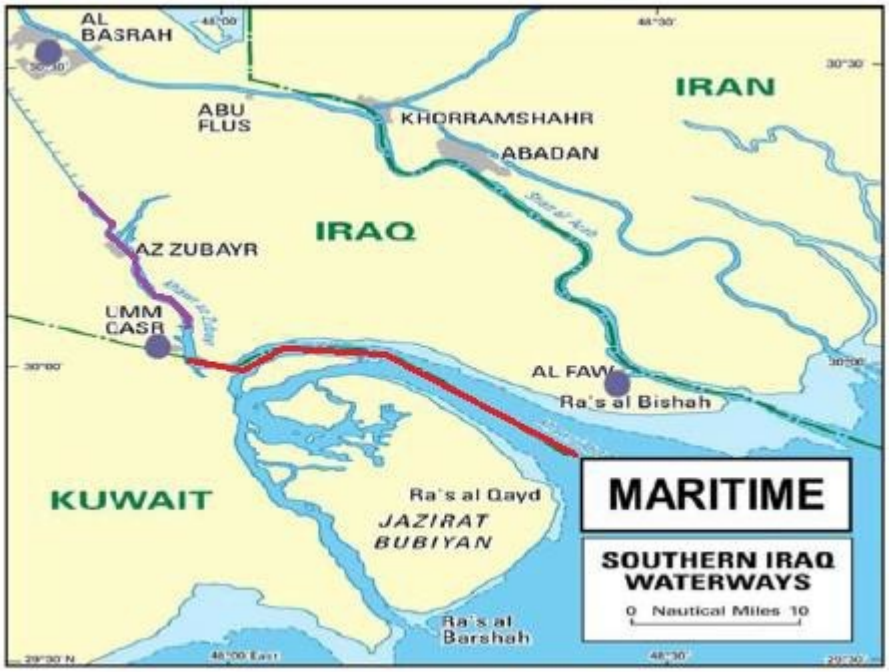
339. Of the other two crew members who were captured at the same time as the claimants, TUV has been located and made a witness statement dated 3 September 2016. However, when he was asked to come to England to attend the trial, TUV told Leigh Day that he would only do so in a claim pursued on his behalf. When informed that this was not possible, TUV told Leigh Day that he was not prepared to give oral evidence to the court. In these circumstances the claimants relied on TUV's witness statement as hearsay evidence. They have not been able to trace the fourth crew member, GRX.

The claimants' allegations in outline

340. It is not in dispute that, a few days after the war began, MRE and KSU (along with TUV and GRX) were captured by coalition forces who boarded the cargo ship at about 8 or 9pm one evening when the crew were about to eat their evening meal. The prisoners were made to lie face down on the deck and their hands were tied tightly behind their backs with plastic cuffs. The claimants allege that excessive force was used in handcuffing them. In particular, MRE alleges that his right arm was pulled back with such force that his shoulder made a sound and he felt as though it had been dislocated. He also claims that a soldier sat on his back causing him severe pain.

341. After the cargo ship had been searched, the four prisoners were taken on a small boat down the KAZ to Umm Qasr. At some point (probably in the vicinity of the Umm Qasr old port) they were transferred to another boat, which has been referred to at the trial as the "medium-sized boat". On this boat they were taken some considerable distance out to sea to a very large military ship on which they were detained overnight.

342. The map below shows the location of Umm Qasr in the south west of Iraq, near the border with Kuwait. The KAZ waterway, on which the cargo ship was moored, runs north from Umm Qasr to Az Zubayr. To the south of Umm Qasr the estuary by which ships reach the open waters of the Gulf, marked with a black line on the map, is known as the Khwar Abd Allah (KAA) waterway.



343. The claimants allege that, after they were brought on board the big military ship, they (and their fellow crew members) were each in turn forced to strip naked and subjected to an intrusive physical inspection which involved sexual humiliation – and, in KSU's case, being burnt on the buttock with a lit cigarette – while soldiers stood around watching and laughing at them and photographs were taken of them.

344. According to the claimants and TUV, MRE was the first to be subjected to this treatment. He gave evidence that, after he had been forced at gunpoint to remove all his clothes, he was examined by a soldier who was referred to as a "doctor" and was wearing blue or purple coloured rubber gloves and holding a torch. This person told him to spread his legs and then shone the torch between his legs and lifted his penis. The "doctor" then signed for MRE to turn around and bend over before inspecting his buttocks, again using the torch. While all this was happening, a bald soldier was taking pictures of MRE with a camera. MRE said that, when he was made to bend forwards, he was terrified that he was going to be raped, but this did not occur. He said that he was shaking with terror and was crying by the time he was told to put his clothes back on.

345. KSU was called forward next. He gave evidence that a soldier who did not speak Arabic repeatedly gestured to him to take all his clothes off and he felt he had no choice, as there were soldiers standing behind him who he was sure were armed. A soldier with a camera took photographs of him as he stood naked. KSU said that the soldier who said he was a "doctor" took a firm hold of his penis and made him turn to the left and then pulled him by his penis and made him turn to the right. The "doctor" then pulled KSU's penis down to make him crouch down before pulling his penis up to force KSU to stand back up. KSU said that, while this was happening, a group of soldiers were standing very close behind him, only around a metre away, and laughing at him. According to KSU, when he was told to get dressed and bent down to put his underwear on, he felt a hot sting on his left buttock which caused him to cry out in pain.

346. TUV in his witness statement described how, when his turn came, he was also made to undress. According to TUV, the soldier who was said to be a doctor did not touch him or do anything but just watched while another soldier took photographs of him from the front and then also from the back and each side. TUV said that, while this happened, there were people around whom he could not see but whom he could hear chatting and laughing. He described the shock and fear that he felt while he was naked, although no physical harm was done to him.

347. The claimants and TUV described how four camp beds had been set up for them on a raised area higher than the main deck level. TUV recalled that some food and water were brought to them but they were all too frightened to eat or drink. They lay on the camp beds for the rest of the night but found it difficult to sleep.

348. A major issue in the case is whether the soldiers who captured the claimants, detained them on the big military ship overnight and allegedly mistreated them were British soldiers.

349. In the morning the prisoners were taken by boat back to Umm Qasr port. Waiting on the dock to receive them were two or three Land Rovers and a group of soldiers. It is not in dispute that these soldiers were British. The claimants allege that, when they came ashore, they and their fellow crew members had sandbags put over their heads. KSU gave evidence that, after he was hooded in this way, he was made to kneel on the ground and to shuffle forward on his knees to the vehicle and was then made to stand and was pushed and kicked into it. MRE said that his turn came last. He gave evidence that, when his turn came to have a sandbag put over his head, a big soldier who seemed to be in charge came towards him and slapped him in the face and boxed him on his mouth and cheek. According to MRE, the soldier kept saying "Don't look at me" but MRE did not understand at the time what the soldier was saying and only realised what the soldier had meant afterwards. He said that the soldier pushed him backwards; he stumbled and his slippers came off. MRE said that he bent down to put his slippers on and that, when he did so, he received a hard blow to his head, which felt as though he had been hit with a weapon.

350. The four prisoners were taken to Camp Bucca, where they were interned. Like Mr Alseran, the claimants allege that the conditions in which they were held at Camp Bucca were inhuman and degrading. MRE also complains about a particular incident during his detention at Camp Bucca, in which he was allegedly kicked in the right knee by a soldier when he was slow to join the queue of prisoners waiting to get their lunch.

351. MRE and KSU claim that they were detained at Camp Bucca for around 35 days before they were released. They were released together.

The factual issues

352. Four factual issues are raised by these claims which I will address in the following order:

i) On what date were MRE and KSU captured?

ii) Were they mistreated as alleged?

iii) Were the servicemen responsible for any such mistreatment British?

iv) On what date were MRE and KSU released?

The date of capture

353. MRE believes that he and his fellow crew members were captured on around the fourth day of the war. There was a television on the cargo ship, from which the crew learnt that the war had begun. MRE gave evidence that on the third day he saw soldiers spread out in a line on the land, all walking in the same direction as if they were combing the area. He said that around that time he and his colleagues also started to see small foreign military boats on the waterway. On the fourth day more military boats passed by, flying what he recognised to be the British flag. MRE said that one of the small boats came up to their ship and beat on the side to attract their attention. A soldier who spoke Arabic asked them who they were and what they were doing in a combat zone. They explained that they worked on the cargo ship. The soldier told them not to move and said that "there is a possibility we will come back to you".

354. KSU gave evidence that after the war started the crew could hear artillery and bombardments from planes. They also saw helicopters flying overhead. He recalled that about two or three days before their capture they saw a number of small military boats passing by their ship, heading north on the KAZ in the direction of Az Zubayr. The soldiers on one of the small boats saw them and a soldier who spoke Arabic hailed them. This soldier said that they were coming and that the crew should not leave the ship.

355. TUV said in his witness statement that in the day or two before their capture he recalls hearing distant gunfire. He could also see what seemed to be people wearing military uniforms coming across the desert from the city of Umm Qasr towards the port. He said that on the day of their capture the crew also saw small military speedboats going up and down the waterway. One of the boats slowed down as it passed them and an Arab person on board spoke to them through a megaphone from around 40 metres away. He said: "Stay put, we are coming to you". TUV also said that in the days before their capture he saw and heard helicopters flying overhead and on the day of their capture a helicopter "froze" in the air above them for a few minutes.

356. Documents disclosed by the MOD show that 539 Assault Squadron of the Royal Marines ("539 ASRM") was involved from soon after the start of the invasion in riverine operations on the KAZ. The 539 ASRM post-operation report records significant movements of craft heading north on the KAZ on 24 and 25 March 2003. In particular, on 24 March the second battle group of 539 ASRM moved up river to Az Zubayr port. The fact that the claimants and TUV all recall seeing numerous small military boats on the waterway in the day or so before the cargo ship was boarded therefore tends to suggest that they were captured on or after 24 March 2003.

357. In terms of documentary evidence, letters provided to MRE, KSU and TUV long after their release (in 2011 and on later dates) by the International Committee of the Red Cross state in each case that the person concerned "was arrested in Iraq on 22 March 2003". However, as discussed already in connection with Mr Alseran's case, the dates given in such letters cannot be relied on and it is clear from other evidence that

the date of 22 March 2003 cannot be correct. As also mentioned in discussing Mr Alseran's case, lists of detainees at Camp Bucca disclosed by the MOD show the date of capture of the claimants (and of TUV and GRX) as 28 March 2003; but, for reasons I have given, no reliance can be placed on this date. More informative is the fact that the prisoner of war identity cards issued to the claimants and TUV in each case show the date on which the card was issued as 26 March 2003. From this I infer that 26 March 2003 was the date when the claimants were registered at Camp Bucca. If they were registered on the day of their arrival, this would mean that they were captured on the evening of 25 March 2003.

358. There is evidence to suggest, however, that the processing of prisoners at Camp Bucca may not have begun until 26 March 2003 – giving rise to the possibility that the claimants were brought to the camp earlier. The officer who was in charge of establishing the theatre internment facility at Umm Qasr, Colonel Pittman of the Queen's Dragoon Guards, was part of a small advance party which arrived at the site where the camp was to be set up on the night of 21-22 March 2003. He gave evidence, which was supported by contemporaneous documents, that the main logistic convoy bringing construction equipment and material, medical supplies and food from Kuwait arrived late on 23 March. There were some 1,200 soldiers and 207 vehicles involved in establishing and securing the site. The plan was to build up to thirty compounds which could each hold 500 prisoners. According to Colonel Pittman, the first six compounds and the processing unit for receiving prisoners were ready within 48 hours – in other words, by the morning of 26 March 2003. Until these compounds were ready, a secure facility was created to hold the prisoners who had already started to arrive.

359. MRE, KSU and TUV all recalled the registration process in which their details were entered on a laptop by a soldier sitting at a desk, a photograph was taken of them and they were each issued with a plastic bracelet inscribed with their prisoner number to wear on their wrist. Their recollections differed, however, as to when and where the process took place. All three witnesses remembered that on arrival at the prison camp they were taken to a place where there were metal shipping containers. There they had to wait in line and were each given a blanket, spoon, plate and cup and possibly also a carton of food. KSU and TUV remembered speaking to some of the other prisoners who included some men who said they had worked on one of the offshore oil terminals, probably Al Bakr port. TUV said in his witness statement that the registration process took place in one of these shipping containers on arrival. KSU, on the other hand, recalled that the process took place later in an olive green tent which was a 10 to 15 minute walk from their accommodation tent. MRE also described the processing as taking place in a tent outside the detention area. When their particulars of claim were originally served in 2013, KSU and MRE both stated that the registration process took place on the second day of their detention at Camp Bucca. But in their evidence at the trial KSU said it took place after a few days and MRE said that he could not remember whether it happened on the day of their arrival at the camp or a day or two later.

360. In the case of KSU, a "capture card" has been found which was completed in Arabic. KSU thinks that he was asked to complete this card by a representative of the Red Cross at some point after he had been registered at Camp Bucca and issued with the bracelet to wear on his wrist. KSU identified the signature on the card as his but said

that, as he cannot write well, the other details entered on the card were written for him by either MRE or GRX. The date written next to the signature on the card is 26 March 2003 and the "date of capture" entered on the card is 25 March 2003.

361. This date of capture could only be correct, however, if the card was completed on the day of the claimants' arrival at Camp Bucca, whereas other evidence that I have mentioned tends to suggest that the registration process (and hence the earliest time when the card would have been completed) is more likely to have taken place on the following day. Furthermore, there is a significant piece of evidence which indicates that the date when the claimants were captured must have been earlier than 25 March 2003. MRE and KSU both recalled that on their first night at Camp Bucca there was a sandstorm which caused the tent in which they were sleeping to fall down on top of them. TUV also described the sandstorm, although he remembered it as occurring on the second night. They all recalled that, on the morning after the sandstorm, they were taken to another tent where they stayed for the remainder of their detention. Documents disclosed by the MOD refer to a major sandstorm occurring on the night of 25/26 March 2003.

362. Accepting as I do that this sandstorm occurred after the claimants had arrived at Camp Bucca, it follows that they cannot have been captured on the evening of 25 March 2003 because that was the night of the sandstorm. If, as I think likely, MRE and KSU are correct in recalling that the sandstorm occurred on their first night at Camp Bucca, this would put the timing of their capture as the evening of 24 March 2003. The explanation for the "date of capture" entered on KSU's capture card could be either that the claimants got the date wrong when they completed the card or (and perhaps more likely) that they took the "date of capture" to refer to the date on which they were interned at Camp Bucca.

363. I conclude that MRE and KSU were captured at about 8-9pm on 24 March 2003 and, after being held overnight on a large military ship as they describe, were taken to Camp Bucca and interned there on 25 March 2003.

Were the claimants mistreated as alleged?

364. Save in two respects, the MOD did not dispute at the trial the honesty and veracity of the evidence given by the claimants about the mistreatment they claim to have suffered at the hands of coalition forces. In particular:

i) The MOD did not challenge the claimants' evidence about the force used to restrain them when they were captured, including MRE's evidence that he sustained injuries to his right shoulder and back.

ii) The MOD did not challenge the claimants' evidence of their mistreatment on the big ship (summarised at paragraphs 343–346 above).

iii) The MOD did not challenge the claimants' evidence that sandbags were put over their heads on the dock at Umm Qasr port and accepted that they "may have been hooded" during the journey from Umm Qasr port to Camp Bucca.

iv) However, the MOD disputed the claimants' other allegations that they were mistreated on the dock at Umm Qasr port and in particular MRE's claim that he was struck on the head with a weapon.

v) The MOD also disputed MRE's evidence that he was kicked in the knee by a soldier while in detention at Camp Bucca.

365. In my view, having read and heard the evidence, the approach taken by the MOD to the claimants' allegations was responsible and realistic. I nevertheless think it right, as well as dealing with the points in dispute, to record the reasons why I am satisfied that the undisputed allegations of mistreatment made by the claimants are substantially true.

366. First, although the claimants' allegations of mistreatment were not documented until after these proceedings were begun in 2010, I am sure that they are not bogus allegations which have simply been made up. Their evidence had the hallmarks, including minor differences between their accounts of the kind to be expected, of evidence based on recollection given many years after the occurrence of traumatic events. What, if anything, is surprising is the extent to which the claimants have described many things which match independent evidence of which they would not have been aware when making their witness statements. Another feature of their evidence consistent with its honesty is that, while complaining in strong terms about their alleged mistreatment, both claimants also referred to various small acts of kindness shown to them by some of the service personnel they encountered at various times.

367. Second, the mistreatment at the heart of their complaints is not mistreatment of a kind which someone in their position who was making a false claim would be likely to invent. There is substantial evidence, including the expert evidence given by Dr George on conditions in Iraq, that being a victim of any form of sexual abuse is associated in the claimants' culture with a high degree of shame and social stigma. I see no reason to suppose that MRE and KSU would have chosen to expose themselves to such stigma by falsely alleging mistreatment of a sexual nature. Nor do I see any reason to think that the distress which they each showed at times when giving their evidence in court about what happened to them on board the big ship was other than genuine. It is notable that all the many doctors who have examined them, including the psychiatrists instructed as expert witnesses by the claimants and by the MOD, have considered them to be truthful (even if not always accurate) historians.

368. In the case of MRE, there is (as I will indicate) reason to think that his perception of the severity of the injuries which he sustained is exaggerated. But there is also medical evidence which indicates that the injuries did occur. In the case of KSU, there is some evidence to suggest that he has, if anything, tended to understate the nature and effect of his experiences.

369. Third, the claimants' accounts are supported by evidence from other witnesses. I have referred already to the evidence of TUV, who was captured at the same time as MRE and KSU. Neither of them has kept in touch with TUV since they were released and there is nothing to suggest that they have discussed their claims or any details of their evidence with him. Although I have taken account of the fact that I have not heard oral evidence from TUV and that he refused to come to the UK to give it, I do

not see this as a reason to doubt the honesty of his evidence – particularly when, as I have indicated, most of the corresponding evidence given by MRE and KSU was not challenged when they gave oral evidence.

370. The claimants also adduced witness statements from MRE's wife and brother and from KSU's wife, sister and brother-in-law. None of the evidence of these witnesses was disputed. Their statements described the physical and psychological condition of MRE and KSU respectively when they were released from detention and since then. They also described the claimants' reluctance to talk about their experiences as well as what they have said to their relatives about the injuries they sustained. Although MRE and KSU each eventually confided to their wives about what happened on the big ship, it appears that they have not told other family members about it.

Medical evidence

371. The fourth and principal basis for concluding that the claimants' allegations of mistreatment are substantially true is the expert medical evidence concerning their injuries.

372. Taking KSU first, the expert psychiatrists instructed by the claimants and by the MOD in these cases, Professor Katona and Dr O'Brien, agreed that KSU was in good mental health before his capture and detention and had significant mental symptoms after it of a type associated with post-traumatic stress disorder. In the months after his release, these symptoms were associated with significant impairment in his work and marital function. The symptoms resolved after some months and the experts agreed that, although KSU still has significant sleep disturbance and intrusive thoughts, these symptoms do not now represent a psychiatric illness or require any treatment.

373. KSU has a mature scar on his left buttock, which is consistent with his account of feeling a hot sting on his buttock when he bent down to put his clothes back on after he had been made to strip on the big ship. An expert in forensic medicine, Dr Jason Payne-James, gave uncontested evidence that the nature of the scar is typical of a burn injury caused by the local application of heat in the form of a lit cigarette or cigar held at an angle of 90 degrees to the skin's surface.

374. Although evidence was adduced that KSU suffers from cardiac hypertension, there is no reliable basis for linking this to any mistreatment or to his detention.

375. MRE's medical condition and history are more complicated. The overall impression given is of a man more severely affected by psychological trauma than KSU and who has a variety of health issues but who catastrophises his situation and symptoms.

376. The expert psychiatrists agreed that, based on the history he has reported, MRE was already developing symptoms of post-traumatic stress disorder while he was in detention which have persisted subsequently. They agreed that there has probably been variation over time in the severity of the disorder and that it should currently be classified as moderate. The experts further agreed that MRE probably also had a major depressive illness following his release but does not currently have an additional diagnosis of a major depression. The experts agreed that MRE's mental symptoms interfered markedly with his ability to work in the first two years after his release and that there remains ongoing dysfunction in his daily life and relationships.

Nevertheless, since about two years after his release he has been able to work and has worked as a taxi driver. He has also got married and had two children.

377. MRE's other health problems include gastrointestinal symptoms. The gastroenterology experts instructed by the claimants and by the MOD, Dr Anton Emmanuel and Professor Paul Ciclitira, agreed that these symptoms are attributable to a combination of hiatus hernia, oesophageal reflux, functional dyspepsia and irritable bowel syndrome. MRE already had some gastroenterological symptoms before his detention but Professor Ciclitira's own notes of his interview with MRE do not justify his opinion that the symptoms were already present then to the same degree as experienced since. Overall, the evidence is clear that MRE's gastroenterological problems have become considerably worse since his detention. I accept as soundly based the opinion of Dr Emmanuel that, whilst the hiatus hernia and reflux are unlikely to be caused by the circumstances of MRE's arrest and detention, his functional dyspepsia and irritable bowel syndrome have probably been exacerbated by his psychological condition. His psychological distress may also contribute to the extent to which he experiences some of his symptoms.

378. Orthopaedic experts instructed by the claimants and by the MOD, Mr Richard Cherry and Mr Jonathan Spilsbury, were both of the opinion, based on their clinical examination of him, that MRE suffered injuries to his right shoulder, lower back and right knee during his detention. At the same time they emphasised that MRE's current symptoms are significantly worse than would normally be expected given the relatively minor nature of these injuries. More particularly:

    i) MRE's description of the injury to his right shoulder fits that of a traction injury caused by forcefully twisting the arm beyond the normal range of movement of the shoulder, along with a momentary subluxation of the glenohumeral joint (i.e. separation of the bone from its socket). MRE still has symptoms of pain and discomfort in moving his right shoulder and lifting his hand above shoulder height. His shoulder exhibits some loss of muscle bulk and weakness of rotation. The experts believe that there was straining and possibly some tearing of the muscle and ligament when the injury occurred that led to a painful arc syndrome which has never been treated.

    ii) The orthopaedic experts agreed that MRE probably suffered a minor soft tissue injury to the lumbar spine, though there was no damage to the spine. They would have expected MRE to have some back pain initially, which may have been quite acute for a few days and probably led to stiffness caused by pain inhibition. However, MRE has complained of continued symptoms of back pain which on his account have got worse since 2010. The experts do not believe that he is malingering but physiologically the injuries suffered in 2003 cannot explain his current back pain. The position is complicated by the fact that the kind of back pain which MRE describes with no obvious cause is very common in the general population.

    iii) The experts agreed that MRE suffered a soft tissue injury to his right knee. The slow swelling over a period of 24-48 hours which he described is typical of an impact injury to the knee resulting in a slow accumulation of synovial fluid. The experts believed that such an injury would probably have been painful for about a month inhibiting the use of the quadriceps and causing

> some muscle wasting during this time. Dr Cherry noted on examination that MRE still has some wasting of the right quadriceps, probably resulting from failure of rehabilitation following the original injury. MRE continues to complain of discomfort to his knee.

379. According to MRE, during the period when he had a sandbag placed over his head, he had sand in his face and experienced pain and watering in his left eye. While in detention, both eyes were painful, blurry and watery, with the left eye being worse than the right. His left eye had a burning sensation and a red discharge. This lasted until he was treated by a doctor who gave him eye drops about a week after his release. MRE says that, ever since then, he has had episodes when his left eye has become red and sore, requiring him to use eye drops. He says that this problem occurs every two weeks or so and that, very occasionally, he has had a similar problem with his right eye. Experts in ophthalmology instructed by the claimants and by the MOD, Dr Halliday and Dr Nourredine, confirmed that MRE has a corneal scar on his left eye and that, assuming no previous history of eye injury, it is likely that MRE suffered from a corneal laceration to his left eye when the sandbag was placed over his head caused by an unidentified sharp object (such as a shard of glass) that was in the bag. This laceration, together probably with corneal abrasion due to sand or dirt entering his eyes, would have resulted in the moderately severe level of pain that he described. This pain settled, however, within at most two weeks.

380. In the opinion of the experts, the burning, discharge and redness that MRE continued to experience in his left eye during the rest of his time in detention was due to an infective conjunctivitis. The ophthalmology experts agreed that the treatment he was given after his release would have cured this infection within a week. The experts were unable to find any eye abnormality which would account for his left eye regularly becoming red and sore in the way that he has described since then. In particular, the experts agreed that the corneal scar does not cause these symptoms.

381. Since his detention, MRE has also suffered from migraine headaches, migraine-related balance problems, visual vertigo, tinnitus and hearing difficulties. Experts in neuro-otology instructed by the claimants and by the MOD, Dr Surenthiran and Dr Bassim, agreed that it is more likely than not that MRE's migraine headaches, migraine-related balance disorder, visual vertigo and a central auditory processing disorder which accounts for some of his hearing difficulties were caused by the blow to his head which he claims to have received on the dock at Umm Qasr. The claimants' expert, Dr Surenthiran, also noted a scar around 2cm long on MRE's forehead which, in his opinion, is consistent with the alleged injury.

Alleged assaults on MRE

382. I have indicated that the two allegations of mistreatment which have been specifically denied by the MOD are MRE's allegations (i) that he was struck on the head probably with a rifle butt on the dock at Umm Qasr and (ii) that he was kicked in the knee while in detention at Camp Bucca.

383. In relation to the alleged blow to MRE's head, the MOD pointed to inconsistencies in accounts given by MRE at different times. A medical report in relation to MRE's hearing loss, tinnitus and balance disorder prepared by Dr Yacoub in January 2013

contains a history provided to Dr Yacoub by Leigh Day. This history includes the following passage:

> "In one particular incident whilst at Umm Qasr port, MRE was struck hard on the forehead with a rifle butt causing a large gash. He was then almost immediately subjected to a barrage of brutal blows to the head and face in the form of punches by the same British soldier causing the claimant to stagger and fall over. He was left bleeding profusely from the nose and mouth."

384. MRE's original particulars of claim dated 29 November 2013 contained similar allegations that he was subjected to a "series of savage assaults" by a British soldier on the dock at Umm Qasr, after which he had "very obvious facial injuries". These allegations were deleted when the particulars of claim were amended in January 2017. Counsel for the MOD suggested that MRE had changed his evidence after disclosure of a photograph taken at the time of his registration at Camp Bucca which shows no apparent mark on his face. They submitted that, given the evident element of catastrophising that appears to be involved, the court ought to regard MRE's evidence as too unreliable to justify a finding that he was subjected to a deliberate assault.

385. There is, however, convincing medical evidence that MRE has suffered a significant blow on the head at some point and I see no reason to doubt his claim that this occurred when he came ashore at Umm Qasr. MRE's allegation also draws support from KSU's recollection of seeing an injury to MRE's head on their first night at Camp Bucca and being told by MRE that he had been hit by the British forces with a weapon. It is notable that KSU mentioned this unprompted when he was interviewed by the Iraq Historic Allegations Team in February 2015 and was asked by the investigator: "Tell me what happened on that first night in the tent". On the other hand, although MRE's claims to have been hit on the head have been consistent, his initial report to Leigh Day that he was also punched savagely in the face is unsupported by KSU's evidence and clearly inconsistent with the photograph taken of MRE within a day or so of his arrival at Camp Bucca.

386. I find that, although the further details of what happened on the dock at Umm Qasr which MRE has given at different times are probably re-imaginings on his part, his basic claim that he was struck on the head by a soldier with what must have been a rifle butt is more likely than not to be true.

387. In relation to MRE's allegation that he was kicked in the knee while at Camp Bucca, counsel for the MOD noted a discrepancy between MRE's evidence at the trial and the report that he gave to Dr Abdullah, a consultant physician who examined him in Basra in December 2012. In his evidence at the trial MRE said that he was jogging towards the area where the detainees had to stand in line for food when he was kicked, whereas he had reported to Dr Abdullah (some four years earlier) that he was "standing in line with other detainees to take a lunch" when he was kicked. Counsel for the MOD also emphasised the evidence of the orthopaedic experts indicating that the problems with his knee of which MRE still complains have no obvious physiological origin and submitted that the court should be slow to accept that any injury was deliberately inflicted given the "very high degree of psychological overlay" which must be involved in MRE's continuing perception of pain and disability.

388. I agree that the medical evidence clearly shows that many of MRE's continuing symptoms, including those relating to his right knee, cannot be explained by the severity of the physical injuries which he described and must have a substantial psychological or psychosomatic component. But this does not mean that the injuries to which MRE attributes his continuing symptoms were never in fact suffered. To the contrary, the medical evidence supports MRE's claim that he suffered such injuries including an injury to his right knee while he was in detention. I do not regard the inconsistency about whether MRE was standing or jogging when the injury was sustained as undermining his evidence that the cause of the injury was a deliberate kick from a soldier. It is the kind of detail which can be differently remembered at different later times without casting doubt on the truth or reliability of the basic allegation.

389. I accordingly find that MRE probably was assaulted by being kicked on the right knee by a soldier, as alleged, during his detention at Camp Bucca.

Who captured the claimants and detained them overnight?

390. The main factual dispute at the trial, to which much of the evidence and argument were directed, was about whether or not the forces who captured MRE and KSU and detained them overnight on the big military ship – where, as I have found, they were mistreated – were British. Both parties proceeded on the footing that the nationality of the forces who captured the claimants and the nationality of the big ship must have been the same. There was good reason for drawing this inference, including the claimants' evidence that soldiers who captured them (and in particular a soldier who could speak broken classical Arabic) stayed overnight on the big ship before taking them back to Umm Qasr port the next morning.

391. The claimants' case that the forces who captured them were British was founded on four main planks:

i) The claimants' identification (supported by their witness, TUV) of their captors as British;

ii) Records made at Camp Bucca;

iii) The fact that the claimants were captured in an area said to have been exclusively patrolled by UK forces; and

iv) The fact that on their return from the big ship the claimants were met by UK forces at Umm Qasr port.

<u>The claimants' identification evidence</u>

392. MRE, KSU and TUV all gave evidence identifying the soldiers who captured them as British. This identification rested partly on claims to have recognised the British flag on uniforms and boats and partly on what the witnesses say they were told by the soldier who spoke classical Arabic.

393. KSU stated that the first time he can now recall noticing the British flag (which he said he knew from his school days) was on the uniforms of the soldiers and flying

from the antennae of the Land Rovers at Umm Qasr port when the claimants disembarked on the morning after their capture. Even if this recollection is accurate, however, it does not assist the claimant's case as it is common ground that the soldiers who met the claimants at Umm Qasr port were British.

394. MRE said that he knew what the British flag looked like because his sisters had visited London when he was young and brought back presents which had the British flag on them. He gave evidence that the small boat onto which he and his fellow crew members were taken after they were captured was flying the British flag. MRE also stated that on the big ship, when he was being told to remove his clothes by the soldier who spoke classical Arabic, he noticed that this soldier had a small flag on his chest which MRE said he recognised as the British flag.

395. TUV said in his witness statement that he thinks he saw a flag which had red and light blue colours on the back of the medium-sized boat. He also stated that on the big ship both the soldier who could speak some classical Arabic and the one who was described as a doctor had a small red, blue and white flag on the left shoulder of their uniforms. TUV stated that, although he did not know then what the British flag looks like, he does know now and he recalls this small flag being like the British flag.

396. I attach no significant weight to the evidence of MRE and TUV that they remember seeing the British flag. Memories of this kind are particularly susceptible to suggestibility and bias. MRE undoubtedly believes that he was captured by British forces, and it is easy for him to think in these circumstances that he saw British flags. The evidence of TUV is even more dubious as he did not know what the British flag looked like at the time of his capture and detention, and red, blue and white are of course also the colours of the US flag. I also mentioned earlier in discussing Mr Alseran's case that the photographic and other evidence indicates that none of the Royal Marines in the invasion force wore flags on their uniforms; and on the claimants' case, as I will explain soon, the forces who boarded their ship were probably Royal Marines. Moreover, in all the photographs which do show British soldiers with a Union Jack on their uniform the flag is on the left shoulder – and not on the chest where MRE said that he noticed it on the uniform of the Arabic speaking soldier. What is consistent at least with MRE's claim to have seen the British flag on the small boat is evidence that some boats operated by 539 ASRM on the KAZ chose to fly the Union Jack (and not, as was usual practice, the white ensign) so as to reduce the risk of being misidentified by US forces, particularly from the air. However, there is other evidence, which I will come to later, which makes it unlikely that the small boat on which the claimants were carried was one of those boats.

397. I attach somewhat greater weight to evidence given by all three witnesses of what they were allegedly told by the soldier who spoke some classical Arabic. MRE stated that, when they were leaving the big ship to be taken back to Umm Qasr, this soldier said to them: "You are detained by the British forces on behalf of the United Kingdom". KSU gave evidence to similar effect. TUV also stated that this soldier told them that they were detained by British forces, but he recalled this as being said shortly after they had come on board the big ship rather than just before they left the next morning. Counsel for the MOD noted that the claimants' own evidence showed that their ability to communicate with the soldier who spoke broken Arabic was poor and suggested that they may have misunderstood what the soldier was trying to tell them. If the claimants are right that some words referring to detention by British

forces were said just before they left the big ship, then counsel for the MOD submitted that it is likely or at least plausible that what the soldier was attempting to communicate was that they were about to be delivered to the British forces to be detained by them.

Records made at Camp Bucca

398. As in the case of Mr Alseran, *prima facie* evidence of which nation's armed forces captured MRE and KSU is provided by the Internment Serial Numbers issued to them (and to their two fellow crew members captured at the same time) at Camp Bucca. The numbers issued to KSU, TUV and GRX all had the prefix "UK" which, as mentioned earlier, signifies that the capturing nation was the United Kingdom. Likewise, their "detainee personnel details" entered on the MOD's AP3 Ryan computer system in each case identified the capturing nation as the United Kingdom. There is less reason to be confident in their cases, however, that the designation was accurate than there was in the case of Mr Alseran. Mr Alseran was brought to the camp as one of a large group of prisoners, all of whom were captured in the same area at around the same time, presumably by forces from the same nation, and transported to Camp Bucca together. Moreover, by the time they arrived at Camp Bucca on 1 April 2003 the registration process was in place and there is convincing evidence that they were registered as soon as the camp opened on the morning of their arrival. There seems very little possibility in these circumstances that their capturing nation might have been wrongly identified. By contrast, MRE and KSU were brought to Camp Bucca as part of a small group of only four prisoners. They arrived some six days before Mr Alseran when the camp was still being set up and I have found that they were not registered until the day after their arrival. In the meantime they had mingled with many other prisoners. It is not clear what, if any, documents relating to their capture came with them. KSU and MRE both said that the soldier from the capturing unit who spoke broken Arabic told them that he had a file of their papers. But even if that is correct, it remains unclear whether these papers were brought to Camp Bucca. Even if they were, there is no evidence that any papers which identified the capturing unit were examined or linked to the claimants when they were registered.

399. I note that in the detainee personnel details entered on AP3 Ryan for KSU, TUV and GRX, the "capturing force element" is described as "1 (UK) ARMD DIV SIG REGT". It has not been suggested that the unit which captured the claimants and their two fellow crew members was part of a signals regiment nor that it was part of the 1st UK Armoured Division. No specific information was entered on the system regarding the circumstances of their capture. Like Mr Alseran and the witnesses who were detained with Mr Alseran, KSU, TUV and GRX were allocated to "capture event 1". Screenshots from the reconstituted AP3 Ryan database show that no fewer than 1,754 detainees were recorded under this capture event.

400. Moreover, different and inconsistent information was entered in the AP3 Ryan database for MRE. In his "detainee personnel details" the capturing nation was recorded as the United States, the "unit/formation of capture" as "American Forces" and his "capture event" as number 2, which had the title "US Capture 1". A screenshot from the reconstituted database shows that a total of 2,097 prisoners were recorded under capture event 2. It appears that, in the same way as all prisoners recorded as captured by UK forces in the first few days of the war were entered in the

database under "capture event 1", all prisoners recorded as captured by US forces were entered under "capture event 2". Reflecting the information entered on the database, the Internment Serial Number issued to MRE when he was registered at Camp Bucca began with the letters "USUS", signifying that he was captured by US forces.

401. TUV in his witness statement described his recollection of the registration process as follows:

> "The soldier spoke to me through a Lebanese interpreter. He asked my name and where I had been brought from. I gave him my name and told him I had been brought from the sea. He said, "who brought you?" I said "the British forces" as I knew that by now as the soldier who could speak classical Arabic on the ship had told us."

This account, if it can be relied on, suggests that the designation of the capturing nation made when the claimants were registered at Camp Bucca may have been based on who they said had brought them to the camp. Of course, the claimants and their two colleagues had indeed been brought to the camp by British forces, as it is common ground that the soldiers who met them on the dock at Umm Qasr port and transported them in Land Rovers to Camp Bucca were British. The fact that MRE was recorded as having been captured by the United States may, as counsel for the claimants suggested, simply have been an administrative error. However, another possibility, suggested by TUV's evidence, is that MRE might have given a different answer from his colleagues to the question "who brought you?"

KSU's capture card

402. A document which provides significant support for the claimants' case is KSU's official capture card, which was completed on 26 March 2003 (the day of his registration at Camp Bucca). As mentioned earlier, the card was signed by KSU but the information entered on the card was written for him by either MRE or GRX. Amongst other information, he was asked to specify who he was "captured by" and the "detaining power". In each case the answer written on the card (in Arabic) was "British". KSU recalled that, before these answers were entered, the four crew members discussed amongst themselves what to write. He said:

> "We concluded that we were captured and detained by British forces. We based this on the uniforms which we had seen on the soldiers, their vehicles and their flags and because the soldier that spoke classical broken Arabic told us that we were captured by the British forces."

403. The capture card is important because it demonstrates that the claimants' belief that they were captured by British forces is one which they held at the time of their detention in Camp Bucca and is not a claim which they have only come up with later. But KSU's evidence also indicates that, when the card was completed, there was sufficient uncertainty in the minds of the claimants and their two colleagues that it required discussion among them to arrive at this view. Insofar as they relied on inferences from any flags which they had seen or from the Land Rovers which

brought them to Camp Bucca, they might have extrapolated that they had been captured by British soldiers from having recognised the soldiers who met them at Umm Qasr port or their vehicles as British. Insofar as they relied on what they had understood from the soldier who spoke broken classical Arabic, there exists at least the possibility, mentioned earlier, that he may in fact have been telling them that they were about to be handed over to the British forces and not that they had already been detained by British forces.

Place of capture

404. The third main plank of the claimants' case is the fact that their ship was moored on a waterway which, it is said, was at the time of their capture patrolled exclusively by British forces. I referred earlier to evidence of the deployment of British forces on the KAZ. According to witness evidence adduced by the MOD from (amongst others) Lieutenant General Jim Dutton, Commander of 3 Commando Brigade Royal Marines, the task of capturing Umm Qasr was originally assigned to 15 Marine Expeditionary Unit ("15 MEU"), a unit of the US Marine Corps. However, on 23/24 March 2003 15 MEU left Umm Qasr to move north and 42 Commando Royal Marines moved to Umm Qasr to take over responsibility for security of the area. 539 ASRM was responsible for patrolling the KAZ north of Umm Qasr at that time. Sergeant Major Cochrane, who was a Boat Group Commander in 539 ASRM, described their mission in evidence as being to patrol and dominate the waterway between Umm Qasr and Al Zubayr. This role is confirmed by the 539 ASRM post-operation report dated 14 April 2003. The claimants also relied on a diary of key events published in the issue for May/June 2003 of the *Globe and Laurel*, the official journal of the Royal Marines. This stated that on 24 March 2003:

> "boats of 539 Assault Squadron Royal Marines (ASRM), with support from 42Cdo RM began clearing the waterways north of Umm Qasr."

I have found that the claimants were captured on the evening of 24 March.

Handover at Umm Qasr port

405. It is common ground that the claimants were met at Umm Qasr port by British soldiers, who took them to Camp Bucca. Counsel for the claimants argued that this was consistent with the capturing nation being the UK.

The MOD's case

406. The evidence which I have so far mentioned generally tends to support the claimants' case that they were captured by UK forces. But the matter does not end there. The MOD relied on a substantial body of evidence to argue both that it could not have been British forces who captured the claimants and also to suggest an alternative theory that the forces who captured the claimants were US Navy Seals, possibly operating with Polish special forces. In particular, the MOD relied on evidence to show that:

i) It was not within the remit or capability of the Royal Marines from 539 ASRM to conduct an offensive boarding of a large merchant ship;

ii) US (and Polish) special forces were operating in the vicinity of Umm Qasr, including north of Umm Qasr on the KAZ, at the relevant time;

iii) The descriptions given by the claimants and TUV of the uniforms, equipment and boats of the capturing forces match those of US forces and are inconsistent with their captors being UK forces; and

iv) Their descriptions also indicate that the big military ship to which they were taken could not have been a UK ship and are consistent with it being a US warship.

The role and capability of 539 ASRM

407. The role of 539 ASRM in the days following the invasion was to patrol the waters of the KAZ, secure crossing points and provide waterborne reconnaissance and transport for other troops. 539 ASRM was augmented by 4 ASRM and 9 ASRM, giving a total of over 50 craft and up to 165 personnel. The boats used by 539 ASRM included four Landing Craft Vehicle Personnel (LCVPs), four Landing Craft Utilities (LCUs), four hovercraft, 24 Rigid Raiding Craft and 12 Inflatable Raiding Craft. I will describe some of these boats in more detail later. There were also four US Navy Special Warfare Special Operations Craft (Riverine) attached to 539 ASRM to provide firepower and protection.

408. While Lieutenant General Jim Dutton confirmed that 539 ASRM was the only unit under his command with the responsibility for patrolling the KAZ waterway, he also said that it was not within their remit to board ships and detain people. He and other witnesses called by the MOD explained that conducting an offensive boarding (i.e. one that might be opposed) of a large ship at anchor is a difficult task which requires a lot of manpower. Major Ben Richardson (then a corporal) from 9 ASRM spent just under two weeks patrolling the KAZ on board a LCVP. He had previous experience of carrying out offensive boardings. He said in evidence that, whilst they might have investigated a vessel that was acting suspiciously, there were no troops embarked on any of the landing craft – for example, there were only four or five men on board his LCVP – and they did not have the personnel needed to carry out an offensive boarding operation. Lieutenant Colonel David Ethell was a captain at the time who commanded the tactical headquarters for 539 ASRM. He confirmed that there were no embarked troops during this phase of the operation and that 539 ASRM did not have the capability in terms of manpower and equipment to carry out an offensive boarding of a high-sided vessel. He said that typically such an operation would have been carried out by special forces.

Where specialist boarding teams were operating

409. There were boarding teams from the Royal Marines Fleet Protection Group who were conducting offensive boarding operations on the KAA during the relevant period. They were based on an Australian ship, HMAS Kanimbla, along with Australian and US Navy boarding teams. These teams worked their way up the KAA to clear the approach to Umm Qasr. The MOD adduced evidence from three witnesses who took part in this clearance operation and from Captain Stacey, a Captain in the Royal Navy who was embarked on HMAS Kanimbla. The evidence of these witnesses was that the coalition boarding teams based on HMAS Kanimbla only operated south of Umm

Qasr, and therefore not on the KAZ. In particular, Major Simon Dack who was the officer commanding the UK teams recalled that the furthest north they came was within two miles (to the south) of the port.

410. Apart from these coalition boarding teams, several of the MOD's witnesses recalled seeing US Navy Special Warfare (NSW) forces operating in the vicinity of Umm Qasr. Captain Stacey, who travelled to Umm Qasr for a few hours on 24 or 25 March 2003, said that these special forces were operating in Mark V Special Operations Craft (SOC) and Rigid Hull Inflatable Boats (RHIBs). Mr Michael Nichol was a Captain in 17 Port & Maritime Regiment who arrived at Umm Qasr port on 25 March 2003. His unit was responsible for securing the port and getting it up and running. He recalled seeing both these types of US NSW boats going up and down the waterways both north and south of the port. Commander John Herriman, who was in command of the UK Fleet Diving Group and was located at Umm Qasr port from 24 March until 10 April 2003, also recalled seeing Mark V SOC patrolling the waterways both north and south of the port.

411. The point was fairly made by counsel for the claimants that there are no references in the documents disclosed by the MOD to US special forces operating north of Umm Qasr on the KAZ apart from the four US NSW SOC (Riverine) attached to 539 ASRM. As well as the recollections of the witnesses I have mentioned, however, there is also material in the public domain which suggests that they did so. Newspaper articles published in the *New York Times* on 28 and 29 March 2003 described how US Navy Special Operations forces, informally known as "Navy Seals", had spent the previous week securing the waterways around Umm Qasr by searching Iraqi vessels. A team of Polish commandos working with the US Navy is also mentioned in the articles. The articles indicate that these special forces had been operating on the KAZ north of Umm Qasr as well as on the KAA to the south. The first article also said that US Navy Seals and special boat teams had taken at least a dozen Iraqi prisoners off abandoned boats in the waterways near Umm Qasr and had handed them over to British Royal Marines at Umm Qasr for detention.

412. There is also photographic evidence which confirms the presence of US Navy Seals and Polish special forces (known as GROM) at Umm Qasr port:

    i) A photograph dated 23 March 2003 shows an Iraqi prisoner and has the caption "Polish and US forces hold a captured Iraqi man on a boat in the port of Umm Qasr in southern Iraq today".

    ii) Several photographs, including one dated 23 March 2003 published by Reuters, show Polish GROM commandos at Umm Qasr port.

    iii) Another photograph showing Polish GROM commandos at Umm Qasr port in "March 2003" was obtained from a website entitled "American Special Ops". The caption to the photographs goes on to say that "Naval Task Group operators searched through a number of vessels found at the port and surrounding waterways".

413. In addition, a video dated 20 March 2003 which was played in court shows US and Polish special forces with their boats in an unidentified port. In the video the camera pans along the jetty and shows both Mark V SOC and RHIBs flying US and Polish

flags. Given the date, I think it unlikely that the port was Umm Qasr, but this video confirms that US Navy Seals and Polish GROM commandos were conducting joint operations in the first days of the invasion.

The claimants' descriptions of their captors

414. In advancing the hypothesis that the claimants were captured by US and Polish special forces, the MOD relied on the descriptions given by MRE, KSU and TUV of the uniforms and equipment of the soldiers who boarded the cargo ship and their descriptions of the small boat, the medium-sized boat and the big ship. As with all the evidence based on recollection so long after the relevant events, this evidence needs to be treated with caution. There are also, as I have indicated, many discrepancies on points of detail between their accounts. Nevertheless, I agree with the submission made by counsel for the MOD that, unlike the evidence of seeing British flags which may have been consciously or unconsciously influenced by knowing the significance of whether their captors were British, the witnesses' recollections of these other matters are unlikely to be affected by any bias because they did not at the time and do not now have knowledge of the different types of equipment, boats and warships used by British and US forces.

The boarding operation

415. In his witness statement TUV said that it was his turn to keep a look-out and he was patrolling around the cargo ship at the time when the ship was boarded. He stated that he was looking out of a window in the accommodation block over the main deck when he saw men coming onto the ship. The men were wearing helmets, with lights on their helmets, and dark khaki uniforms. TUV said that they had weapons which he described as having a red laser and a sight on the top. He recalled all the soldiers as wearing the same uniform, which was a dark khaki uniform with large patches of camouflage. TUV also described having something drawn on his forehead following his capture, though he could not say what it was. He also saw the others having something drawn on their foreheads.

416. MRE was in the ship's salon when the boarding took place. He described the first soldiers he saw who entered the salon as wearing a dark blue, almost black uniform and black boots. They were holding what looked like automatic weapons and also had hand guns in their belts. He said that later he saw other soldiers in the boarding party who were wearing a different, desert colour uniform with a camouflage pattern. He recalled that one of them, the soldier who spoke to them in broken classical Arabic, was wearing red-brown boots. MRE said that, after he had been captured, he was taken down to the lower deck and that, as he went down the steps, he saw a soldier in a dark blue uniform rolling up what looked like a set of steps made of thick metal wire, which he thought they must have used to board the ship. MRE also said that the soldiers wrote signs on the prisoners' foreheads which he thinks were the letters "A", "B", "C" and "D".

417. KSU was also in the salon when the ship was boarded. He recalled all the soldiers he saw as wearing a yellow desert-coloured uniform and desert-coloured boots. Although not mentioned in his evidence at the trial, when he was interviewed by the IHAT in February 2015 KSU said that the four members of the crew were numbered

one to four by the capturing soldiers, with the numbers written on their foreheads in red pen.

418. In relation to this evidence, the following points may be noted:

i) The descriptions given by the claimants and TUV indicate that the soldiers who boarded the cargo ship were a large team who were trained and equipped to conduct an offensive boarding. For example, Lieutenant Colonel Ethell explained that, to board a high-sided vessel, flexible caving ladders would be needed. As mentioned, MRE described seeing a soldier rolling up such a ladder. Other items of specialist equipment observed by the claimants and TUV include non-standard weapons such as pistols (for use at close range), rifles or carbines with red laser sights and helmets with lights on. Lieutenant Colonel Ethell said that the marines in 539 ASRM did not have any of this equipment.

ii) The MOD's witnesses confirmed that members of 539 ASRM all wore light, desert-coloured camouflage uniforms. They did not wear the darker uniforms which MRE and TUV recalled at least some of the soldiers who boarded the cargo ship as wearing; nor were they issued with (Black) Fire Resistant Immersion Suits (such as were worn by boarding teams operating from HMAS Kanimbla). On the other hand, the photographs of US Navy Seals and Polish special forces show US Navy Seals wearing dark khaki camouflage uniforms and the Polish GROM commandos wearing dark uniforms. They also have lights on their helmets.

iii) Lieutenant Colonel Guy Balmer, who at the time was a staff officer at the headquarters of 3 Commando Brigade Royal Marines (which included 539 ASRM as well as 40 and 42 Commando), gave evidence that writing letters on foreheads or marking prisoners was not the practice of 3 Commando.

The small boat

419. The claimants and TUV all described being taken from their ship onto a small boat. MRE described the boat as about 7 metres long, with a black inflatable rubber frame and a metallic and dark grey exterior. He said that the boat had a solid floor of grey plastic, a stainless steel wheel and a small tower, which in a drawing attached to his witness statement he has labelled "the driving room" and located towards the front. KSU described the boat as a small rubber boat which was open with the engine at the back. TUV described the boat as a small boat made of "plastic" like rubber, sturdy and solid. He said that the prisoners were made to sit on the floor in the middle of the boat and there were three or four soldiers who sat on the sides of the boat, one driving the boat and the others guarding the prisoners.

420. As mentioned earlier, the small boats operated by 539 ASRM comprised Rigid Raiding Craft and Inflatable Raiding Craft. The Rigid Raiders were of two types. The Mark 1 version was a hard fibreglass boat with a shallow draft. A maximum of eight passengers sat on inflatable tubular cushions on the gunwales and had to hold on tight. The Mark 3 Rigid Raiders were larger, heavier boats. They were rigid with no inflatable parts and had two rows of four seats capable of holding up to eight passengers. The Inflatable Raiding Craft had an inflatable keel and were powered by

a removable outboard motor. According to Lieutenant Colonel Ethell, they could carry 6 – 8 people but these would all be very close to the point of touching. Furthermore, the inflatable keel caused the boat to flex in all but benign conditions and made it very wet for passengers. None of these boats fits the descriptions given by the claimants and TUV of the small boat.

421. Their descriptions are, on the other hand, consistent with a RHIB. 539 ASRM did not have any RHIBs. Photographs and videos put in evidence at the trial showed US Navy Seals and Polish GROM travelling in RHIBs which were black and dark or light grey in colour. For example, the Polish special forces' own website includes photographs of such RHIBs flying both Polish and American flags and equipped with a caving ladder and pole, of the kind described by Lieutenant Colonel Ethell. Data published in *Jane's Fighting Boats* indicate that the US NSW RHIBs were 11 metres long and just over 3 metres wide and were capable of carrying nine Navy Seals at a speed of 35 knots.

The medium-sized boat

422. At some point probably in the vicinity of Umm Qasr old port, the prisoners were transferred to the medium-sized boat. MRE estimated that this boat was about 15 metres long. He said that there was a glass structure over the main part of the boat which covered a seating area. On each side of the seating area there were black leather chairs which looked like bus chairs. A drawing that he made shows the seats facing forwards. KSU described the medium-sized boat as approximately 9 – 10 metres in length and 3 – 4 metres wide. He said that in the middle of the deck were two rows of seats similar to aircraft seats with a small gangway between them. He stated that the seats were enclosed in a room with windows and a roof. A drawing made by KSU shows weapons on each side near the bow of the boat. TUV described the boat in his witness statement as "looking a bit like a tourist boat but in military style". He said that it was dark in colour with a sort of glass frame or compartment over it for passengers. He stated that there were seats in it but he did not remember how they were arranged. TUV did not remember seeing any weapons fixed to the boat.

423. All three witnesses recalled that the medium-sized boat travelled very fast. TUV in his witness statement described the boat as having "jet" engines which went "phhhhhhhhhhhhhhhhh".

424. These descriptions correspond well with the Mark V Special Operations Craft used by the US NSW forces. The Mark V SOC are about 25 metres long and 5 metres wide. They have an angular design with a pointed bow and are grey in colour. There is a large enclosed central cabin. A video played in court included footage taken inside the cabin which showed several rows of black leather seats, all with arm rests, and a gangway down the middle. The video also gave a good impression of how fast the boat can travel. Information published in *Jane's Fighting Boats* indicates that the Mark V SOC is powered by twin jet engines and has a speed of 45 knots. Photographs of these boats indicate that they were armed with machine guns, albeit that these were mounted towards the stern and not near the bow.

425. By contrast, none of the boats operated by 539 ASRM (nor by other UK forces) correspond to the descriptions given by the claimants and TUV of the medium-sized

boat. The only type of boat of a similar size operated by 539 ASRM was a LCVP. The LCVPs were 15.5 metres long and just over 4 metres wide. However, such landing craft are rectangular in shape with a ramp which lowers at the front so that vehicles can drive on and off the boat rather than having a pointed bow as shown in MRE's drawings. Nor did the LCVPs have enclosed seating or look anything like a "tourist boat but in military style", as described by the claimants and TUV. The LCVPs had a small wheelhouse at the stern with a large "welldeck" at the front for carrying vehicles or up to 30 personnel. When used for carrying personnel, there were normally three rows of benches which ran from front to back. These landing craft were also much slower than the Mark V SOC. There were two types of LCVP in operation. As discussed further below, both had a "planning speed" of 15 knots and the maximum speed achievable by either craft was 24 knots in the case of the Mk 5 LCVP when operating in optimum conditions in a "light role".

The big ship

426. All the witnesses recall the journey in the medium-sized boat to the big ship as a long ride. MRE thought that it took about an hour and a half to two hours. All three witnesses stated that, when they reached the big ship, they were taken into the ship through an opening in the ship's side. A drawing made by MRE shows the opening as on the port side, near the stern. He thought that he had to step up around half a metre or more to reach the opening. He said that on stepping into the ship he saw that he was in a very big space, like a garage with a metal floor. He recalled seeing painted lines on the floor and traffic cones. MRE estimated that the garage area was about 20 metres wide. In his statement he said that, when they entered the ship, the floor in front of the entrance was flat for a bit and then in the middle of the ship "it was like a ramp which went down into the water of the sea". He said:

> "This was where I assumed that boats would come into the back of the ship. There was a machine to pull the boats up into the ship. The wall to my right was metal but where the ramp bit was there was no wall to my right and I could see directly out onto the sea. I thought at that moment that it seemed that the ship was maybe waiting for other boats to come inside it. The ramp was about seven or eight metres wide."

427. KSU recalled the entrance on the side of the large ship as being level with the deck of the medium-sized boat and that they stepped straight onto the large ship. He also in a drawing depicted the entrance as on the port side of the ship. He stated that the entrance door was the size of a normal door into a house. Like MRE, KSU described the interior as a huge, empty garage area. He said that the floor and walls were made of aluminium and that there were lines painted on the floor with reflective lights, like the lanes you see on roads. He said that there were multiple lanes – he would estimate four or five. He recalled seeing a large crane, which he described as part of the ship and secured to the ship with belts. In his witness statement, KSU said that, when they were sitting on the beds that had been set up for them after they had each in turn been made to strip, MRE asked if they could urinate by saying the English word "piss". The soldiers understood and took them to the back of the ship. KSU stated:

> "At the back of the ship was a huge open doorway in a metal frame. The bottom half of the door was closed up to the middle

> like a barrier, but the top half was open. There was a roof covering it. I did not understand the function of the door but as the space inside was a garage I thought perhaps it opened to allow vehicles off the ship. I believe it would need to have been fully closed when the ship was sailing because the water was very near to us. The door was metal and in two parts, but it was not solid, it had large gaps in a grid form."

KSU said that he and MRE stood and urinated into the sea through the gaps in the metal grid of the large door.

428. TUV recalled the door through which they entered the big ship as being about one and a half or two metres above the waterline. Once through the doorway, he saw that they were in a huge, dimly lit garage. In his witness statement he said:

> "A little to my right hand side … the floor of the garage sloped down like a ramp and I could see that the back of the ship was open so that the sea was coming against the ramp, around a metre or two below the level we were standing on. The ramp went down into the sea. I think now that there must have also been a door at the back of the ship to allow boats in – otherwise, I would not understand the purpose of the water and ramp in the back of the ship. The floor of the garage was metal and I think there were yellow lines painted on it which I thought might be to act as paths for walking."

TUV also described a sort of raised, mezzanine level around four metres by five metres and with a few stairs going up to it, on which four beds had been set up for the prisoners.

429. Although there are discrepancies between these accounts, notable common features about which the witnesses are, in my view, unlikely all to be mistaken are the following:

i) They recall entering the big ship through a door in the ship's side which was close to the waterline.

ii) They were taken into a huge empty space which was like a garage (with lanes for vehicles marked out).

iii) There was a wide opening across the stern of the ship which was open or partly open to the sea. (KSU gave a more detailed description of a huge doorway divided into two sections, with the bottom half closed and the top half being a large, metal grid.)

iv) According to MRE and TUV, there was a ramp which went down into the water of the sea and which seems to have been inside the ship.

v) MRE and KSU also recall seeing a crane which they assumed was used to pull boats into the ship.

430. The MOD suggested that the claimants' descriptions of the big ship match a type of ship called a Landing Platform Dock. The characteristic feature of such ships is that they contain a large, hangar-like compartment at the waterline. By taking on water, the stern of the ship can be lowered so that this compartment is flooded thus enabling landing craft and other boats to enter the ship and dock. The US Navy order of battle for "Operation Iraqi Freedom" shows that the US fleet included two amphibious task forces, each of which contained seven ships of this general type. Photographs of some of these ships show that the stern door extends across the full width of the landing dock compartment and is split into two sections: a lower section hinged at the bottom and an upper section hinged at the top. In some of the photographs the top section looks like a metal grill.

431. Videos played in court of the USS Pearl Harbor, a Landing Platform Dock which was part of the US fleet, and the USS Denver, a ship of the same type, showed respectively an amphibious vehicle and a landing craft entering the flooded dock compartment through the open stern doors. In the video taken inside the USS Pearl Harbor, when the amphibious vehicle reaches the far end of the flooded dock, it drives out of the water up a ramp to a vehicle deck. It can be seen that there are raised walkways along each side of the ship which extend the full length of the dock compartment and continue along the side of the vehicle deck. The video at one point shows a steel ladder about three metres high leading from the vehicle deck up to the raised walkway or platform area at the side of the ship.

432. The UK fleet did not include any Landing Platform Docks; indeed, there were none in the Royal Navy at that time. Nonetheless, the claimants' representatives identified four UK vessels which were said to fit, at least broadly, the witnesses' descriptions of the big ship. Three of these were Royal Fleet Auxiliary vessels of a type known as Landing Ship Logistics, named respectively Sir Bedivere, Sir Percivale and Sir Tristram. The fourth was HMS Ocean, a helicopter carrier.

433. Of these four vessels, Sir Tristram was specifically designated as a ship which was to be used as a maritime detention facility, if necessary. Article 22 of Geneva III precludes the internment of prisoners of war at sea but there is also an obligation not to detain prisoners of war in an area where they may be exposed to danger (see articles 19 and 23). The UK detention policy envisaged that prisoners of war captured at sea or during the initial stages of an amphibious operation might need to be held temporarily on board a ship until they could be transferred to a prisoner of war handling facility onshore.[39] The plan was to use Sir Tristram for this purpose. Lieutenant Colonel Anthony Hulse was assigned to prepare and command the UK maritime detention facility on Sir Tristram and was embarked on Sir Tristram for that purpose between 17 and 27 March 2003. He gave evidence that, throughout his tenure, no detainees of any nationality were brought to the UK maritime facility. In the light of this evidence, the claimants accepted that the big ship on which MRE, KSU and their two fellow crew members were detained overnight is unlikely to have been Sir Tristram.

---

[39] See the MOD's Joint Warfare Publication 1-10 on Prisoners of War Handling, March 2001 edition, Annex 3C – Special Provisions for the Handling of Prisoners of War Captured at Sea.

434. The first large ship to dock at Umm Qasr after the invasion was RFA Sir Galahad, which docked on 28 March 2003 bringing supplies of humanitarian aid. Before Sir Galahad could reach the port, the KAA waterway which leads to Umm Qasr from the northern Gulf had to be cleared of mines. Mr (then Commander) Charles Wilson of the Royal Navy was in charge of this operation. He was embarked on Sir Bedivere, which was his command ship for the operation and was stationed in the approaches to the KAA waterway in the northern Gulf. Mr Wilson gave evidence that no prisoners were brought on board Sir Bedivere at any time while he was embarked. He maintained that, if there had been any proposal to bring any prisoners onto the ship, he would certainly have been aware of it.

435. Similar evidence was given by the commanding officer of Sir Percivale, Mr (then Captain) Peter Farmer. He stated that, on initial deployment, Sir Percivale had on board troops including 539 ASRM and various vehicles, boats and hovercraft. These were discharged in Kuwait before the start of hostilities. It was then anticipated that Sir Percivale might take on board American diving teams and act as their mother ship while they inspected dhows leaving the KAA; but this did not actually happen. On 7 April 2003 Sir Percivale went up to Umm Qasr to discharge around 300 tonnes of bagged rice loaded in Kuwait. Mr Farmer stated that Sir Percivale never held any prisoners and had no involvement in prisoner of war handling.

436. As photographs and the evidence of these witnesses showed, the descriptions given by the claimants and TUV of the big ship are also inconsistent in several respects with these Landing Ship Logistic vessels. In particular:

i) Neither Sir Bedivere nor Sir Percivale had an entrance on the side of the ship near the waterline. Mr Wilson said that, if you were to come to Sir Bedivere by boat, there was a ladder which would be lowered over the side. This would involve a steep climb. Mr Farmer said that there was a bunker access door on the side of Sir Percivale but this was some way above the waterline and was not used to transfer personnel to the ship at sea; nor did it connect directly with the vehicle deck.

ii) There was a very large vehicle or general storage deck inside each of these ships, which extended the entire length of the vessel. In the case of Sir Bedivere, however, Mr Farmer said that at the relevant time this was mostly taken up with containers, portacabins and other equipment required to support the mine clearance vessels. In the case of Sir Percivale, Mr Wilson said that the bags of rice, when loaded, occupied most of the vehicle deck but he could not remember whether the rice was loaded before 24 March 2003.

iii) None of the Landing Ship Logistic vessels had an internal dock or equipment for winching boats into the ship.

iv) Sir Bedivere and Sir Percivale each had a large door at the stern but it was only 4 – 5 metres wide and did not extend across the full width of the ship; nor did it have separate top and bottom sections as described by KSU.

437. HMS Ocean was the Royal Navy's largest warship and its only helicopter carrier. The forward two-thirds of the vessel held helicopters and landing craft. The rear third contained a vehicle deck serviced by two hydraulic ramps, one on the starboard side

and one at the stern. In the days immediately before the start of hostilities, a large number of vehicles and helicopters were landed from HMS Ocean along with embarked forces. The vessel then sat well off the coast and continued to provide logistical support as operations progressed.

438. Vice-Admiral Sir Adrian Johns, who was in command of HMS Ocean at the time, was called as a witness by the MOD, along with Mr Alexander Sharpe who was serving on board as Executive Warrant Officer. Both witnesses said that they were as sure as they could be that no Iraqi detainees were brought on board HMS Ocean at any time during the conflict. Mr Sharpe said that he oversaw all personnel on and off the ship and that no one could have come on board the ship without his knowledge.

439. Again, the descriptions of the big ship given by the claimants and TUV do not match HMS Ocean. The vessel does have a large vehicle deck which was empty at the time. But there is no internal dock. In addition, the rear ramp is only about 4 metres wide and is of solid construction without any gaps; nor does it split in the middle. Mr Sharpe said that no beds or photographic equipment were ever kept on the vehicle deck. Both witnesses stated that there was no door for personnel entry at sea anywhere near the waterline. Vice-Admiral Sir Adrian Johns said that, to transfer personnel into the ship from a boat which came alongside, it was necessary to winch the boat up to the vehicle deck; alternatively, if the boat was not brought on board, one of the ship's boats would be lowered and the personnel transferred to that boat, which would then be winched up. Both witnesses also pointed out that the hull of the ship is cut away at the stern which would make a boat transfer in that area impossible.

440. On 26 April 2017, after the end of the trial, a TV documentary programme was broadcast entitled "Warship" which included footage of HMS Ocean. This showed a door on the starboard side of the vessel through which personnel can enter when the ship is at sea. The claimants sought to rely on this as fresh evidence which had not been reasonably available at the trial.

441. In response, the MOD on 17 May 2017 served a witness statement from Mr John Davidson, Through-Life Manager for HMS Ocean, explaining that the doorway shown in the television documentary was a pilot ladder access door which had been added during a refit of the vessel carried out between 2012 and 2014. Mr Davidson exhibited a list and drawings of the relevant additions and alterations. Vice-Admiral Sir Adrian Johns also made a supplemental witness statement confirming categorically that there was no such door on HMS Ocean in 2003. The claimants acknowledged that they were not in a position to challenge this evidence.

Time, speed and distance

442. A yet further difficulty for the claimants' case is the time that it would have taken to reach any of the British vessels which were suggested as candidates for the big ship on the assumption that the medium-sized boat on which the prisoners were taken to the big ship was a LCVP.

443. At the end of the trial, the MOD provided information through a witness statement from Major John Fidler, who manages the UK amphibious capability, of the speed that can be achieved by a LCVP. He stated that the "planning speed" of both the Mk5A and the Mk5B is 15 knots. The planning speed is the average speed at which

one would expect to travel during a journey, assuming average conditions; if the conditions were good, the LCVPs could go faster than the planning speed. Major Fidler explained that external factors such as sea state (if it is above sea state 2) and tidal flow have an effect on speed. He said that the water in the northern Gulf is very warm, including at night, which prevents the engine from cooling down and operating efficiently and adversely affects the speed of the craft. He also stated that in wartime, in order to maintain situational awareness, it would not be usual to go at the maximum speed possible.

444. Of the two types of LCVP, the Mk5A were faster than the Mk5B. A document provided by Major Fidler giving craft details for the Mk5A LCVP indicates that the speeds which the craft can achieve are: 24 knots when operating in a "light role"; 18 knots when operating with a medium load (of 30 troops); and 12 knots when operating with a heavy load (with maximum stores).

445. In addition to this evidence, the MOD disclosed the logbooks for the UK vessels in the northern Gulf which showed their locations at all relevant times. The MOD produced calculations said to show that a LCVP could not have reached HMS Ocean or Sir Bedivere or Sir Percivale within a timeframe which fits the claimants' evidence.

446. The claimants' representatives subsequently pointed out what were said to be some mapping errors made by the MOD in plotting the positions of the vessels. They accepted that Sir Percivale, which at midnight on 24/25 March 2003 was around 250km from Umm Qasr as the crow flies, was too far out to sea to be within range. They plotted the distance to HMS Ocean at that time as 107km and the distance to Sir Bedivere as 103km. They also analysed all the disclosed ships' logs and found that the sea conditions on the night of 24/25 March 2003 were extremely calm with virtually no wind and a sea state of either category 1 or category 2 (indicating a maximum wave height of half a metre). The tide data showed that the boat which took the prisoners to the big ship would have been travelling with the tide before 21:57 and against the tide after that time. The evidence suggests that the boat had a light load. The claimants' representatives argued that in these circumstances, if the boat was a Mk 5 LCVP, it is reasonable to assume that it could have travelled at a speed approaching the maximum speed in a light role of 24 knots.

447. Travelling at 24 knots, it would have taken over 2¼ hours to cover a distance of just over 100 km. At a speed of 18 knots, the journey would have taken more than 3 hours and at the planning speed of 15 knots it would have taken some 3 hours 40 minutes. I think it unrealistic to suppose that a LCVP undertaking this journey would have maintained the maximum speed possible, particularly given the evidence of Major Fidler about the reduced engine efficiency when operating in warm waters. Moreover, the distance calculations are on any view understated because they assume travel in a straight line, whereas a boat proceeding down the KAA waterway and then out to sea would not be travelling in a straight line. Taking these factors into account, it seems to me reasonable to assume that to reach either HMS Ocean or Sir Bedivere in a LCVP would have taken at least 3 hours.

448. On the evidence it is not impossible that the journey from Umm Qasr to the big ship took as long as this but it is improbable that it did. It was evidently already dark when the cargo ship was boarded and the soldiers who came on board spent some time searching the ship. MRE estimated that the crew members stayed lying on the floor

for around three hours while the search took place. That seems almost certain to be an over-estimate, but KSU and TUV also recalled lying on the deck for a long time – TUV thought maybe around an hour, maybe more. MRE thought that the journey in the small boat to Umm Qasr then took perhaps an hour, as the boat stopped several times, and that they then waited for some time – maybe an hour – near the dock at the old port before being transferred to the medium-sized boat. He estimated that the journey to the big ship took about an hour and a half to two hours. KSU's recollection was that they were transferred to the medium-sized boat after only a short journey of perhaps 15 minutes, but he too recalled stopping at the port for what could have been around 45 minutes or an hour, as though the capturing troops were expecting someone to meet them. KSU thought it took a long time, perhaps an hour or more, to travel to the big ship. TUV similarly recalled the journey to Umm Qasr as taking only around 15 minutes and then waiting on "stand by" for maybe an hour. He thought that the transfer to the medium-sized boat took place at the end of this wait and that it was a "very long ride" to the big ship: he did not give a time estimate.

449. I view these various estimates of times given by the witnesses (particularly after so many years) as inherently unreliable. Nevertheless, as a matter of general impression, given that a significant amount of time was evidently spent first of all in searching the cargo ship and then waiting – apparently in the hope of being able to land the prisoners – at Umm Qasr, and given that the claimants were evidently detained on the big ship for at least several hours, I think it difficult to fit into the overall sequence of events a journey time to the big ship of more than about two hours.

The return to Umm Qasr

450. That impression also takes account of the time required for the return journey. MRE said that in the morning the four prisoners were taken back to Umm Qasr in a boat which looked like the first small boat they had been on after they were captured. He said that they sat near the bow and got wet. He thought that the journey took about two hours. KSU thought that they were taken back to Umm Qasr on the medium-sized boat, but he too recalled sitting near the bow and getting wet, which seems inconsistent with a boat that had enclosed seating. All three witnesses recalled the soldiers putting some kind of plastic sheet to cover them. TUV said in his witness statement that the four prisoners were taken back to Umm Qasr in a small speedboat, which was accompanied by two other similar small boats. He described the floor of the boat as made of rubber. He also said that the sea water splashed over them and they got wet; and that the soldiers then put them under a waterproof nylon sheet to protect them from the water.

451. Quite apart from the journey time, this evidence is not consistent with the return journey taking place in a LCVP. Rather, it suggests that the boat used to take the prisoners back to Umm Qasr was a RHIB.

The handover at Umm Qasr

452. KSU described the soldiers who met them at Umm Qasr port as wearing the same desert type sand coloured uniforms as the soldiers who had captured them. However, both MRE and TUV recalled the soldiers on the dock as wearing lighter coloured camouflage uniforms than the soldiers they had seen until then. If the recollections of MRE and TUV are correct, this tends to suggest that the prisoners had not previously

been in the custody of members of the Royal Marines – though KSU's evidence would tend to suggest the contrary.

453. As mentioned earlier, the claimants argued that the fact that they were met at Umm Qasr by British forces and taken to Camp Bucca indicates that they were captured by British forces. They also argued that this is inconsistent with their captors being US forces. There is evidence that a US ship, the USS Dubuque, was used by US forces to hold prisoners captured on water. The USS Dubuque Command History for 2003 states that 106 prisoners of war were held on the ship from 21-29 March and from 18-21 April 2003. Counsel for the claimants submitted that it can in these circumstances be inferred that, if the crew of the cargo ship had been captured by US forces, they would have been taken to USS Dubuque and detained there.

454. I do not accept that such an inference can be drawn. There is no evidence explaining the US detention policy, but I see no reason to assume that prisoners captured by US forces in the vicinity of Umm Qasr, including any prisoners taken on the waterway north of Umm Qasr, would have been detained on USS Dubuque. There is no firm evidence of where USS Dubuque was located at the relevant time but Captain Stacey recalled that it was well to the south of HMAS Kanimbla (which was also equipped to handle prisoners) and he therefore thought it unlikely that prisoners would have been taken there from the area north of Umm Qasr. Furthermore, the detention records and much other evidence shows that many prisoners captured by US forces were interned at Camp Bucca. Some indication at least that those prisoners could have included the claimants is provided by the article published in the *New York Times* on 28 March 2003, mentioned earlier, which reported that US Navy Seals had taken at least a dozen Iraqi prisoners off abandoned boats in the waterways near Umm Qasr and had handed them over to British Royal Marines at Umm Qasr for detention.

Conclusion

455. There are many features of the evidence discussed above which suggest that MRE and KSU were captured by US forces (specifically, US Navy Seals possibly operating with Polish special forces under US command) and were held overnight on a US navy ship. However, the evidence is by no means consistent. Moreover, there are potentially ineradicable difficulties in trying to resolve the inconsistencies and come to a definite conclusion about the identity of the capturing forces in the absence of any reliable documentary record 14 years after the relevant events. I am also conscious that the court has not received any evidence from the US military and that such evidence might have disproved (or proved) their responsibility for detaining the claimants. Apart from any consideration of restraint in avoiding unnecessary criticism of acts attributable to a friendly foreign state, a court should be very slow for reasons of basic fairness to make findings which impute misconduct to a non-party who has had no involvement in the proceedings and no opportunity to rebut the imputation. It would, in my opinion, only be right to do so if it was necessary in order to decide the dispute between the parties to the litigation.

456. In *Rhesa Shipping Co SA v Edmunds (The "Popi M")* [1985] 1 WLR 948 at 951 and 955, Lord Brandon emphasised that, even after a prolonged inquiry with a mass of evidence, the trial judge is not bound in every case to make a finding one way or the other on a disputed question of fact and that the judge always has open the third alternative of saying that the party on whom the burden of proof lies in relation to any

averment made by that party has failed to discharge that burden. Lord Brandon further observed that, while no judge likes to decide cases on the burden of proof, there are cases in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.

457. I consider that the present case is one of those unusual cases in which deciding a disputed question of fact on the burden of proof is only the just course to take. My conclusion on this issue is that the claimants have failed to prove that on the balance of probability the forces who captured them and detained them overnight on the big ship were British forces. They have therefore also failed to prove that the MOD was responsible for their mistreatment during this period.

Date of release

458. It is nevertheless not in dispute that the claimants were in the custody of British forces after they disembarked at Umm Qasr port on the morning after their capture. In order to determine the length of time for which MRE and KSU remained in British custody, it is necessary to identify the date of their release from Camp Bucca.

459. MRE and KSU each described in their evidence the process which led to their release. There came a time when soldiers started to come to their compound with a list of detainee numbers which would be called out. The prisoners whose numbers were called out would be then be escorted out of the compound. Several hours later some of the prisoners would be brought back to the compound but the rest did not return. MRE said that on the first occasion when this happened the prisoners who were brought back to the compound explained that they had all been taken to a place where they had been questioned and that, after the questioning had been completed, the other prisoners had been released.

460. One day MRE and KSU had their numbers called out. They were taken in a group to some tents and, when their turns came, they were each asked questions through an interpreter by soldiers who were sitting at a table. They each recall being questioned about their backgrounds, whether they were soldiers or civilians, where they were captured and whether they had any connections with the Ba'ath party or any political group. After answering the questions, MRE and KSU each learnt that they were to be released. They both recalled that they were required to sign a document in English (which they did not understand) and were then taken to the entrance to the camp, given a cardboard box containing some tinned food and told to go. They said that they were not given any money or means of transport and had to walk a long way along the road before a car stopped and gave them a lift in the direction of Basra city. By hitchhiking and walking, MRE managed to make his way to his brother's house and KSU got to his parents' home.

461. As set out in their particulars of claim, first served in November 2013 (more than ten years after the relevant events), the claimants' case is that they were detained until around the beginning of May 2003. In his evidence MRE said that he counted the days for the first week but after that he stopped counting. He said he believes that he was still in detention when Baghdad fell (which was on 6 April 2003) and when the statue of Saddam Hussein was toppled (which was on 9 April 2003). At the time when the statue was toppled he thinks he had been in detention for around 20 days and that he was released around 15 days after that, but he cannot be sure: it might be

more, it might be less. KSU estimated that he was detained for approximately 30 to 35 days, or perhaps 40 days.

462. The claimants and TUV all recalled that the claimants were released before TUV and GRX. TUV said in his witness statement that he believes that MRE and KSU were released after around 45 days and that he was detained for around 2½ months. He stated that he was first taken to what he described as the "court" before MRE and KSU but on that first occasion he was returned to detention after being questioned. He said that he thinks that GRX was released around ten days after MRE and KSU. Eventually, TUV's detention number was called out a second time. He was taken back to the "court", which he said was now in a big container like a shipping container with air conditioning. On this occasion he was released. TUV said that, when he was released, he was given $5 in $1 bills as well as a box of food and was taken by bus to Umm Qasr (where he lived).

463. MRE and KSU were not given any record of their detention at the time of their release and had no cause to chronicle or try to work out exactly how long they spent at Camp Bucca until after they had learnt about the possibility of bringing a claim against the MOD and had instructed Leigh Day, which was not until late 2010. In the case of TUV, the question only arose when he made his witness statement in late 2016. In these circumstances, as in the case of Mr Alseran, the estimates given by the claimants and their witnesses of the length of their detention must be regarded as very unreliable. I think there is also likely to be a natural tendency to over-estimate the duration of an experience which was obviously deeply stressful and unpleasant and which may well have felt subjectively at the time (and may feel in hindsight) to have lasted longer than it actually did.

464. MRE and KSU have each obtained two letters from the International Committee of the Red Cross attesting to their date of release but, as I have already found, such letters do not indicate the source of the information given in them and cannot be relied on. Moreover, the letters issued to MRE and KSU are contradictory. Although there is no reason to doubt their evidence that they were released together, letters issued to each of them by the ICRC on 6 March 2011 state that, "according to the detaining authorities," KSU was released on 26 April 2003 and MRE was released on 18 May 2003. Further letters from the ICRC dated 24 November 2013 state that they were each released on 12 April 2003. The discrepancy between this date and the dates given in the earlier letters is unexplained. A letter issued to TUV on 31 May 2015 gives his date of release as 17 May 2003.

The MOD's records

465. As in the case of Mr Alseran, by far the most reliable evidence of when the claimants were released is, in my view, the information contained in the MOD's records of detainees. I have explained that these records are of two types: information derived from the AP3 Ryan database used by the MOD at the time and spreadsheets created on various dates containing lists of detainees.

466. The information recorded on the reconstituted AP3 Ryan database for each of KSU and MRE contains a similar internal inconsistency with regard to their date of release to that noted earlier in the case of Mr Al-Aidan (see paragraph 208 above). On the tab labelled "capture/hold/release" in their "detainee personnel details", their release date

is in each case shown as 18 May 2003. However, the details of where and when they were held shown on the same tab and on the tab labelled "prisoner location history" in each case record the date and time of their release as 10 April 2003 at 10:14 and give the "event ID" as "21". The tab for "prisoner release event 21" shows a release date of 18 May 2003 but, as with "prisoner release event 18", the "release description" displays an error message stating that "this release event is now no longer in use!!!!!!". The details of prisoners released show that KSU and MRE were part of a group of 24 prisoners released in event 21.

467. For reasons already given when considering the data recorded for Mr Al-Aidan, the date of 18 May 2003 shown for "release event 21", accompanied as it is by an error message, cannot in my view be relied on. Equally, the date of 10 April 2003 fits with my earlier finding that Mr Al-Aidan was released on 7 April 2003 in "release event 18" (i.e. three days and three events before KSU and MRE). In addition, spreadsheets containing lists of detainees created on 23 April, 22 May and 27 June 2003 record the date of release of MRE and that of KSU as 10 April 2003. (Some later lists of detainees show a date of release for them of 17 or 18 May 2003, but these lists no longer show a date of capture and give a "held from" date of 16 April 2003, which is plainly incorrect.)

468. The data for TUV entered on the AP3 Ryan database record that he was released on 7 May 2003 in "release event 48". This is the same "release event" as is recorded for Mr Alseran, who I have already found was released on 7 May 2003. Confirmation of the accuracy of this date is provided by the fact that no date of release is shown for TUV in the list of detainees created on 23 April 2003 and that, in the lists created on 22 May and 27 June 2003, his date of release is shown as 7 May 2003.

469. The same lists of detainees which show MRE and KSU as having been released on 10 April 2003 also show this as the date when GRX was released. The data recorded on the reconstituted AP3 Ryan database for GRX contain the same internal inconsistency with regard to his date of release as already discussed in relation to MRE, KSU and Mr Al-Aidan. Thus, on the tab labelled "capture/hold/release" in his "detainee personnel details", his release date is shown as 17 May 2003. However, the details of where and when GRX was held shown on the same tab and on the tab labelled "prisoner location history" record his date and time of release as 10 April 2003 at 09:44 and give the "event ID" as "20". The tab for "prisoner release event 20" shows a release date of 17 May 2003 but the "release description" for this event again displays an error message. The details of prisoners released include GRX as one of 27 prisoners released in this event.

470. Identifying the actual date of "release event 20" as 10 April 2003 does not fit exactly with the hypothesis that a new release event was created on the system for each day. However, the discrepancy is a minor one and it could be, for example, that prisoners who were cleared for release on 9 April were for some reason not in fact released until the next day or that, although they were released, their records were not updated to show their release until the next day. At all events, I consider it overwhelmingly likely that the event in which GRX was released occurred on or about 10 April 2003 and not on 17 May 2003.

471. The records indicating that GRX was released on the same day as MRE and KSU (or possibly on the previous day) do not accord with their recollection and that of TUV

that he was released after the claimants. But GRX did not give evidence and the documentary records are more likely to be accurate than what the witnesses now recall. Furthermore, the dates of release documented in the MOD's contemporaneous or near contemporaneous records are consistent with other evidence given by the claimants and TUV which I think more likely to be reliable than their subjective estimates of how long they spent in detention.

472. Thus, MRE and KSU each stated that throughout their time at Camp Bucca all the soldiers they saw were wearing the same yellow-brown desert colour military uniform with brown undergarments which they believe was the uniform worn by British soldiers. KSU worked in the kitchen at the camp alongside soldiers, including three female soldiers, whom he recalls wearing that uniform. Reverend Mercer and other witnesses confirmed that the claimants' descriptions match the desert combat uniforms worn by British forces. Neither MRE nor KSU recalled seeing any soldiers at Camp Bucca wearing any different uniform.

473. As mentioned in discussing Mr Alseran's case, US Military Police had taken over the duty of guarding prisoners at Camp Bucca by 7 April 2003. British soldiers must also have stopped working in the kitchen by that time. If MRE and KSU had remained in detention for many days after the handover, I think it likely that they would have remembered seeing soldiers who were wearing different uniforms from the British army uniform. TUV stated that later in his detention he came to recognise the different uniforms and vehicles of the British and American forces. This suggests that, unlike MRE and KSU, TUV remained at Camp Bucca for some time after the US Military Police took over the duty of guarding prisoners.

474. The claimants' evidence also fits with other evidence about the timing of the release process. The MOD relied on a witness statement made for the purpose of the Baha Mousa inquiry by Mr David Frend, who was present in Iraq in 2003 as a military lawyer. Major Frend (as he then was) said that he first went to Camp Bucca on 29 March 2003. He left the camp on 11 April. For most of his time there his daily "bread and butter" work consisted in sitting on the panels which were established to try to determine which detainees were civilians who should be released immediately. He said that these hearings started on 30 March 2003, at which point there were around 2,000 detainees in Camp Bucca. The evidence of Major Christie, another military lawyer, indicates that efforts were made to give priority to those who had been captured first, although this was logistically difficult. MRE and KSU were among the earliest prisoners detained at Camp Bucca, arriving some six days before Mr Alseran, for example. I see no reason to doubt the evidence of MRE and KSU that they were released on the first occasion when they taken for questioning. I have found earlier that Hasan Al-Aidan, who was interned at Camp Bucca at the same time as Mr Alseran on 1 April 2003, was released on 7 April 2003 and that Mr Alseran was probably first taken for questioning by, at the latest, 10 April 2003. It seems unlikely in the circumstances that MRE and KSU would have had to wait any later than this before being questioned.

475. Another marker is that under the programme of accelerated release which began on 28 April 2003 (see paragraph 225 above) the UK adopted a policy of paying $5 to each prisoner on release and also organised a system for transporting those released by bus to various drop-off points. (Approval for the payment of $5 per prisoner on release was confirmed in an internal MOD email dated 26 April 2003.) The evidence of

MRE and KSU indicates that these procedures were not in place when they were released. By contrast, TUV's evidence shows that, by the time he was released, these procedures were in place.

476. The dates of release shown in the MOD's records also make sense of a letter (written in Arabic) sent to TUV by his mother via the Red Cross while he was detained at Camp Bucca. The letter is dated 22 April 2013 and includes the statement (as translated): "Thank God we heard that you were fine from your friends [KSU], [GRX], and [MRE]". It appears from the evidence of both KSU and TUV that there was some communication between their families while they were in detention. The best explanation of what was written in this letter seems to me to be that, by 22 April 2013, KSU, MRE and GRX had all been released and KSU's family had contacted TUV's family to tell them this information and to let them know that TUV, although still detained, was OK.

Conclusion

477. I find as a fact that MRE and KSU were both released from Camp Bucca on 10 April 2003.

Responsibility for detention at Camp Bucca

478. In part IV above in considering Mr Alseran's case I found that, although after 7 April 2003 US forces were responsible for guarding and maintaining all the prisoners detained at Camp Bucca, the UK authorities retained responsibility for deciding whether UK captured prisoners should be released. As discussed earlier, whether or not he was in fact captured by UK forces, KSU was registered at Camp Bucca as a UK captured prisoner (as were TUV and GRX). The decision whether to keep him in detention or release him would therefore have been treated as matter for the UK authorities.

479. MRE's position is less clear cut, since he was registered as a US prisoner. Nevertheless, it is apparent that, while Camp Bucca was a UK facility, the UK authorities took responsibility for implementing and operating the system of screening detainees including US captured detainees. The draft report dated 7 May 2003 prepared by Major Christie states that, after the US arrived to take over the camp, "the UK retained the lead for the screening process but … integrated US JAG officers and SNCOs into the process. The US then adopted the idea." I infer from this that, at the time when MRE was released on 10 April 2003, the practical responsibility for screening detainees and deciding whether or not they should be released remained with the UK.

480. That this was so in MRE's case is confirmed by his recollection that the panel which screened him for release was chaired by a British soldier. MRE recalled that there were three members of the panel – a female soldier who was sitting in the middle and conducted the questioning, flanked by two men. He described the female soldier as wearing a brown T-shirt and trousers of light desert colour with camouflage, both of which were part of the uniform he had seen throughout his detention at Camp Bucca. He also recalled that on the sleeve of her uniform there was "a sort of leather bracelet which had a circle like a medallion and on it a crown like the crown of the Queen of England". Reverend Mercer identified this as an accurate description of a leather

wristband with a crown emblem which is part of the insignia of a British Warrant Officer.

481. I conclude that, whether or not the US was also responsible for his detention, MRE as well as KSU remained under the effective control of the UK in this regard, such that the UK was responsible for his detention for the whole period that he was held at Camp Bucca.

Liability for mistreatment

482. The treatment complained of by MRE and KSU which I have found proved consists of: (i) excessive force used at the time of their capture; (ii) subjection to forced nudity and to physical assault and sexual humiliation on the big ship; (iii) hooding during the journey from Umm Qasr port to Camp Bucca; (iv) ill-treatment, including striking MRE's head with a rifle butt, at Umm Qasr port; and (v) a kick which caused swelling to the knee sustained by MRE at Camp Bucca.

483. The most serious of these matters by some distance is the second, which plainly constituted inhuman and degrading treatment. However, the claimants have failed to prove that the soldiers responsible for their capture and for mistreating them on the night of their capture were British. It follows that the MOD is not responsible for the first two of the five matters just mentioned, and I therefore do not consider them further.

484. The MOD accepts that the soldiers who took the claimants into their custody at Umm Qasr port were British soldiers. It follows that the MOD is responsible for the third and fourth of the matters I have listed.

485. MRE cannot now remember at what point during his detention the incident in which he was kicked occurred. It is apparent from his evidence, however, that it must have been at least several days before he was released. He said, for example, that he saw a doctor the next day who gave him some painkillers but that, when these ran out after a while, he did not go back to ask for any more because there was always a big crowd of people who wanted to see the doctor when he came each day to the compound and MRE did not want to wait or fight to see him. It might also be expected that MRE would have noticed if the soldier who kicked him in the knee was wearing any different uniform from the soldiers who had previously been guarding the prisoners. In fact, as discussed earlier, MRE only remembers ever seeing soldiers wearing one type of uniform during his detention and his description of that uniform matches the uniform worn by British soldiers. Accordingly, although I have found that responsibility for guarding the detainees was taken over by US Military Police three days or so before the claimants were released, it is probable that the incident in which MRE was kicked occurred before that time and that the soldier who assaulted him was British.

486. In relation to each matter for which British soldiers were responsible, it is necessary to decide whether it gave rise to liability under article 3 of the European Convention and/or to liability in tort under Iraqi law. I also need to consider the allegation made by MRE and KSU, as well as by Mr Alseran, that the conditions in which they were detained at Camp Bucca amounted to inhuman or degrading treatment.

487. I will start by addressing the hooding of MRE and KSU. The claimants contend that this was a breach of article 3 of the Convention and also an assault which gave rise to liability in tort. The MOD denies this.

Hooding: the history

488. Hooding was one of five techniques used in interrogating prisoners in Northern Ireland in the early 1970s which was the subject of an application to the European Court of Human Rights. The other four techniques were forcing prisoners to stand in stress positions, subjecting them to noise, depriving them of sleep and depriving them of food and drink. On 2 March 1972, the then Prime Minister, Mr Edward Heath, made a statement in Parliament that the five techniques would not in future be used as an aid to interrogation in any circumstances. A similar unqualified undertaking was given by the British Attorney-General to the European Court. In its judgment the Court concluded that "recourse to the five techniques amounted to a practice of inhuman and degrading treatment, which practice was in breach of article 3": see *Ireland v United Kingdom* [1978] 2 EHRR 25, para 168. Although this conclusion related to the practice of the five techniques in combination, the European Court has since suggested that hooding alone amounted to a breach of article 3: see *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25, para 209.

489. On his first visit to Camp Bucca on 29 March 2003, Lieutenant Colonel Mercer saw prisoners hooded at the JFIT Compound. He immediately wrote a memo to General Robin Brims, the Commander of the UK 1st Armoured Division, expressing his concern that this treatment violated the Geneva Convention. The Commanding Officer of Camp Bucca, Colonel Baldwin, also raised concerns about hooding, including with the International Committee of the Red Cross whom he invited to visit the camp. They did so and on 1 April 2003 the ICRC indicated that it intended to make a formal complaint about the UK's treatment of prisoners, one particular concern being the hooding of prisoners. As a result of these various concerns, orders were given that hooding was to cease for all purposes. Despite these orders, some hooding of prisoners continued, including notoriously in the case of Baha Mousa who died in British custody in September 2003.

490. The circumstances in which the practice of hooding was used in Iraq were investigated in depth at the public inquiry into the death of Baha Mousa. In his report published in September 2011, Sir William Gage, the retired Court of Appeal judge who chaired the inquiry, made detailed findings on this subject. The MOD had argued that hooding for security purposes would be lawful if a number of conditions were met but emphasised that hooding had by then been banned at all times and for all purposes and that the MOD had no intention to re-visit that ban. In view of this ban, Sir William did not think it necessary to make findings as to the legality of hooding but observed that the arguments in favour of a complete prohibition on the use of hoods were overwhelming. He also said:

> "Since sight deprivation can be achieved practicably and more effectively by a less de-humanising means it is difficult to

> conceive how a return to the use of hoods could be justified whether militarily, legally or as a matter of policy."[40]

491. Of the 73 recommendations made in the Baha Mousa inquiry report, the first was that "the MOD should retain its current absolute prohibition on the use of hoods on captured personnel".[41] Recommendation 4 was that:

> "The essence of guidance on hooding should be that it is prohibited at any time for whatever purpose to place a sandbag or other cover over a [captured person's] head".

492. In July 2010 the Government published a document giving guidance to UK intelligence officers and service personnel on the detention and interviewing of detainees overseas. An annex to this guidance recorded the Government's view that certain practices "could" constitute cruel, inhuman and degrading treatment. These included methods of obscuring vision or hooding "except where these do not pose a risk to the detainee's physical or mental health *and* is necessary for security reasons during arrest or transit". In *R (Al Bazzouni) v Prime Minister* [2011] EWHC 2401 (Admin), [2012] 1 WLR 1389, the claimant challenged the lawfulness of this guidance on the grounds that hooding is contrary to English common law, article 3 of the European Convention and customary international law and ought therefore to be prohibited in all circumstances. The Divisional Court was satisfied that there was convincing evidence that "the United Kingdom Government's consistent policy has been that hooding is neither to be used nor condoned by UK personnel in any circumstance, including during transit or for security reasons" (para 80). The Divisional Court concluded that, although it was conceivable that in certain factual circumstances hooding might not be unlawful, the exception contemplated in the guidance was unworkable and that, in circumstances where "[t]he Government's policy is, for good reason, to prohibit hooding, [the guidance] should be changed to omit hooding from the ambit of the exception" (see paras 90-94).

493. The current edition of the MOD's Joint Doctrine Publication 1-10 on Captured Persons (JDP 1-10), promulgated in January 2015, contains a section on prohibited acts. This includes a discussion of the "five techniques" including hooding, which is defined as placing a cover over a captured person's head and face (see para 218). A footnote makes it clear that "a cover includes a sandbag". The text states:

> "Hooding is prohibited at any time, for whatever purpose".

To reinforce this point, at the end of the section there is a shaded box containing the words (in capital letters):

> "HOODING IS PROHIBITED IN ALL CIRCUMSTANCES"

This statement of policy could not be clearer.

---

40 See the report of the Baha Mousa inquiry, Vol III, Part XVI, Ch 2, para 16.71.

41 Ibid, Vol III, Part XVII.

The use of hooding in this case

494. Despite its unequivocal published policy, the MOD felt able to submit at the trial of MRE and KSU that the hooding of captured persons does not amount to inhuman and degrading treatment under article 3 of the European Convention where it is done for short periods of time during transit for reasons of operational security, and also to deny that the hooding of MRE and KSU for the duration of the journey from Umm Qasr port to Camp Bucca was a breach of article 3.

495. It is disappointing that the MOD appears to regard its published doctrine on this practice as a form of abstinence on its part which is more honoured in the breach than the observance. As the lessons of Northern Ireland, the Baha Mousa inquiry and the *Al-Bazzouni* case do not seem to have been fully absorbed by the MOD, I consider that the court should now make it clear in unequivocal terms that putting sandbags (or other hoods) over the heads of prisoners at any time and for whatever purpose is a form of degrading treatment which insults human dignity and violates article 3 of the European Convention. It is also, in the context of an international armed conflict, a violation of article 13 of Geneva III, which requires prisoners to be humanely treated at all times.

496. An incantation of "operational security" cannot justify treating prisoners in a degrading manner. If it were seriously to be suggested that allowing prisoners to see particular installations or equipment or activities would have put British military personnel at risk, the relevant concern would need to be specifically identified and substantiated. No attempt has been made in this case to do that. Even where a genuine concern of that kind exists, it is difficult to see how it could ever be necessary or proportionate to deprive a captured person of sight by covering their entire head with a bag when there are other acceptable means of addressing the risk such as covering the windows of vehicles, taking a different route or, if absolutely necessary, briefly blindfolding the prisoner. In any case such considerations are entirely academic in the present case as there is no evidence of anything that the claimants might have seen on the journey from Umm Qasr port to Camp Bucca apart from several miles of sand.

497. According to Colonel Stephen Cox who was the Deputy Commander of 3 Commando Brigade, Royal Marines, and responsible between 23 March and 6 April 2003 for the coordination of coalition activity in Umm Qasr, Camp Bucca was about 40 minutes drive from Umm Qasr port. I therefore infer that the claimants must have been hooded for at least that length of time. The experience had a particularly traumatic effect on MRE. As mentioned earlier, there is evidence that dirt or sand inside the sandbag put over his head, including a sharp object such as a shard of glass, got into his left eye, causing a small scratch on the cornea (although not one which has damaged his eyesight) and an eye infection which persisted while he was detained at Camp Bucca. He also suffered fear and anxiety from having his head completely covered with a bag. The psychological effect of the experience is manifested in two symptoms from which MRE still suffers. One, which is a recognised feature of post-traumatic stress disorder, is that he periodically experiences "flashbacks" accompanied by feelings of acute anxiety which may be described as "panic attacks". He said in evidence, and I accept, that when these episodes happen the memories that overwhelm him are predominantly of the three occasions during his captivity when he felt that he was going to die. These were: the occasion when the soldiers came on

board the cargo ship, the incident on the big ship when he was forced to take his clothes off, and the occasion "when they had a bag over my head". The second relevant symptom is that his left eye regularly becomes red and sore. As mentioned earlier, the expert ophthalmologists who examined MRE could find no physiological cause for these episodes, which appear to be psychosomatic. But the fact that his psychiatric condition is expressed in this particular way seems likely to reflect the traumatic impact of the original experience.

498. KSU has not suffered such severe long-term psychological effects as MRE from his experiences at the hands of coalition forces, including that of being hooded. But I accept his evidence that having a sandbag put over his head and then being forced to the ground and made to shuffle forwards on his knees before being shoved and kicked into a vehicle caused him to feel terrified and humiliated. He said in his evidence: "I could not understand why they would do such a thing to another human being. They were treating me like I was an animal." It is difficult to disagree with that description.

499. I accordingly find that the hooding of the claimants with sandbags at Umm Qasr port and for the duration of the journey in which they were taken to Camp Bucca constituted inhuman and degrading treatment which violated article 3. I also find that it was an assault which caused moral, physical and psychological harm and gave rise to liability in tort in accordance with article 202 of the Iraqi Civil Code.

Other assaults

500. I have found that when they came ashore at Umm Qasr, as well as having sandbags placed over their heads, MRE and KSU were subjected to further mistreatment. In particular, MRE was hit on the head with what must have been a rifle butt, an assault which has caused him some permanent disability. Applying the criteria identified in part IV at paragraphs 230–231, I have no doubt that this constituted inhuman treatment. The rough treatment of KSU would not on its own have crossed the article 3 threshold but it was so closely connected with the hooding that I regard it as part of the same episode which amounted to a violation of article 3 as well as an assault.

501. On the other hand, there is no suggestion that the kick on the knee that MRE received during his detention at Camp Bucca was part of any wider course of conduct or was anything other than an isolated incident. Indeed, MRE said in evidence that afterwards other soldiers apologised to him and he was told that the soldier who had kicked him would be disciplined. It was a simple assault which caused a minor injury and in my view fell below the threshold of severity required for a breach of article 3.

Conditions at Camp Bucca

502. It is alleged by these claimants and by Mr Alseran that the conditions in which they were detained at Camp Bucca were inhuman and violated article 3 of the European Convention.

Factual findings

503. Although there were some discrepancies between the recollections of different witnesses, considered as a whole the evidence about the conditions at Camp Bucca painted a broadly consistent picture and I make the following factual findings.

504. The prisoners at Camp Bucca were held in compounds. Each compound was intended to hold up to 500 people and was surrounded by barbed wire fencing. Colonel Pittman, who was the second in command while British forces were running Camp Bucca and who gave evidence at the second trial, estimated that the size of each compound was around 150 metres by 75 metres. Within each compound there were two large marquee tents. The sides of the tents could be rolled up and were kept rolled up most of the time. Colonel Pittman said that within each tent the ground was covered with domestic carpet. Each prisoner was provided with a blanket but no other form of bedding. Mr Alseran, MRE and KSU all said – and I accept – that, because of the number of prisoners in the compound where they were held, they would sometimes have to sleep on the sand outside the tented area.

505. When the camp was first set up, food consisted of daily ration packs supplemented by a few other items such as biscuits and honey purchased in Kuwait. This was similar to the food rations issued to the British troops but many detainees objected to it because it was not the kind of food that they were used to eating. Some of the detainees started a hunger strike to protest about the food. After this, the British soldiers agreed to allow the detainees to cook their own food and the quality improved. (As mentioned earlier, KSU worked as one of the cooks.) After these arrangements were implemented, food was prepared in a central area and distributed to each compound twice a day (except for Sundays, when the prisoners continued to receive ration packs).

506. Clothing was provided only to detainees who appeared to lack proper clothing. Otherwise the detainees remained throughout their captivity in the clothes they were wearing when captured. All seven witnesses detained at Camp Bucca who gave evidence at these trials complained that they had to wear the same clothes throughout their detention and were not provided with any change of clothing. There were also no facilities for them to wash their clothes.

507. At each end of the compound there was a block of eight latrines. These were pits dug in the ground with a wooden platform over them and screened by hessian sacking. Mr Alseran said that there was often a long queue to use the toilet because there were not many toilets and so many prisoners. MRE and KSU complained that the toilets were dirty, that the smell from them was very strong and that there was no privacy when using them. There were daily latrine patrols in which the faeces were taken out, the sand was burned with diesel and the pits were limed. Nevertheless, both Reverend Mercer and Colonel Pittman recalled a strong stench from the latrines and clouds of flies.

508. To begin with, detainees were issued with bottles of water for drinking and to use for any ablutions. According to Mr Neil Wilson, a Warrant Officer at the time who gave evidence to the Baha Mousa inquiry, there were initially problems with the distribution of water largely caused by detainees fighting over it. He said that detainees were, however, given the same amount of water as British troops. Colonel Pittman recalled the water ration being 2 litres a day. After some days water tanks were installed outside the complex and water was piped into the compound through hose pipes. On 4 April 2003 the Commanding Officer of the Camp noted in the Commander's Diary:

> "The water tanks are up and running in all 11 accommodated cages, giving the prisoners ample water to drink, wash and ablute with. A supply load of 75,000 L a day is organised which must be sufficient for under 5,000 PWs."

The water supply was controlled and was only turned on at certain times of the day. MRE and KSU complained that, with so many people, the water would run out with the result that there was very little opportunity to shower. It appears that initially detainees were not provided with any soap but that soap was later issued.

509. There were no regular medical checks but medical assistance was available. Colonel Pittman recalled that some of the prisoners suffered from stomach upsets and said that this was due to the change in their diet. There were no outbreaks of disease at the camp.

510. A separate tent was set up outside the complex with the intention that it could be used for prayer but it was not in fact used. Colonel Pittman explained that it was expected that there would be some religious leaders among the detainees who would come forward and seek to conduct some form of worship, but this did not happen. KSU complained that there was no clean place to pray and that, because of the lack of water, he could not perform the ablutions necessary to enable him to pray which greatly upset him. Mr Al-Aidan said that he would pray when there was enough water for him to wash, but the water tanks were sometimes empty.

511. The prisoners were allowed to move around the compound as they wanted. But there were no recreational facilities of any kind.

Breaches of the Geneva Conventions

512. The Geneva Conventions contain detailed provisions concerning the treatment of prisoners of war and civilian internees. These include provisions requiring:

i) suitable bedding and accommodation including a requirement for prisoners of war to be quartered under conditions as favourable as for the forces of the Detaining Power who are billeted in the same area (Geneva III, article 25; Geneva IV, article 85);

ii) daily food rations sufficient to keep prisoners in good health and sufficient drinking water (Geneva III, article 26; Geneva IV, article 89);

iii) provision of sufficient clothing, underwear and footwear (Geneva III, article 27; Geneva IV, article 90);

iv) canteens to be installed in all camps, where prisoners can buy foodstuffs, soap and tobacco at prices no higher than local market prices (Geneva III, article 28; Geneva IV, article 87);

v) sanitary conveniences conforming to the rules of hygiene and maintained in a constant state of cleanliness, showers or baths to be available and sufficient water and soap for personal toilet and for washing personal laundry (Geneva III, article 29; Geneva IV, article 85);

vi) an adequate infirmary where prisoners may receive medical attention, with medical inspections to be held at least once a month (Geneva III, articles 30-31; Geneva IV, article 91-92);

vii) suitable premises for the holding of religious services (Geneva III, article 34; Geneva IV, article 86);

viii) facilities for recreational pursuits including sports and outdoor games (Geneva III, article 38; Geneva IV, article 94).

513. It is apparent from my factual findings that not all of these requirements were complied with. Lieutenant Colonel Mercer first visited Camp Bucca on 28/29 March 2003 and made a further visit on 19/20 April 2003. In his evidence he described the conditions at the camp as "rudimentary", "crude" and "sub-standard". He expressed the view that UK forces did not "come even close" to meeting the standards for the treatment of prisoners of war and internees required by the Geneva Conventions and MOD policy, and said that this was recognised at the time. Documents disclosed by the MOD confirm that it was indeed recognised at the time that, as it was put in one inspection report, "only a percentage of the Convention on internees is being adhered to".

514. In my view, the most serious breaches of the Geneva Conventions in the handling of prisoners at Camp Bucca were: the failure to provide prisoners with any change of clothing or facility to wash their clothes (with the result that Mr Alseran, for example, was forced to stay in the same clothes in which he was captured for over a month); the lack for at least part of the time of adequate facilities for washing which also prevented prisoners from practising their religion; and the complete absence of any form of recreation for prisoners.

Was there a breach of article 3?

515. It does not follow, however, from these findings that the conditions in which prisoners were held at Camp Bucca violated article 3 of the European Convention. The requirement to treat protected persons humanely has been described in the ICRC Commentary as the basic theme of the Geneva Conventions: see Commentary on the Geneva Conventions of 1949, vol III, ICRC, 1960, p140. This requirement is stated in article 13 of Geneva III, article 27 of Geneva IV, article 75 of AP I and article 4 of AP II. A question on which I invited argument at the second trial was whether the specific provisions of the Geneva Conventions regarding the treatment of internees referred to above are intended to spell out in concrete form what humane treatment requires in the context of internment, such that a failure to comply with those provisions gives rise to an inference of inhuman treatment. That in turn might found an inference that there was a breach of article 3 of the European Convention, much as the European Court in assessing conditions of detention has treated failure to comply with certain specific requirements relating to personal space and other aspects of detention as creating a presumption that article 3 has been violated: see *Ananyev v Russia* (2012) 55 EHRR 18, paras 143-159.

516. Having heard argument on this point, however, I have concluded that such inferences cannot properly be drawn. It is clear that a basic purpose of the Geneva Conventions is to seek to ensure that prisoners of war and other persons protected by the

Conventions are treated humanely. There can also be no doubt that the specific requirements relating to the treatment of internees referred to at paragraph 512 above are intended to further that basic purpose. But when regard is had to the nature and degree of detail of the requirements, they cannot reasonably be understood as defining the obligation of humane treatment such that – to take two examples – a failure to set up a canteen at which food and other articles can be purchased or a failure to encourage intellectual pursuits also constitutes a breach of the more fundamental obligation to treat prisoners humanely. Still less can any transposition automatically be made to what constitutes a breach of the prohibition against inhuman and degrading treatment established by article 3 of the European Convention.

517. I have summarised earlier (at paragraph 230 in part IV) the standards which determine whether ill-treatment attains the minimum level of severity to amount to a breach of article 3. It is in the nature of those standards that they cannot be reduced to a check list of specific requirements. There are too many variables. For example, conditions which would not constitute inhuman treatment if a person was detained in those conditions for a few days might become so if the detention lasted for several months. It seems to me that, while the specific provisions of the Geneva Conventions are a helpful reference point, what is ultimately required is a broad evaluative judgment. It is necessary to ask: having regard to all the circumstances – including the logistical difficulties faced by the detaining power at the relevant stage of the conflict and the length of the claimant's detention – were the conditions in which the claimant was detained, either in a particular respect or considered overall, calculated to cause such intense suffering or hardship as to deny, to a seriously detrimental extent, the claimant's most basic needs as a human being?

518. Applying that test, although the conditions in which Mr Alseran, MRE and KSU were held at Camp Bucca, particularly in the first few days of their detention, were arduous, I do not consider that those conditions, either in any particular respect or considered overall, amounted to inhuman or degrading treatment which violated article 3 of the European Convention on Human Rights.

The unlawful detention claims

519. I turn to the claims made by MRE and KSU that their detention was unlawful and gave rise to liability (a) under article 5 of the European Convention and (b) in tort.

520. As previously discussed, the question whether the claimants' detention was consistent with article 5 of the European Convention depends in the first place on whether there was a legal basis for it. As in the case of Mr Alseran, the MOD has argued that there was a legal basis for detaining MRE and KSU under international humanitarian law, either as prisoners of war under Geneva III or as persons whose internment was necessary for imperative reasons of security under Geneva IV.

Were MRE and KSU prisoners of war?

521. The categories of person specified in article 4 of Geneva III who, when they have fallen into the power of the enemy, are prisoners of war include:

> "(5) Members of crews … of the merchant marine … of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law."

At the trial I invited argument on whether MRE and KSU fell into this category. This depends on the answers to two questions: (i) was the cargo ship of which MRE and KSU were crew members part of the merchant marine of Iraq; and (ii) if so, did they "benefit by more favourable treatment under any other provisions of international law"?

Was the claimants' ship an Iraqi merchant ship?

522. An authoritative commentary on international law applicable to armed conflicts at sea is the San Remo Manual, prepared by a group of international lawyers and naval experts convened by the International Institute of Humanitarian Law and adopted in 1994. The San Remo Manual defines a merchant vessel as "a vessel, other than a warship, an auxiliary vessel, or a state vessel such as a customs or a police vessel, that is engaged in commercial or private service": see part I, section V, para 13(i). The cargo ship on which MRE and KSU were serving when they were captured was engaged in commercial or private service and fell squarely within this definition as well as within the ordinary meaning of the term "merchant marine".

523. As noted in the Explanation which accompanies the San Remo Manual (at para 112.3), the fact that a merchant vessel is flying the flag of an enemy state has traditionally been treated as conclusive of the vessel's nationality and hence of its enemy character (see also *The Unitas* [1950] AC 536, 550). The Manual adopts this approach but also recognises, realistically, that in the modern era when merchant ships frequently operate under flags of convenience the fact that another state's flag is flown does not prevent a ship from being considered enemy in character on the basis of other criteria, including ownership: see part V, section I, paras 112 and 117.

524. The cargo ship was in fact registered in Belize, although its owner was Iraqi. According to MRE, when at sea the ship flew the Belize flag, but "normally when the ship was sitting at anchor in Iraq, we would put up the Iraqi flag". KSU recalled that the ship had the Iraqi flag flying from the tower. I infer from this evidence that the cargo ship was probably flying the Iraqi flag when the ship was boarded. But even if not, in circumstances where the ship was anchored in an Iraqi inland waterway and manned by an Iraqi crew, I think it clear that the boarding party was entitled to treat the ship as an Iraqi merchant vessel.

Were the claimants entitled to "benefit by more favourable treatment"?

525. It is generally understood that the reference in article 4(5) of Geneva III to the possibility of "more favourable treatment under any other provisions of international law" is a reference to article 6 of Hague Convention IX of 1907: see e.g. the 1960 ICRC Commentary to the Third Geneva Convention p66; the Explanation accompanying the San Remo Manual at para 165.7; R Tucker, *The Law of War and Neutrality at Sea* (1955) pp113-4; and D Fleck, *The Handbook of International Humanitarian Law* (2013) section 1032. Article 6 of the Hague Convention states:

> "The captain, officers and members of the crew, when nationals of the enemy State, are not made prisoners of war, on condition that they make a formal promise in writing, not to undertake, while hostilities last, any service connected with the operations of the war.

526. The ICRC Commentary explains that this provision was effectively rendered obsolete by state practice during the First and Second World Wars, when captured merchant seamen were treated sometimes as prisoners of war and sometimes as civilian internees. When Geneva III was agreed at the Diplomatic Conference of 1949, the proposal that merchant seamen should qualify for the status of prisoners of war was accepted, but not without some difficulty and with the inclusion of the proviso allowing for the possibility of better treatment: see ICRC Commentary, p66; Final Record of the Diplomatic Conference of Geneva of 1949, vol IIA, pp238-9 and 418-9.

527. The interpretation adopted in the Explanation accompanying the San Remo Manual (at para 165.9) is as follows:

> "Unless the merchant vessel … is taking part in hostile operations …, there is no reason why the crew should not benefit from the more favourable treatment and be released. The captor will need to make an assessment of whether the crew of the merchant vessel is likely to undertake activities that will help the military action of the enemy, and if he considers that internment is necessary for his security, the crew is entitled to prisoner of war status."

Similarly, Els Debuf in *Captured in War: Lawful Internment in Armed Conflict* (2012) at pp329-240 argues that, having regard to the principle of military necessity that underlies the internment provisions of Geneva III and the possibility of release expressly contemplated by article 4(5), a person referred to in that provision may only be interned on the basis of Geneva III where he or she poses a threat to the military operations of the interning power. I find this interpretation persuasive.

528. The claimants sought to rely on article 50 of AP I, which defines a "civilian" as any person who does not belong to one of the categories of persons referred to in article 4A (1), (2), (3) and (6) of Geneva III and in article 43 of AP I. As merchant seamen are referred to in article 4A(4), they fall into one of the categories of person who are classified under the Geneva Conventions both as prisoners of war (if they are captured) and as civilians. The significance of being a civilian is that, pursuant to article 51 of AP I, civilians enjoy general protection against dangers arising from military operations and must not be the object of attack unless and for such time as they take a direct part in hostilities. Being a "civilian" within the meaning of article 50, however, does not give a person protected status under Geneva IV, since all categories of prisoner of war are excluded from the ambit of Geneva IV (see paragraph 246 above). Thus, article 50 of AP I does not assist on the question of whether there is power to detain.

529. In the present case, the boarding party which captured the claimants searched the ship and found only one weapon – a rifle which the crew kept for self-protection and which had been hidden. Nevertheless, the claimants were on a ship which was moored in the middle of a strategic waterway. It was the first week of the war and it was

feared that many Iraqi combatants were not wearing uniforms. Intelligence reports for 23 and 24 March 2003 outlined the security concerns for the waterways at that time, including the potential risk of 'suicide boats' anchored on the KAZ as well as the threat of mines. Moreover, MRE and KSU said that, on the evening on which they were captured, all the lights on the ship had been turned on – which was bound to arouse suspicion. In the circumstances, it seems to me that the boarding party cannot be faulted for taking the view that it was necessary to detain the crew in order to ensure the security of coalition forces using the KAZ waterway. That being so, the effect of article 4A(5) is that the crew became prisoners of war.

530. If I am wrong about that, then I consider that a similar analysis applies as in the case of Mr Alseran and that there was power under article 27 of Geneva IV to detain the claimants in order to remove them from an area in which they posed a potential threat to security.

531. Once the claimants had been captured and brought to Camp Bucca, the relevant question was again whether it was necessary to detain them for reasons of security but the context in which that question arose was different. The claimants were no longer situated on a ship in a strategic location. The issue became whether there was evidence to indicate that, if released, they would take up arms or otherwise pose a threat to coalition forces. The investigation of the facts at this trial indicates that there was no such evidence. That must also have been the conclusion reached by the assessment panels which interviewed MRE and KSU, as the decision made was to release them. I accept their evidence that the first and only time when they were questioned by a panel was on the day of their release, which I have found was 10 April 2003.

Was there an effective means of challenge?

532. The second aspect of whether the claimants' detention complied with article 5 is whether they had an effective means of challenging the lawfulness of their detention. I have described in part IV in dealing with Mr Alseran's case the system which was operated at Camp Bucca of screening prisoners for release. I have found that the system was flawed because it wrongly applied a presumption that, if there was any doubt, it should be assumed that detainees were prisoners of war who should be kept in custody. However, this flaw in the procedure did not affect the detention of MRE and KSU as, on the first occasion when they were interviewed by an assessment panel, the decision was made to release them.

533. The remaining question is whether the assessment was sufficiently prompt. I have found that MRE and KSU were interned at Camp Bucca on 25 March 2003 and released on 10 April 2003. They were therefore held at Camp Bucca for 16 days.

534. As discussed in relation to Alseran's case, in order to comply with article 5 the first review must be held "shortly after the person is taken into detention". There is no litmus test for deciding what length of delay will result in a breach of this requirement and it is necessary to take account of the circumstances including the fact that the claimants were detained in the first days of a war and the large number of detainees who needed to be processed. Making every allowance for these factors, however, I do not consider that detaining a person in a prison camp for 16 days before giving any attention at all to the question of whether it was justifiable to detain them could be

said to meet the obligation to provide a fair and effective review process. I have formed the opinion that a detainee was entitled to have their case assessed within at most ten days of their arrival at Camp Bucca (see paragraph 294 above). It follows that, in the cases of MRE and KSU, there was in my view a breach of article 5(4). Furthermore, had they been interviewed by a panel at least six days earlier than they were, there is no reason to suppose that the decision reached by the panel – that they ought to be released – would have been different.

535. I accordingly find that, although the capture and initial detention of MRE and KSU was lawful, their detention after 4 April 2003 in circumstances where there had not yet been any assessment made of whether it was lawful to detain them contravened article 5.

Crown act of state

536. As in the case of Mr Alseran, the detention of MRE and KSU was undoubtedly unlawful as a matter of Iraqi law. In so far as their detention was authorised by the Crown, however, any claim in tort arising out of their detention by British forces is barred by the doctrine of Crown act of state. I have concluded at paragraphs 317–328 above that, during the international armed conflict and occupation phases of the UK's involvement in Iraq, British forces were authorised by the Crown to detain persons when and only when such detention was compatible with the Geneva Conventions and article 5 of the European Convention. I have found that this was the case for MRE and KSU until 4 April 2003 but not after that date. It follows that a claim in tort lies in relation to their detention between 4 and 10 April 2003.

Conclusions

537. In summary, subject to the issue of limitation addressed in part VII, my conclusions in these (linked) cases are as follows:

i) Although their allegations that they were mistreated at the time of their capture (which on my finding occurred on 24 March 2003) and on the large warship are true, the claimants have failed to prove that the soldiers who captured and mistreated them were British.

ii) There is, however, no doubt that from when they disembarked at Umm Qasr port on the day after their capture until their release from Camp Bucca, which I have found occurred on 10 April 2003, MRE and KSU were in the custody of British forces who were responsible for their detention throughout that time.

iii) The hooding of MRE and KSU with sandbags during their transportation to Camp Bucca was inhuman and degrading treatment which violated article 3 of the European Convention as well as amounting to an assault.

iv) MRE was struck on the head on the dock at Umm Qasr and later kicked in the knee by a British soldier while detained at Camp Bucca, as alleged. Both assaults gave rise to liability in tort and the former also constituted inhuman treatment which violated article 3 of the European Convention.

v) As in the case of Mr Alseran, the conditions in which the claimants were detained at Camp Bucca were harsh but did not amount to inhuman treatment.

vi) Although unlawful under Iraqi law, the capture and initial detention of MRE and KSU was in accordance with international humanitarian law. They were, however, entitled under international humanitarian law and article 5 of the European Convention to have their cases assessed and a decision whether to intern or release them made promptly following their arrival at Camp Bucca on 25 March 2003. Making all due allowance for the wartime conditions, such an assessment should have taken place within, at most, ten days of their internment. In fact, their cases were not considered until 10 April 2003 – when the decision was made that they should be released. In the result, MRE and KSU were unlawfully detained for six days. Their detention during this period therefore violated article 5 of the European Convention and also gave rise to a claim in tort (as the British government did not authorise detention which was in breach of international humanitarian law and the Human Rights Act).

VI. MR AL-WAHEED'S CLAIM

Mr Al-Waheed's background

538. Mr Al-Waheed was born in Basra in May 1963 and was therefore 43 years old at the time of his detention by British forces in February 2007. At the time of the trial he was aged 53. He is more highly educated than the other claimants in these lead cases, having a degree in Mathematics from Basra University. After graduating from university, he was conscripted for six years' compulsory military service, as all Iraqi men were at the time. He served in the Gulf War in 1990-91 as part of an air defence unit, and saw two of his friends die and a fellow officer sustain severe injuries when his unit was struck by a missile.

539. Mr Al-Waheed completed his military service in 1994. By this time Iraq was badly affected by economic sanctions and the only work he could find was in Tikrit in the Salahadin Province to the north of Baghdad. Mr Al-Waheed worked as an interior decorator in the mansions of government officials, specialising in elaborate cornice work. In 2000 he managed to get a more secure job in the state-owned electricity company, as a computer programmer controlling the gas turbine generators. By then he had been married for ten years to his first wife, with whom he had five children.

540. Mr Al-Waheed and his family were scarcely affected in their daily lives by the invasion and occupation of Iraq. But by 2005 there was growing sectarian violence in Salahadin Province and members of his Shia community began to be targeted by terrorist groups. Mr Al-Waheed decided that it was too dangerous to continue living there and took his family back to Basra. He managed to arrange a transfer within the electricity company to the Shaibah branch, where he continued in the same role as before.

541. Following the move, Mr Al-Waheed's marriage broke down and he got divorced. Mr Al-Waheed and his children, who remained with him, lived with his parents in a residential district of Basra City. On 26 September 2006 he re-married, having been introduced to his new wife, Nazhat, through a family connection. She was 25 years

old when they married. Nazhat's family home was on the same street as Mr Al-Waheed's parents' house, only about 100 metres away. Her parents had both died and she was living in her family home with her older brother, Ali Jaleel, and her younger sister.

542. After his marriage to Nazhat, Mr Al-Waheed rented a flat for them to live in, not far from their respective family homes. Nazhat became pregnant but there were concerns about the pregnancy and she underwent surgery to tie her uterus. Nazhat was told to rest in bed as much as possible and she moved back to her family home so that her sister could look after her. Mr Al-Waheed visited her after leaving work each day and sometimes stayed overnight.

543. On the evening of 11 February 2007 Mr Al-Waheed made such a visit to Nazhat's family home. Nazhat's younger sister was also present but their older brother, Ali Jaleel, had gone out. Mr Al-Waheed's children came with him but at some point in the evening they left to sleep at his parents' house.

Mr Al-Waheed's arrest

544. At around 0030 Mr Al-Waheed was lying in bed next to his wife when he heard sounds of vehicles and gunfire outside in the street. He got out of bed and went into the hall as soldiers burst through the front door. Mr Al-Waheed was arrested and the house was searched. In one of the rooms the soldiers found a partly assembled IED. They also found a large quantity of mortar bombs on the roof and on the stairs leading up to the roof of the house.

545. Mr Al-Waheed alleges that he was assaulted at the time of his arrest. He also alleges that during the journey from the house to the British military base at Basra Airport he was assaulted and tortured by the soldiers travelling with him.

546. The operation in which Mr Al-Waheed was detained, named "Operation Saddlers", had targeted two houses in Basra (referred to in the military jargon as "Alphas"). One of the houses ("Alpha 418") was Nazhat's family house and the aim of the raid was to arrest her brother, Ali Jaleel (referred to as "Bravo 418"), and to search the house for any illegal weapons and exploitable information. At least 30 soldiers were involved in the operation. They were commanded by Mr Gareth Fulton who served in the Yorkshire Regiment from 2005 to 2013 and was a Lieutenant at the time. Mr Fulton and three other men who took part in the operation were called by the MOD as witnesses at the trial. The other men called as witnesses were: Major Ben Sawyer, then a Captain in the Royal Logistic Corps and an expert in IED disposal; Mr David Turner, then a Lance Corporal in the Royal Engineers who was second in command of a search team of six men who searched Alpha 418; and Mr Gareth Raper, then a Lance Corporal in the Yorkshire Regiment who was the first soldier to enter the house.

547. Mr Fulton said that on such operations there would regularly be exchanges of gunfire and roadside bombs on the route to and from the target buildings. Operation Saddlers was no exception. On their way to the target houses the military convoy, consisting of Snatch Land Rovers and Warrior light armoured vehicles, came under attack from small arms fire and Rocket Propelled Grenades ("RPGs"). An IED also exploded behind one of the vehicles but caused no damage. On the return journey to the

military base at Basra Airport the convoy again came under attack from small arms fire and RPGs. Fire was returned, with four hits claimed. The convoy was also delayed by a major obstacle in the road. As a result, the return journey, which would normally take about 30 minutes, took over two hours. The convoy arrived back at the Basra Airport base between 0315 and 0330 on 12 February 2007.

The context of Operation Saddlers

548. To put Operation Saddlers in context, Mr Fulton estimated that during this tour of duty, he took part in 60-70 such operations within a period of some six and a half months. Mr Raper's recollection was that a house raid took place almost every night.

549. Operation Saddlers was one of many strike operations carried out in connection with "Operation Sinbad", an initiative pursued by the MNF in Basra between September 2006 and March 2007 with the aims of rooting out members of militias and undertaking rebuilding projects in preparation for handing over the security of Basra to the Iraqi government. This initiative was met with an upsurge in violence from the main militia group, Jaysh al-Mahdi, as it threatened their growing power in Basra.

550. A report prepared by the International Crisis Group in June 2007 and quoted by the claimants' expert on country conditions, Dr Alan George, summarised the situation during this period as follows:

> "Between September 2006 and March 2007, Operation Sinbad sought to root out militias and hand security over to newly vetted and stronger Iraqi security forces while kick starting economic reconstruction. Criminality, political assassinations and sectarian killings, all of which were rampant in 2006, receded somewhat and – certainly as compared to elsewhere in the country – a relative calm prevailed. Yet this reality was both superficial and fleeting. By March-April 2007, renewed political tensions once more threatened to destabilise the city, and relentless attacks against British forces in effect had driven them off the streets into increasingly secluded compounds. Basra's residents and militiamen view this not as an orderly withdrawal but rather as an ignominious defeat. Today, the city is controlled by militias, seemingly more powerful and unconstrained that before."

551. The attacks on British forces caused heavy casualties. 46 British soldiers were killed and 350 were wounded during this period. The number of deaths was almost as many as during the invasion and initial period of occupation in 2003 and more than in any other period of the conflict.

Detention at Basra Airport

552. On arrival at the Basra Airport base, Mr Al-Waheed was made to sit outside on the pebbled ground. It was cold at night at that time of year but he claims that he was not given anything to keep him warm. He also alleges that, while he was sitting on the ground, soldiers threw stones at him intermittently.

553. In accordance with standard procedure, Mr Al-Waheed was photographed, as was the soldier who had detained him. In circumstances where this soldier was not a witness at the trial and is, by implication, accused of having assaulted Mr Al-Waheed, I will refer to him as Private P. Although this is a matter of impression, in the photographs taken of him Mr Al-Waheed appears to me to be in considerable physical discomfort. In addition, blood from a cut and swelling can be clearly seen above his left eye.

554. A further part of the procedure on arrival was for the detaining soldier and officer in charge of the operation to make statements recording the circumstances of an arrest. Statements were made by Private P and Lieutenant Fulton, and I will come shortly to the contents of these statements. In addition, a swab was taken from Mr Al-Waheed's hand which was tested for explosives by Lance Corporal Fogarty, a specialist from the Joint Chemical Biological Radiological Nuclear Regiment, using a Sabre 4000 trace detector. After conducting that test, Lance Corporal Fogarty made a statement describing the procedure followed and recording the result, which was a one bar reading (on a ten point scale) for RDX (a military explosive found in IEDs). According to Lance Corporal Fogarty's statement, this meant that Mr Al-Waheed was "far away from an explosive", and a later summary of Mr Al-Waheed's case, prepared in connection with his internment, described the level of RDX detected as "insignificant".

555. At 0410 Mr Al-Waheed was seen by a medical officer, Dr Iain Thomson, who made brief notes at the time of his examination and was a witness at the trial. Dr Thomson did not record any injuries to Mr Al-Waheed. The only observation that he noted which could be a sign of mistreatment was of blood in the right ear (with no source found). When he gave evidence, Dr Thomson could not explain why he did not note the cut above Mr Al-Waheed's left eye which can be seen in the photographs, except to say that he must not have noticed it.

556. Between 0426 and 0500, and again between 0600 and 0645, Mr Al-Waheed underwent "tactical questioning". He claims that this involved "harsh" interrogation methods which have since been banned by the MOD.

557. The Standard Operating Instruction which applied at the time of Mr Al-Waheed's detention, HQ MND (SE) SOI 390 dated 15 November 2006, stated (at para 22):

> "The detailed and accurate recording of the TQ [tactical questioning] or interrogation product is crucial for use in any potential future prosecution, for intelligence purposes, and to rebut any subsequent allegations of abuse. Each TQ or interrogation session must be audio or video recorded and this may be done either overtly or covertly. Additionally, contemporaneous notes should be taken during each TQ or interrogation session in order that an immediate record is available and in order that a written record is retained in the event of a failure of the electronic recordings. Where a detainee has subsequently been interned, a detailed summary of the TQ or interrogation sessions must be produced using the contemporaneous notes and the tape recordings. This summary together with the original tape recording must be provided with

> all other documentary evidence within 48 hours of the initial detention."

558. Although audio or video recordings and contemporaneous notes of the tactical questioning of Mr Al-Waheed were presumably made in accordance with this instruction, they have not been found by the MOD in the searches carried out for the purpose of this litigation. The only record of the tactical questioning which has been found and disclosed is a short witness statement dated 12 February 2007 made by the officer who conducted the questioning. This records the times of the sessions and a very short summary of what Mr Al-Waheed said (to the effect that he was only visiting his wife at the time of his arrest and knew nothing of any evidence recovered from the house).

559. At 0915 on 12 February 2007 a decision was taken to intern Mr Al-Waheed. The officer who authorised his internment did so on the basis that Mr Al-Waheed "was found in a room handling an IED". Later that morning Mr Al-Waheed was transferred by helicopter to the Divisional Temporary Detention Facility at Shaibah. He was admitted to the facility at 1300 hours as "internee 91057".

Medical examination at Shaibah

560. On his arrival at the Shaibah detention facility, Mr Al-Waheed underwent a further routine medical examination. According to the applicable guidelines, the aims of this examination were to identify any medical problems (either immediate or chronic) that required treatment and also to "initiate investigations into the cause of recent injuries that may have been caused by detainment in order to help counter false allegations of abuse made at a later stage."[42] The examination was carried out by Dr Ross Moy, the medical officer at the facility. Dr Moy is still serving in the Royal Army Medical Corps and is now a consultant in Emergency Medicine. He made notes of his examination at the time and was a witness at the trial.

561. As part of the medical examination, Dr Moy's practice was to ask the detainee to remove his clothing (apart from his underwear) and to perform a physical inspection. On inspecting Mr Al-Waheed, Dr Moy noted "extensive linear bruising over shoulders and upper arms". He also marked this bruising on a body diagram. Dr Moy remembered the bruising as a pattern of lines in multiple directions. It gave him the impression that Mr Al-Waheed might have been hit with an implement such as a stick. Dr Moy also marked on the body diagram "abrasions" on the crown of Mr Al-Waheed's head and above his left eye.

562. Dr Moy was concerned at the possibility that these injuries might have been caused by British soldiers when Mr Al-Waheed was detained. I will come back shortly to the action that he took to follow up this concern.

563. Blood was found on testing of a urine sample taken during the examination. Dr Moy agreed in cross-examination that this could have resulted from injury to the kidneys and, although other explanations were possible, might have been caused by beating.

---

[42] See Annex M to Operational Directive – Divisional Temporary Detention Facility, MND(SE) 3082, 15 July 2006, "Medical Management of Detainees and Internees on Operation Telic", para 3(a).

564. Later entries in Mr Al-Waheed's medical notes record that shortly after midnight that night (at 0005 on 13 February 2007) Mr Al-Waheed was seen by a medical orderly because of a complaint that the middle finger of his right hand was swollen and painful. The next day Dr Moy referred Mr Al-Waheed to the A&E department of the military hospital at Shaibah for further assessment. The medical notes record Mr Al-Waheed as explaining through the interpreter that the injury to his finger had occurred during his arrest. The decision was made at the hospital not to X-ray the finger, as the treatment (with strapping and painkillers) would have been the same whether or not it was broken.

Detention in the north compound

565. At the Shaibah detention facility Mr Al-Waheed was initially imprisoned in the north compound, where internees were held for interrogation by the Joint Forward Interrogation Team ("JFIT") for up to 14 days. He claims that the conditions in which he was detained amounted to inhuman and degrading treatment. His specific complaints, which I will examine later, include the fact that he was held in solitary confinement, and allegations that his cell was very small, dirty and had no natural light, that there was inadequate sanitation, that he was subjected to sensory deprivation whenever he was taken out of his cell for any reason and that he was deliberately deprived of sleep, not only by being interrogated at all hours, but by soldiers banging on his cell door to keep him awake.

Interrogations

566. When Mr Al-Waheed arrived at the Shaibah detention facility on 12 February 2007, he had had no sleep the previous night and had already undergone two sessions of tactical questioning between 0430 and 0645 that morning. His first interrogation at Shaibah took place shortly after his arrival between 1438 and 1521. During the next 30 hours, he was interrogated a further nine times: at 1953-2018, 2132-2202, and 2338-2350 on 12 February 2007; and at 0009-0018, 0215-0258, 0454-0507, 1057-1202, 1605-1617 and 1952-2022 on 13 February 2007. After that interrogations became less frequent. Mr Al-Waheed was interrogated twice on 14 February, three times on 15 February, twice on 16 February, once on 18 February, twice on 19 February, once on 20 February and once on 24 February 2007 (the day before he was moved from the north compound to the main part of the detention facility).

The RMP investigation

567. On 13 February 2007, the day after he conducted his medical examination of Mr Al-Waheed, Dr Moy spoke on the telephone to Major Hazelton, the senior officer in the Royal Military Police ("RMP") at Basra. Dr Moy followed up this conversation with an email:

> "As discussed earlier this evening, I have concerns regarding the handling of Internee 1057.
>
> He has arrived at the DTDF [Divisional Temporary Detention Facility] with extensive bruising over his upper back and arms. This bruising is linear, and suggestive of being struck repeatedly with an implement. I suggest that it is unlikely these

> injuries were sustained during a struggle, he appears to have been deliberately beaten.
>
> On arrival at the DTDF, I estimate that the bruising was older than six hours, but less than three days. I can't be any more exact than that, I'm not a specialist in forensics.
>
> I think this needs to be investigated, and I suspect you're the man to do it."

568. After speaking to the senior legal officer, Major Hazelton sent an email to senior officers in the chain of command recommending that an investigation must be carried out. This was agreed.

569. Major Hazelton then instructed a captain in the Special Investigation Branch of the RMP to investigate Dr Moy's concerns, and she in turn deputed a sergeant, assisted by a corporal, to interview Mr Al-Waheed. Although Major Hazelton was called by the MOD as a witness at the trial, no evidence was adduced from the individuals who actually carried out the investigation.

570. Mr Al-Waheed was interviewed by the RMP on the afternoon of 14 February 2007. A case file diary for the investigation records the interview as starting at 1530. Mr Al-Waheed was asked questions through an interpreter and a statement of his evidence was then prepared in English and in Arabic. Mr Al-Waheed signed the Arabic version of his statement. He also signed a form consenting to photographs being taken of his injuries. His signature of this form is timed at 1724, indicating that the whole process took around two hours. The record of the investigation confirms that photographs of the injuries were taken, but the photographs have not been found by the MOD in the searches carried out for the purpose of these proceedings.

571. The statement signed by Mr Al-Waheed said that he was not ill-treated by British forces at any time during his arrest and detention. It also stated that he was not prepared to divulge to either the Iraqi authorities, Multi-National authorities or any type of medical/welfare authorities how he came to have his injuries and that he would not be pursuing any form of complaint against members of Multi-National Forces for their treatment of him. Mr Al-Waheed admits that he signed the statement, but denies that it accurately reflected what he told the RMP.

572. The content of Mr Al-Waheed's statement was reported up the chain of command to Major Hazelton. He in turn sent an email at 2025 on 14 February 2007 to the senior officers in theatre (with others copied in) which began:

> "Good news, internee 1057 does not wish to make any complaints."

The email went on to say that, when interviewed, the internee had stated that he was happy with the treatment he had received from the British authorities and would not divulge how he had come to have bruises on his back and arms.

573. Thereafter, no further steps were taken to investigate how Mr Al-Waheed had come by his injuries, and the file was closed.

Contacts from Mr Al-Waheed's brother

574. Mr Al-Waheed's brother, Abdulmajeed Hameed Ali Al-Waheed, was called as a witness. He is two years older than Mr Al-Waheed. For almost all of his career he has worked as an assistant in various medical centres. He speaks reasonable English and in October 2006 he briefly worked as an interpreter for the British Army at the Shaibah detention facility. He left after only a month when he became too frightened to continue working as an interpreter after incidents which included the killing by militia of 17 Iraqis working with the British (including a cousin of his family).

575. Abdulmajeed first learnt of his brother's arrest when he received a phone call from his family (who had themselves been told by neighbours) about an hour after it occurred. He went to the street where his parents' home and his sister-in-law's family home were situated at around 0700 in the morning on 12 February and spoke to some neighbours who lived across the street from Nazhat's family home and also to Nazhat's sister to find out what had happened. They told him that they had seen Mr Al-Waheed with his head covered and hands tied being pushed with force into the back of a vehicle. Later that day Abdulmajeed received a telephone call from the Red Cross office in Basra to inform him that his brother had been arrested by British forces. The next day (13 February) he went to Shaibah and spoke to a friend who worked there as an interpreter. The friend confirmed that Mr Al-Waheed was being held at the facility.

576. On the morning of 14 February 2007 Abdulmajeed went to the British base at Basra Airport and spoke to an officer in the legal department. He handed in a letter requesting his brother's release. The letter explained that his brother was just visiting his wife's family at the time of his arrest (because she was sick) and did not live in the house or own anything found there. It also emphasised that their family did not support any militia or political parties working against the MNF and that they respected British justice. Although not included in the letter, the legal officer also noted Abdulmajeed as saying that neighbours and his sister-in-law had seen violence towards Mr Al-Waheed. In his evidence at the trial Abdulmajeed confirmed that this was a reference to their having seen his brother being pushed with force into the back of a vehicle and that no one told him that they had witnessed any other violence. Abdulmajeed also gave the legal officer all the information he could about Nazhat's brother, Ali Jaleel, whom he understood the British soldiers had been looking for. The legal officer prepared a note of the conversation which he circulated to others including the senior legal officer.

577. Abdulmajeed left his telephone number and subsequently received a telephone call from a British intelligence officer. At the officer's request he brought to the Shaibah detention facility a videotape of his brother's engagement party in which he pointed out Ali Jaleel. In the following days he also made enquiries to try to find Ali Jaleel but without success, eventually learning that Ali Jaleel had fled to Iran.

578. Abdulmajeed made further visits to the British army legal office at Basra Airport while his brother was in custody to press for his brother's release. On one of these visits he submitted letters which he had obtained from the head of his tribe and from the head of the local municipal council attesting to the fact that his brother was not a member of any political party or militia and was not involved in any adversarial activity against Multi National Forces in Iraq.

Evidence about the circumstances of arrest

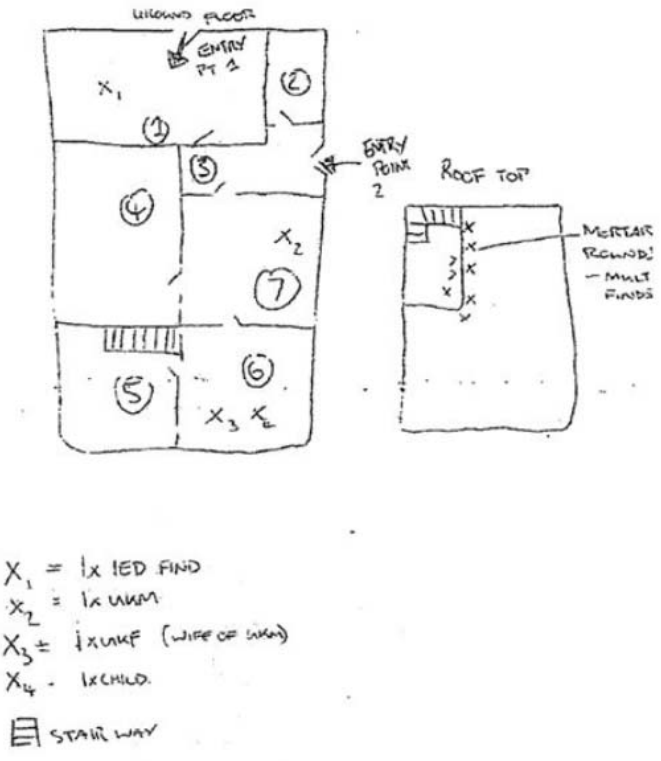
579. In his statement made on the night of the arrest Private P had written:

> "As I entered the Alpha through the main door, I proceeded into the first room on the left where I stopped and detained the [Bravo]."

In his statement made that night Lieutenant Fulton had written:

> "As I entered entry point 2 (as per sketch plan), I told Private [P] to detain the unknown male located in room 7 (as per sketch plan). The unknown male was sat down messing about with an [IED]. The male was seen doing this in room 3, he was detained in room 7 after running into this room."

The reference to room 3 must have been a mistake for room 1, since the attached sketch plan showed the IED as found in room 1, which was a room to the right of the hall (for someone entering through the door marked as "entry point 2"). I reproduce the sketch plan drawn by Lieutenant Fulton below:



580. On the one hand, Lieutenant Fulton's statement indicated that, when he entered the house, Mr Al-Waheed was located in room 7 (a living-room to the left of the hall). On the other hand, the statement indicated that Mr Al-Waheed had been seen in another room "messing about" with an IED before running into room 7. The use of the passive voice ("the male was seen doing this") suggests that Lieutenant Fulton had not himself seen Mr Al-Waheed with the IED – as indeed he could not have done if Mr Al-Waheed was located in room 7 when Lieutenant Fulton entered the house.

581. It seems that after the visit from Mr Al-Waheed's brother on 14 February 2007 the senior legal officer looked at the evidence recording the circumstances of the arrest, as later that day he emailed the RMP pointing out that it was unclear whether or not Mr Al-Waheed had been seen in the room where the IED was found and asking the RMP to interview Lieutenant Fulton and Private P as soon as possible to clarify exactly what happened.

582. On 15 February 2007 a further statement was taken from Private P. In this statement Private P confirmed that, on entering the house, he went into the first room on the left (room 7) and detained the unknown male. He did not go into room 1 (where the IED was found) and did not see the male in room 1, nor did he see the male in possession of an IED.

583. A statement was also taken on 15 February 2007 from Lance Corporal Raper, who stated that he was the first man to enter the house. In the hallway there was an unknown male standing near the door to room 1. Lance Corporal Raper needed to get to room 1 (which had another, locked entrance from the street through which soldiers had been trying to break in – marked in the plan as "entry point 1") so he moved the male into room 7. Once the male was moved, Lance Corporal Raper entered room 1 by pushing the door down using his body. He said: "I cannot state whether the door was locked or not. The door came open easily." He stated that, once he had gained entry to room 1, he saw the IED.

584. An email sent on 15 February 2007 (presumably to the senior legal officer, although the addressee is unclear) summarised the statements of Private P and Lance Corporal Raper. Although no further statement was taken from Lieutenant Fulton at this stage, it appears that the investigator had also spoken to Lieutenant Fulton as the email reported:

> "Lt Fulton was not in the Alpha at this time and cannot comment."

585. A second statement was subsequently taken from Lieutenant Fulton on 8 March 2007. In this statement Lieutenant Fulton confirmed that he was not present when Mr Al-Waheed was detained, as he was in the other Alpha (target house). He said that, several minutes after the Alpha was secure, he went into the Alpha. He said he found a soldier – whom I will refer to as Lance Corporal "L" – with the Bravo (target person) in room 7 and the IED in room 1. He explained the comment he had made in his first statement about the unknown male being seen in the same room as the IED by saying that he recalled speaking to Raper and L individually in the house. Lance Corporal Raper told him about the IED find and Lance Corporal L told him he had detained the Bravo. Lieutenant Fulton stated that, as Raper and L were working as a pair, he had presumed (incorrectly) that the Bravo was found in the same room as the IED. He said he could not recall why he had written in his first statement that the unknown male was sat down messing about with the IED, but confirmed:

> "I did not see the Bravo messing about with the device as I was in the other Alpha at that time."

586. There is an apparent discrepancy between Lieutenant Fulton's first statement, in which he said that he told Private P to detain the unknown male, and his second

statement, in which he said that Lance Corporal L had detained the Bravo. This was not explored when Mr Fulton gave evidence. The explanation may be that Lance Corporal L was the person who first physically detained Mr Al-Waheed but Private P was instructed to act as the detaining soldier. Mr Fulton did say in his evidence:

> "I would always decide which soldier was the detaining soldier because that would mean they would be escorting him all the way through."

587. What is clear from all the statements taken by the RMP is that no one had seen Mr Al-Waheed in the same room as the IED, let alone "messing about" with it. Nor was he seen running into room 7. He was found standing in the hall and was then taken into room 7. The IED was found in a room (labelled room 1 on the plan) on the other side of the hall. There was no one in room 1 when the soldiers entered the house, and the door to that room was closed and may or may not have been locked.

588. In his evidence at the trial Mr Fulton gave a different account from that given in either of his contemporaneous statements. He said he now thinks that he did not in fact enter the building through the door marked "entry point 2" on his plan as recorded in those statements and it was actually more likely that he entered through "entry point 1". He said he remembers that Private P entered the property first and that he and others followed behind. He believes that when he entered what he now thinks was room 1 he did indeed see a man sitting on the sofa with a very large IED in front of him in the centre of the room; on seeing the soldiers, the man ran into room 3 (the hall) and then into room 7. Mr Fulton agreed that what he said in his statements at the time is more likely to be accurate than his memory now of what happened some nine years ago and said that the difference has caused him some anxiety. Nevertheless, he said he has wrestled with the question of what happened and his memory is that he saw Mr Al-Waheed moving out of the room where the IED was found.

589. I accept that Mr Fulton was sincere in what he says he now remembers. At the same time it is obvious that his memory cannot be better nine years after the relevant events than it was when he made a statement on 8 March 2007, three weeks after the strike operation, for the purpose of clarifying exactly what he had and had not seen when he entered the target house. Mr Fulton's current memory of events is also completely inconsistent with the other contemporaneous statements. His testimony is, in my view, a textbook example of a false memory created in trying to make sense of something that happened a long time ago. What Mr Fulton has clearly wrestled with is how he could have written in his first statement made immediately after the operation that the detainee was seen "sat down messing about" with the IED if neither he nor anyone else had in fact made such an observation and if the detainee was not even found in the same room as the IED. Mr Fulton has evidently convinced himself that he could not have written that the detainee was "sat down messing about" with the IED unless he had witnessed it.

590. I do not think it conceivable that Mr Fulton did see Mr Al-Waheed with the IED, had forgotten that fact when he made his second statement three weeks later (when his recollection was that he had not entered the house until several minutes after Mr Al-Waheed had been detained), but has now recovered the true memory of what he saw. I am sure that the account given by Mr Fulton in his second statement, when he was asked to clarify exactly what he had and had not seen, was the truth. When he made

that statement, Mr Fulton could not explain why he had previously said that Mr Al-Waheed was seen "sat down messing about" with an IED. I am driven to conclude that this was an embellishment falsely reported by someone present to strengthen the evidence against a detainee who was believed to be a bomb maker. It certainly had that effect at first, as it led to the belief that Mr Al-Waheed had been caught "red handed". Some initial reports (though it is unclear what their source was) apparently gave even more colour to the account. According to a case summary, which may have been prepared for the Divisional Internment Review Committee (referred to below):

> "Initial reports stated that [the detainee] was found applying camouflage to a shaped charge IED found in the house."

These "initial reports" were pure fiction.

Reports of interrogations

591. Written reports of the interrogation of Mr Al-Waheed have been disclosed. In their original searches for the purpose of disclosure, however, the MOD failed to locate any of the video recordings of the interrogation sessions. Nor were any notes taken during the interrogations found. During the course of the trial the MOD managed to find video recordings of two sessions: session 16, which lasted 29 minutes between 1651 and 1721 on 15 February 2007; and session 24, which took place much later on 16 March 2007 when Mr Al-Waheed was in the main detention facility. The films of these two interrogation sessions were viewed during the trial.

592. The approach used in the interrogation sessions varied. According to the reports, the first session was conducted using a "neutral" approach, with the aim of assessing "the attitude of the subject". The next seven interrogation sessions were conducted using what is described as a "firm/logical" approach (with some "harsh" interrogation in the second session). In subsequent sessions, including the two for which video recordings have been found, a "friendly" approach was generally adopted.

593. The initial assessment of the interrogation team was that Mr Al-Waheed was an IED maker. This assessment was based principally on the fact that Mr Al-Waheed was arrested in a house in which an IED was found and on his "actions on arrest". Those actions are not specified in the report, but I think it likely that they refer to the claims in Lieutenant Fulton's first statement that Mr Al-Waheed had run out of the room where the IED was found, having been seen "messing about" with the device. The assessment was also thought to be supported by Mr Al-Waheed's "technical knowledge and military experience" and the fact that in the second interrogation session he mentioned that he had nothing to do with IED making before the interrogator mentioned the topic – which was taken to indicate that he had something to hide.

594. The assessments of the interrogation team started to change on the second day (13 February 2007). The reports of the interrogation sessions on that day recorded Mr Al-Waheed as having "answered all questions", and later as "keen to answer questions" and "free flowing with information". Mr Al-Waheed maintained that he was only visiting his wife when he was arrested; that the house belonged to his brother-in-law, Ali Jaleel Hamadi, whom he had only known for around three months since his

marriage and had only met on a few occasions; that he hated terrorists for killing his cousin, who had worked as an interpreter for the MNF, and for ruining his country; and that his brother had worked as an interpreter for the British forces but had left when their cousin was killed.

595. The opinion of the interrogators changed further on 14 February 2007 after they learnt that the initial reports from the strike team about the circumstances of Mr Al-Waheed's arrest were inaccurate and, in particular, that he had not been found handling an IED when the strike team entered the house nor was he seen running from the room in which the IED was found. In the report of interrogation session 13, which was conducted between 1956 and 2027 on 14 February using the "firm/logical" approach, the officer in charge of the interrogation commented:

> "Now that we have clarified the exact circumstances of his arrest, none of the facts contradict his story. We will use the next sessions to gain further information on Ali Jaleel who may be responsible for the recovered IEDs. Without any further information, it will not be possible to continue this interrogation for many more sessions."

596. By the time of interrogation session 19 on 18 February 2007, Mr Al-Waheed was being assessed as "truthful and honest". In the report of that session the officer in charge commented:

> "We have no evidence or reporting on this individual beyond the fact that he was present in a house in which an IED was recovered. He claims that he has no link to the IED and that another individual Ali Jaleel is responsible for it. We have no reason to disbelieve 91057 [Mr Al-Waheed]. Unless further information or forensics can link 91057 to the IED, his case should be re-evaluated by the DIRC."

597. After session number 20 on 19 February the interrogation team concluded that Mr Al-Waheed could provide no more information on Ali Jaleel and that he had not been involved in any militant activities. On 20 February, after session 22, the report stated:

> "It is assessed that the subject has no further relevant information. He has shown his willingness to provide MNF with any information required and is assessed to no longer be of any intelligence value."

598. The last interrogation session (number 23) before Mr Al-Waheed was moved from the JFIT compound to the main part of the detention facility took place on 24 February 2007. According to the report, this session took place because Mr Al-Waheed had asked to speak to the interrogator to pass on further information that might be of interest. However, the intelligence and information gained were recorded as nil. The assessment states:

> "It is assessed that the subject has no further information of relevance to divulge. There is a dearth of exploitable information regarding this subject, and it does appear to the

> JFIT that this is a case of 'wrong place, wrong time'. He has shown his willingness to provide MNF with any information required but his knowledge and access appears to be limited. It is assessed that, in the absence of ... further intelligence regarding this subject, he is of no further intelligence value to the JFIT."

Transfer to the main facility

599. On 25 February 2007 Mr Al-Waheed was moved from the north compound to the main part of the detention facility at Shaibah. This comprised four large halls each containing a number of cells. Mr Al-Waheed shared a cell with around 20 other prisoners. He was now allowed to receive family visits, and Mr Al-Waheed's mother, brother and his wife, Nazhat, all came to visit him at various times.

600. There was one further interrogation session after Mr Al-Waheed was moved to the main part of the detention facility. This took place on 16 March 2007 at Mr Al-Waheed's own request as he had some information he wanted to impart. He was also in considerable pain at this point suffering from haemorrhoids. After the session he was examined by Dr Moy who found that he had a 3-4cm rectal prolapse and referred him to the military hospital for treatment.

601. Mr Al-Waheed spent nine days in the hospital, during which time he underwent a procedure to treat his haemorrhoids. He was discharged from the hospital on 25 March 2007 but was still complaining to medical staff of pain and bleeding on the following two days. He was released from detention on 28 March 2007.

The DIRC

602. A committee called the Divisional Internment Review Committee ("DIRC") was responsible for reviewing the grounds for internment of persons held in the Shaibah detention facility. The DIRC had five members. They were: the General Officer Commanding ("GOC") of the British and other coalition forces in the south-eastern area of Iraq; the Chief of Staff; the Chief Intelligence Officer; the Policy Advisor to the GOC (a civil servant within the MOD); and the senior legal officer. Meetings of the committee were chaired by the GOC but all members had an equal vote. The Policy Advisor at the relevant time was Ms Fiona White, who was called as a witness by the MOD.

603. The policy was for the DIRC to conduct an initial review of a decision to intern a person as soon as possible and in any event within 48 hours of the initial detention.[43] The DIRC would authorise either continued internment, release or transfer of the internee to the Iraqi judicial system. The criterion which the DIRC was required to apply in deciding whether to authorise continued internment was whether the internment was necessary for imperative reasons of security.

---

[43] See the terms of reference at Annex K to Operational Directive – Divisional Temporary Detention Facility, MND(SE) 3082, 15 July 2006.

604. The DIRC held regular meetings at least every 28 days at which the decision to continue the internment of each internee was reviewed. There was also an obligation to notify the DIRC where it became apparent to either the officer in command of the detention facility or any member of the DIRC or the officer who originally interned an individual that internment might no longer be justified for imperative reasons of security. The DIRC had then to convene an *ad hoc* meeting as soon as reasonably practicable to review the internment of that individual.

Initial review of Mr Al-Waheed's detention

605. Mr Al-Waheed's internment was first considered at an *ad hoc* meeting of the DIRC on 13 February 2007. As recorded in the minutes of the meeting, the legal officer told the committee that Mr Al-Waheed had been detained during an operation which involved searching an Alpha for a Bravo. The Bravo was not present, but the detainee was found in a room "messing around with" an IED. He fled the room before being restrained by British troops. The committee discussed the information presented and concluded that Mr Al-Waheed was caught "red-handed". They voted unanimously to intern him on the basis that it was necessary to do so for imperative reasons of security.

Decision to release Mr Al-Waheed

606. The next regular meeting of the DIRC was held on 22 February 2007 and Mr Al-Waheed's case was reviewed at this meeting. By this time the inaccurate information about the circumstances of Mr Al-Waheed's arrest had been corrected, as the RMP had taken the additional statements from Private P and Lance Corporal Raper mentioned earlier and had also spoken to Lieutenant Fulton to clarify the position. According to the minutes of the meeting, the Chief Intelligence Officer explained that Mr Al-Waheed's detention was not based on any intelligence and rested solely on his proximity to an IED which was found in the same property as him. Initially it had been believed that Mr Al-Waheed had been found in the same room as the IED. However, this was now not the case and it transpired that he had just been in the same property. The Chief Intelligence Officer stated that it was the opinion of JFIT having interrogated Mr Al-Waheed over the last ten days that he was nothing more than a person "in the wrong place at the wrong time". The committee was also told that Mr Al-Waheed's brother had come to see the legal officer and had said that Mr Al-Waheed had just recently married and was visiting his new wife at her family home.

607. The committee took a vote on whether to continue Mr Al-Waheed's internment. By a majority of three to two, they voted to release him.

608. After a decision was made to release an internee, the release would normally take place the next day. In Mr Al-Waheed's case, however, that did not happen. The documents disclosed by the MOD include a document in Arabic dated 23 February 2007, which I infer is a copy of a document given to Mr Al-Waheed, stating that the DIRC had reviewed his case on 22 February 2007 and decided that his continued internment was necessary for imperative reasons of security. That was the opposite of what the committee had in fact decided.

Reversal of the decision to release

609. It is unclear on whose authority Mr Al-Waheed was kept in detention despite the decision of the DIRC that he should be released. What is documented is that an *ad hoc* meeting of the DIRC was scheduled for 24 February 2007 to consider whether to approve the internment of an individual who had just been arrested, and on the night before that meeting the members of the DIRC were informed by the senior legal officer that Mr Al-Waheed's case (and the cases of two other internees whom the committee had decided on 22 February to release) would be "tagged onto" this *ad hoc* meeting "as a precaution, to ensure that the information on which the DIRC of 22 Feb made its decision was as full as possible and accurate".

610. No minutes of the *ad hoc* DIRC meeting on 24 February 2007 have been found but the MOD's disclosure contains an email sent by the senior legal officer to the secretary of the committee which appears to be a note prepared for the meeting. In this email the senior legal officer (who had been one of the two committee members in the minority who had voted on 22 February 2007 to continue Mr Al-Waheed's internment) questioned whether the committee had at that meeting been given an accurate summary of the evidence bearing on whether or not Mr Al-Waheed had been found in the same room as the IED. The senior legal officer recalled the Chief Intelligence Officer as having told the committee that the witnesses had now changed their stance as to what they did and did not see. He observed in his note that the committee had accepted this at face value and no detail of who or which witnesses had changed their statements was gone into. The senior legal officer said that he would like to go into such detail now so that the committee could consider the evidence and decide "if there was in fact a change in perception to be made".

611. The senior legal officer then referred to the additional statements taken from Private P and Lance Corporal Raper and noted that they were clear that they did not see Mr Al-Waheed with the IED. He emphasised that, on the other hand, Lieutenant Fulton's statement had not changed and that this statement appeared to contradict those of the two soldiers. His note continued:

> "I have to say that if Lieutenant Fulton were to state in a second statement that what he stated originally is hearsay or wrong then the original decision of the DIRC should in my legal opinion stand as no one was given a perception that influenced them which is misleading."

612. Although no minutes of the *ad hoc* meeting on 24 February 2007 have been found, I infer that the committee decided on that occasion that Mr Al-Waheed should not after all be released but should be kept in detention until a further statement had been taken from Lieutenant Fulton (who had by this time gone to the UK for seven days of R&R) to confirm what he did or did not see.

Further decisions to continue Mr Al-Waheed's detention

613. Another *ad hoc* meeting of the DIRC was held on 12 March 2007 to consider the internment of 11 individuals who included Mr Al-Waheed. By this time Lieutenant Fulton's second statement had been obtained which confirmed that Lieutenant Fulton had not been in the house when Mr Al-Waheed was detained, that he had not seen Mr

Al-Waheed in the same room as the IED and that the assertion in his first statement that Mr Al-Waheed was found with the IED was erroneous. The minutes of the meeting on 12 March 2007 record the senior legal officer outlining the background and noting that a new statement had now been obtained from Lieutenant Fulton which confirmed the change of evidence. The committee nevertheless decided to put over the decision whether to release Mr Al-Waheed until the next DIRC meeting. Two reasons for this were recorded in the minutes. First, the committee was told that the ordnance recovered from the strike operation had been sent for forensic testing, but the results of the testing had not yet been received and it was thought that the forensic evidence could bear on the decision whether to release Mr Al-Waheed. Second, three members of the DIRC who were present on 22 February 2007 when the decision had been made to release Mr Al-Waheed were absent. According to the minutes, the GOC commented on "the need for continuity of decision makers" and "it was agreed to wait to make a new decision with a DIRC as originally constituted."

614. A regular meeting of the DIRC took place nine days later on 21 March 2007, with the same constitution this time as on 22 February 2007. In relation to Mr Al-Waheed, the minutes record only that the senior legal officer briefed the committee on the background and that the committee agreed to review the matter when the results of forensic analysis of all the IED components had been received (as had not yet happened). The committee then voted unanimously to continue Mr Al-Waheed's internment until then.

The second decision to release Mr Al-Waheed

615. Mr Al-Waheed's case was once again reviewed (along with eight other cases) at an *ad hoc* meeting of the DIRC on 27 March 2007. The forensic results were now available, and the committee was told that these results could not prove a connection between Mr Al-Waheed and the IED parts. The committee was reminded of its decision to release Mr Al-Waheed on 22 February 2007, which was said to have been "suspended to ensure the committee was not mislead *[sic]* in making its decision". The minutes state that the committee "decided to stand by its original decision to release the internee."

616. I observe that the process which led to the committee deciding to "stand by" its original decision to release Mr Al-Waheed had caused him to remain in detention for over a month.

Subsequent events

617. Mr Al-Waheed's troubles did not end on his release. His wife, Nazhat, miscarried when she was about five months pregnant. There was also bad blood between the two families because Mr Al-Waheed's family were angry that Nazhat's brother, Ali Jaleel, had caused his detention. During this dispute Mr Al-Waheed's family home was attacked with a rocket propelled grenade, though fortunately no one was injured. These events led to the breakdown of Mr Al-Waheed's marriage and he and Nazhat were divorced in 2008.

618. Mr Al-Waheed married again in 2009 and has had three more children in this marriage. He has also continued to work for the Shaibah branch of the electricity company. It is clear, however, that Mr Al-Waheed's detention and the events which

flowed from it have had a significant psychological effect on him. Both Mr Al-Waheed and his wife gave evidence that he is nervous, morose and has problems controlling his anger. He says that he also has difficulties concentrating and with his memory, which have caused him to make a lot of mistakes at work. As well as his psychological symptoms, Mr Al-Waheed has many medical complaints which he attributes to his detention. These include constant lower back pain, pain in most joints and particularly his left knee, severe problems with haemorrhoids which developed while he was in detention and he says have never gone away, type 2 diabetes and a heart condition. He has episodes of feeling weak, dizzy and short of breath, which sometimes lead him to faint. He says that he can only walk about 500 metres and then only if he stops every 50 metres to rest.

619. The expert psychiatrists instructed respectively by the claimants and the MOD, Professor Katona and Professor Sir Simon Wessley, agreed that, when they examined Mr Al-Waheed in April 2016, he was suffering from post-traumatic stress disorder and depression with significant anxiety symptoms, described by Professor Katona as panic attacks. The experts agreed that Mr Al-Waheed's mental health problems and his multiple physical symptoms cause him significant impairment. They also agreed that his mental and physical conditions are inter-related and affect each other.

620. Much as with MRE, it appears that Mr Al-Waheed's psychological trauma is manifested partly in physical symptoms for which there is no physiological cause. Mr Al-Waheed's psychiatric condition and his exaggerated perception of pain have also, I am sure, coloured his memories of the past. They have led him to perceive his pain and suffering while in detention as more severe than it actually was.

621. Two examples illustrate this trait. Mr Al-Waheed believes that he has lost weight since he was detained. He now weighs 65kg and recalls that at the time of his detention he weighed 90kg. In fact, his weight in detention was recorded as 69kg. A second example is that, when asked to assess the severity of the pain that he suffered in detention on a subjective scale of 1 to 10, with 10 being the worst pain it would be possible to experience, he assessed the pain from the beating he allegedly suffered at 9 and the pain from his haemorrhoids at 10. It is impossible to reconcile these assessments with the two video recordings of interrogation sessions in which there is no outward sign that Mr Al-Waheed is in pain.

622. This is not to say that Mr Al-Waheed's medical problems are other than real and disabling and have their origins in highly traumatic events.

Mr Al-Waheed's claims

623. I will consider in turn Mr Al-Waheed's claims:

i) that he was assaulted and tortured on the night of his arrest;

ii) that the conditions in which he was detained during the first two weeks of his internment violated article 3 of the European Convention; and

iii) that his detention was unlawful under Iraqi law and violated article 5 of the Convention.

Allegations of assault

624. Mr Al-Waheed alleges that, both at the time of his arrest and while he was being transported to the Basra Airport base in a Snatch Land Rover, he was assaulted by British soldiers. Other than admitting that it is likely that robust physical force was used in Mr Al-Waheed's arrest and that it is possible that he was pushed (for his own safety) into the vehicle, the MOD entirely denies these allegations.

625. In his witness statement Mr Al-Waheed described his arrest as follows:

> "The soldiers immediately grabbed me and threw me to the ground forcefully so that I was lying face down. They then beat me viciously. They beat me with the butts of their guns and kicked me with their boots. They were wild; randomly hitting me anywhere and everywhere on my body. The soldiers were also shouting and yelling."

626. Mr Al-Waheed also gave evidence that, after he was released from detention, his wife told him that she and her sister had been beaten by soldiers during the house raid and that she had felt pain in her stomach from then until she miscarried.

627. Mr Al-Waheed said in his witness statement that after a few minutes the soldiers stopped hitting him and a heavy bag was placed over his head. He stated:

> "I think the bag was made from wool but I am not sure. The bag aggravated my sinusitis and I soon found it difficult to breathe. The soldiers also put goggles on top of the bag to cover my eyes and placed ear muffs on my ears. The bag was loose at first and it was possible for me to see my feet but when they put the goggles on my head I could not see anything."

Mr Al-Waheed said that he also had a memory of the soldiers tying his wrists tightly with something plastic. Mr Al-Waheed described being pulled roughly to his feet by soldiers who then ran out of the house, pulling him alongside them. Within seconds of leaving the house, he was lifted from the ground and thrown into the back of a vehicle.

628. In a supplemental witness statement made only three weeks after his original witness statement was signed, however, Mr Al-Waheed said that he may have been wrong in thinking that he had a bag placed over his head. He said that he had previously thought that a bag was used to cover his face partly because he remembered feeling as though he could not breathe and also because he had seen coverage on the news that showed detainees with bags on their heads. However, he had recently happened to meet someone who lived across the street from Nazhat's old house and who had seen him being brought out of the house at great speed by the soldiers. This person recalled that Mr Al-Waheed had a helmet on his head, goggles and something on his ears but no bag on his head. Mr Al-Waheed now thought that this made more sense because the thing on his head was really heavy.

629. Mr Al-Waheed gave evidence that, as soon as the vehicle started to move, the soldiers began to beat him violently and this continued throughout the journey. He said that

the soldiers hit him with the butts of their rifles and kicked him hard with their boots. Later during the journey, his skin was repeatedly pinched with what felt like a pair of cutting pliers, which was very painful. He was also poked painfully with something sharp. This was done all over his body. He said that he was also punched in the face and received a blow to the mouth which caused a tooth to fall out. At some point during the journey a soldier grabbed one of his fingers and pulled it back so hard that he thought it would break.

630. Mr Al-Waheed also claimed that at some point during the journey his goggles were removed and a liquid was thrown into his eyes, causing a burning sensation. At another point a liquid with an acidic taste was put in his mouth. He further stated that, on two occasions, the doors of the vehicle were opened and, after a strong blow from a soldier, he felt himself falling out of the back of the vehicle and feared he would be run over by the vehicle behind. At the last minute a soldier grabbed him and dragged him back inside. Mr Al-Waheed said that he heard the soldiers in the vehicle talking and laughing, and they seemed very happy at the things they were doing to him.

631. Mr Al-Waheed stated that the journey from his wife's house to the airport should normally take about 30 minutes but it took much longer – he thought about an hour – because the vehicle was moving very slowly.

The soldiers' evidence

632. I have mentioned that four soldiers who took part in the strike operation gave evidence at the trial. In summary:

i) Mr Fulton (then Lieutenant Fulton) said that he would have heard if Mr Al-Waheed had been assaulted in the house, and that he would have remembered if anything exceptional had happened after Mr Al-Waheed was detained. Mr Fulton expressed the view that the space in the back of a Snatch Land Rover was too confined for it to be feasible to hit someone with a rifle butt, particularly as the soldiers would be strapped in and the vehicle would be bouncing around. Mr Fulton also said that it would have been extremely dangerous for a soldier to hit someone with the butt of a loaded gun. An SA80 rifle, similar to the rifles carried by his unit at the time, was brought to court so that he could demonstrate this.

ii) Major Sawyer recalled going into the room where the IED was found to render it safe. He was then taken up some stairs to where the rest of the bomb-making material was found. He did not recollect seeing Mr Al-Waheed but is sure that he heard nothing that indicated that anyone was being assaulted.

iii) Mr Turner (then a Lance Corporal in the Royal Engineers) entered the house shortly after the strike team as part of a search team of six men. He based himself in room 7 where Mr Al-Waheed was being held and logged all the items collected by other members of the search team which were brought to him before being bagged up. Mr Turner said he recalled Mr Al-Waheed simply sitting on the ground being guarded by a soldier, with no indication of any violence.

iv) Mr Raper had no real recollection of what happened after he found the IED except that he may have gone up the stairway from the main room (room 7) to see if he could assist. But he described the procedures which were followed on such operations and how the house would have been flooded with people whilst the search was taking place.

633. None of the soldiers who accompanied Mr Al-Waheed in the Land Rover on the journey to Basra Airport was called as a witness by the MOD. Nor have those soldiers been identified, save that one of them must have been the detaining soldier, Private P, and Mr Fulton thought that another may have been Lance Corporal L.

Assessment of Mr Al-Waheed's evidence

634. I have concluded that Mr Al-Waheed's account of what happened to him from the time of his arrest to the time of his release from detention was false or exaggerated in many respects. I have reached that conclusion on the whole of the evidence, and I will mention particular points on which I reject his testimony as they arise. I am nevertheless satisfied that some of the allegations of mistreatment made by Mr Al-Waheed are true. I have reached that conclusion only where the allegation is supported by independent evidence, as I am not prepared to base any finding of fact on Mr Al-Waheed's testimony alone.

635. I will address first Mr Al-Waheed's allegations of assault at the time of his arrest.

Alleged assault at time of arrest

636. In his witness statement Mr Al-Waheed said that soldiers burst into the bedroom, but I am satisfied from the contemporaneous evidence, in particular Lance Corporal Raper's statement made on 15 February 2007, that Mr Al-Waheed had come out of the bedroom into the hall, where he was standing when the first soldier (Lance Corporal Raper) entered the building. I am also sure that Mr Al-Waheed was not hooded, as he originally claimed, and think it unlikely that he had a helmet put on his head – although he is undoubtedly correct in stating that blacked out goggles and ear defenders were placed on him, which was the standard practice in such operations. Mr Al-Waheed's evidence about hooding and wearing a helmet is, I think, a good illustration of how his memories of what happened have been shaped by his physical feelings as he now remembers them (difficulty in breathing and weight on his head) and external influences (what he has seen on television or been told by someone else).

637. More importantly, I am sure that Mr Al-Waheed was not violently beaten in the way that he described, and think it unlikely that he was assaulted at all, in the house where he was arrested. My reasons include the following:

i) The aim in a house raid of this sort was to get in and out as quickly as possible before the soldiers came under attack from insurgents. The target house was quickly filled with soldiers and was a scene of intense activity whilst a search was carried out, evidence was gathered and any ordnance found was made safe. There were a number of officers and NCOs from different units present and no sustained assault on a prisoner could have taken place without them becoming aware of it.

ii) From my impression of their characters, I do not consider that Major Sawyer or Mr Turner would have turned a blind eye if they had seen or heard any sign of an assault. Moreover, Mr Turner's recollection of the prisoner simply sitting on the floor being guarded in the main room where items found by the search team were being collected and logged fits with other evidence, including Private P's description in his statement made on arrival at the Basra Airport base of the detainee's behaviour on arrest as "shaking, compliant throughout".

iii) Although they would not have been able to see what was happening as they were in an adjacent room, Mr Al-Waheed's wife, Nazhat, and her sister would have heard sounds of him being assaulted if he had been violently beaten as he described. In that event I am sure that Nazhat's sister would have reported this to Mr Al-Waheed's brother, Abdulmajeed, when he spoke to her a few hours later to find out what had happened and that Abdulmajeed would have complained about the assault when he saw the legal officer at Basra Airport on 14 February. (I am equally sure that Nazhat's sister would have told Abdulmajeed if she and Nazhat had themselves been beaten by soldiers.) In fact, the only violence which Nazhat's sister reported – and about which Abdulmajeed did complain – was the use of force to push Mr Al-Waheed into the vehicle when the soldiers took him away.

iv) Abdulmajeed gave evidence at the trial which impressed me with his honesty not least because he did not support his brother's testimony on a number of important points. Abdulmajeed said that, when he was first allowed to visit his brother at the Shaibah detention facility, Mr Al-Waheed told him that, during the journey to Basra Airport, the soldiers had hit him repeatedly with their rifle butts on his back and legs and he had also been punched in the face. However, Abdulmajeed did not recall his brother telling him that he was subjected to any other violence during his arrest or detention.

638. I therefore reject Mr Al-Waheed's allegations that he was beaten at the time of his arrest in his wife's family house. I also reject as false his allegation that his wife and her sister were beaten by soldiers. The only alleged use of violence at the time of his arrest that I find proved is that Mr Al-Waheed was shoved forcefully into the back of a Land Rover. Although I do not find that the force used was unlawful, I reject the MOD's assertion that this was probably done for his own safety. The guidance on strike operations applicable at the time indicates that it was part of a deliberate policy designed to maintain the "shock of capture". A "template of a detention operation" annexed to the guidance outlined the procedure on leaving the targeted house as follows:

> "Detainee move to exit of Alpha. Plasticuffs applied (if not already done), sensory deprivation equipment applied. Detainee is now led ('Bravo Run') to snatch / boat / helicopter. Maintain shock of capture."

Mr Al-Waheed's injuries

639. It is, however, a matter of record that, when Mr Al-Waheed was physically examined by Dr Moy on his admission to the Shaibah detention facility on the afternoon of 12

February 2007, he was found to have extensive linear bruising over his shoulders and upper arms, which led Dr Moy to think that he had been struck repeatedly with an implement. It is equally plain that this bruising and also swelling on Mr Al-Waheed's upper back and arms must still have been clearly visible two days later when these injuries were referred to in the statement taken by the RMP and photographs were taken of the injuries. Although those photographs have not been found, the earlier photographs taken of Mr Al-Waheed at Basra Airport suggest that he had been hit in the face. The blood in his right ear noted by Dr Thomson at that time (although Dr Thomson failed to note any other signs of injury) and the blood found in a sample of Mr Al-Waheed's urine taken on his arrival at the Shaibah detention facility are also consistent with beating.

640. The obvious occasion when such a beating could have been inflicted is during the journey from the house to Basra Airport following Mr Al-Waheed's arrest. That accords not only with Mr Al-Waheed's evidence but, much more reliably, with his brother's evidence of what Mr Al-Waheed told him when he first visited Mr Al-Waheed in detention. There is no need for me to reach any positive conclusion about the implement used, which Mr Al-Waheed could not see because he was wearing blacked out goggles. I am not persuaded by Mr Fulton's evidence that soldiers would have put themselves in danger if they had hit someone with their rifle butts, particularly if they were seated and the person struck was lying on the floor at their feet. As Mr Fulton demonstrated in court, the rifle could not fire unless the safety catch was first removed and the trigger was then pressed. The SA80 rifle also has a short barrel and an overall length of just over 30 inches (or approximately 78 cm). I do not accept the suggestion that there was too little room to wield the weapon within the confines of the vehicle. But it is also possible that some other implement was used. I accept that such a beating is unlikely to have taken place while the vehicle was travelling at speed over bumpy roads. I have mentioned, however, that the journey to Basra Airport, which was normally around 30 minutes, took over two hours and that the convoy was delayed because of (amongst other reasons) a major obstacle in the road. There must therefore have been significant periods of time when the vehicle was stationary.

641. Counsel for Mr Al-Waheed suggested that the reason why he was assaulted is that the soldiers who detained him believed him to be an IED maker. Mr Al-Waheed was the only male found in a house in which a large quantity of explosives and a partly assembled IED were discovered. In the soldiers' eyes, he might well have been responsible for killing and injuring their comrades. It is a matter of public record that in the week before the operation two British soldiers had been killed by IEDs in separate incidents in Basra. One of those incidents had occurred only two or three days earlier on 9 February 2007. In that incident one soldier, Private Luke Simpson, was killed and an officer sustained serious injuries when an IED detonated close to their vehicle. Like the soldiers who arrested Mr Al-Waheed, they were both members of the Yorkshire Regiment. Mr Fulton said that he knew the officer who was severely injured in the explosion very well and that some of his men would have been likely to know the soldier who died, Private Simpson. Mr Fulton also explained that no distinction was drawn by the British soldiers between different insurgent groups, all of whom were known simply as "the enemy".

642. I have mentioned that a soldier who Mr Fulton thought may have travelled in the vehicle with Mr Al-Waheed was Lance Corporal L. Facebook messages which L has posted, including one posted on 9 February 2014, the seventh anniversary of Private Simpson's death, show that he was very close to Private Simpson. Documents disclosed during the trial by the MOD also show that Lance Corporal L was suspected of involvement in an assault on civilians when stationed in the Falkland Islands on 15 March 2008. The incident was investigated by the RMP but no charges were brought. The claimant relies on this incident and on Facebook messages discussing fights in which Lance Corporal L was involved to suggest that he had a propensity to violence.

643. I make no specific finding that Lance Corporal L took part in assaulting Mr Al-Waheed. Nor does the fact that the soldiers who detained Mr Al-Waheed thought they had captured someone involved in making bombs of the kind used to kill their comrades demonstrate that they inflicted the injuries observed by Dr Moy. This evidence does, however, form part of an overall picture in which deliberate beating by the soldiers who accompanied Mr Al-Waheed on the journey to the Basra Airport base is the probable explanation of his injuries.

Mr Al-Waheed's statement to the RMP

644. In denying that British soldiers assaulted Mr Al-Waheed, the MOD relied principally on the statement which Mr Al-Waheed signed on 14 February 2007 when the RMP interviewed him about his injuries. As mentioned earlier, that statement said that his injuries were not caused by members of the MNF and that he was not ill-treated in any way during his initial arrest and detention. With regard to the journey from the house to Basra Airport, the statement said:

> "Once I had been placed into the vehicle, I can remember being on a journey for about 15 minutes before I arrived at another camp.[44]
>
> During this journey I was not ill-treated again either physically or mentally, by any of the soldiers present throughout this time."

645. Mr Al-Waheed gave evidence at the trial that he told the RMP investigator exactly how he had been beaten and abused by British soldiers but, when asked whether he wanted to make a complaint against the British Army, told the investigator that he did not. He said that he gave this answer because he was frightened about what would happen to him if he made a complaint and, in particular, that it might result in his being kept in detention for longer. He said that he signed the Arabic version of his statement without reading it and that it does not reflect what he in fact told the RMP.

646. I do not accept that Mr Al-Waheed signed the statement without reading it. Nor do I accept his evidence that the statement was not an accurate record of what he told the RMP. It is notable that, as well as signing the statement on each page, Mr Al-Waheed

---

[44] Since the journey in fact took over two hours, it is difficult to make sense of this time estimate – unless Mr Al-Waheed thought that he was being asked at this point about the journey from Basra Airport to Shaibah, as is perhaps suggested by the reference to "another" camp.

also initialled three corrections to the text to indicate his approval of them. Moreover, although neither of the RMP soldiers who conducted the interview was called as a witness by the MOD, I think it inherently unlikely that they deliberately manufactured and had translated into Arabic a false statement which, as their luck would have it, Mr Al-Waheed did not read at all and so did not notice its falsity before he signed the statement and initialled it in several places.

647. I do, however, find credible Mr Al-Waheed's evidence that he decided not to complain about his treatment to the RMP because he was fearful about the consequences and worried that it might lead to him being detained for longer. I bear in mind that, when Mr Al-Waheed was interviewed on the afternoon of 14 February 2007, less than three days had elapsed since his arrest. Even if he had not been assaulted by British soldiers as he claims – and even more so if he had – the circumstances of his arrest and initial detention must have been traumatic. Since his arrest, he had also been repeatedly interrogated by British soldiers and had hardly any sleep. After being brought to Basra Airport, he was subjected to "tactical questioning" (probably involving, as I shall find, 'harsh' interrogation methods) between 0426 and 0630 that morning. Then, following his arrival at the Shaibah detention facility in the afternoon of 12 February, he had been interrogated 11 more times. This included interrogations at intervals throughout the night of 12/13 February. On every occasion when he had been taken from one place to another – including, I infer, when he was taken to be interviewed by the RMP – he was subjected to sensory deprivation. To put it at its lowest, these were not propitious circumstances in which to ask Mr Al-Waheed whether he had any complaint to make that he had been ill-treated by his captors and invite him to make a statement giving details of any such complaint. Nor is it necessary to have studied guidance on the difficulties of interviewing vulnerable and intimidated witnesses to appreciate that a prisoner in Mr Al-Waheed's position is likely to have been extremely wary about making allegations to British soldiers – whatever assurances the RMP gave him of their independence – about how other British soldiers had recently ill-treated him.

648. It is also relevant to consider what other possible explanation there could be for the bruising and swelling to Mr Al-Waheed's upper back and arms referred to in the statement taken by the RMP, if those injuries were not caused by British soldiers. Dr Moy's estimate when he examined Mr Al-Waheed was that the bruises were no more than three days old. It would be a cruel coincidence if, within the day or so before he was arrested and detained by British forces, Mr Al-Waheed happened to have been the victim of a deliberate beating by someone else. Nor does the evidence give any credence to such a possibility. Amongst other things, Mr Al-Waheed was interrogated extensively by British intelligence officers about his associations and his movements in the period before his arrest. In later interrogation sessions, he was assessed by the interrogation team not only to be answering all questions fully and truthfully but as willing to provide any information required. Yet nothing emerged to indicate that he had been the victim of an assault by a third party shortly before his arrest, nor to indicate any circumstances in which such an assault could possibly have occurred.

649. It was suggested in cross-examination of Mr Al-Waheed by counsel for the MOD that he had been beaten with a rod or stick, having "got involved" with his brother-in-law, Ali Jaleel, and other members of the Mahdi Army. Although it was not made entirely

clear why on the MOD's case such involvement might have led to Mr Al-Waheed being beaten, I understood the suggestion to be that the aim might have been to deter him from informing on his brother-in-law and his brother-in-law's associates. It was suggested that Mr Al-Waheed had been slow to reveal to his interrogators things that he knew about Ali Jaleel. After the interrogators started using a friendly approach, however, and asked him to think about anything that might be pertinent, he told them about an occasion around seven weeks earlier when he was visiting his brother-in-law's house and came across a box that Ali Jaleel had left on top of an oil tank in the garden. Mr Al-Waheed said that he was curious and, on looking inside, he found a wooden box which had a small plastic tube running out of the top and back into it. He also found two carrier bags which were full of a putty type substance. Mr Al-Waheed told the interrogators that he later asked his wife about these items and she told him to stay out of Ali's business and not to ask. He said that his wife had previously warned him to stay away from Ali's business.

650. Whilst I find it difficult to believe that Mr Al-Waheed did not suspect the nature of his brother-in-law's activities, the suggestion that he might have been subjected to a beating in order to warn him off is not one that carries any credibility. I cannot conceive that within a few hours of such a beating Mr Al-Waheed would have been staying overnight in his brother-in-law's house. Nor can I see any reason why, if Mr Al-Waheed had been beaten by members of the Mahdi Army, he would have withheld this information from his interrogators (whilst nevertheless telling them about the box that he had found in the garden). Had he indeed been beaten in order to warn him off, it would have been to his obvious advantage to disclose this fact in order to demonstrate that he was not a terrorist and to establish his innocence.

651. Furthermore, the soldiers who interrogated Mr Al-Waheed must have been aware that he had sustained injuries which were being investigated by the RMP. I am sure that they must also have been told the result of the RMP investigation. There is direct evidence in the video recording of interrogation session number 16, which was viewed in court, that they knew that Mr Al-Waheed claimed to have been beaten. When asked whether he had been able to remember anything further, he can be heard to say, whilst gesturing to his head, words which have been translated as:

> "I am sitting trying to gather information my head is ... has headache because of so much beating ... I am sitting ... just a while ... I will try hard and remember."

The interrogator responds "I understand, I understand".

652. If the soldiers who interrogated Mr Al-Waheed had thought it possible that the beating he had apparently suffered was inflicted before his arrest, they would have been very keen to establish when, by whom and why Mr Al-Waheed had been assaulted, and would not, I am sure, have been content with the answer that he gave to the RMP that he was not prepared to divulge this information. The fact that there is no reference to this subject in any of the interrogation reports indicates to me that the soldiers who conducted the interrogations knew that the only time any beating might have occurred was after Mr Al-Waheed was arrested.

653. Other evidence which confirms that Mr Al-Waheed's injuries were sustained after his arrest (and not in the day or so before it) includes the following:

i) The photographs taken of him on arrival at Basra Airport, and in particular the blood that can be seen above his left eye, indicate that he had fresh injuries.

ii) In his particulars of claim and witness statement Mr Al-Waheed alleged that during the tactical questioning at Basra Airport the officer said to him that he had resisted arrest, which was why he had been beaten. I would not have felt able to rely on that evidence were it not for the fact that the report of Mr Al-Waheed's first interrogation session at Shaibah contains the following under the heading "details of arrest":

> "When arrested he fled the living room into another room where he was forcibly restrained resulting in bruising to the Subject (see TQ Reports)." [emphasis added]

The "TQ Reports" have not been found but the explanation for "bruising to the Subject" which was evidently contained in those reports must have come from one of the soldiers involved in detaining Mr Al-Waheed. Mr Fulton confirmed that it was normal practice for members of the strike team to provide a verbal brief to the tactical questioners. It is clear from the evidence that Mr Al-Waheed did not resist arrest. But the fact that the tactical questioners were told otherwise to explain bruising which must have been apparent suggests that one of the detaining soldiers thought it necessary to make a false claim in order to explain Mr Al-Waheed's injuries.

iii) On the night of 12/13 February 2007 Mr Al-Waheed complained that the middle finger on his right hand was swollen and painful to move. As recorded in the medical notes, Mr Al-Waheed said that the injury to his hand occurred during his arrest. That is not consistent with his statement to the RMP that he did not suffer any ill-treatment during his arrest and initial detention.

654. Considering the evidence as a whole, I find that the injuries to Mr Al-Waheed's head, upper body and right hand recorded in his medical notes were deliberately inflicted by the soldiers who travelled with him to the Basra Airport base and that during that journey Mr Al-Waheed was systematically beaten with one or more implements (probably rifle butts) and was punched in the face.

655. It has not been proved, however, that any of the other mistreatment which Mr Al-Waheed claims to have suffered during the journey occurred. The allegations that his skin was repeatedly pinched with what felt like cutting pliers, that an acidic liquid (which the claimant's representatives suggest was urine) was thrown in his mouth and eyes, and that he was made to think that he would be thrown from the back of the vehicle, rest solely on his own testimony, which I have found to be highly unreliable. Notably, no marks were observed by Dr Moy and there is nothing in the medical notes which suggests that Mr Al-Waheed's skin had been severely pinched or cut. Moreover, Mr Al-Waheed's brother, Abdulmajeed, did not recall being told about the cutting pliers at any time between when Mr Al-Waheed was detained and this case coming to court.

656. Similarly unsupported is Mr Al-Waheed's allegation that one of his teeth was knocked out. Whilst at the Shaibah detention facility, Mr Al-Waheed saw a dentist. He did not tell the dentist that he had lost a tooth. His explanation that he was too

scared to mention this to the dentist is inconsistent with his willingness to tell the medical staff that his finger had been injured during his arrest.

657. The mistreatment to which Mr Al-Waheed was subjected constituted an unlawful assault. On the findings I have made, it was also inhuman treatment which violated article 3 of the European Convention, but it was not of such gravity and did not cause such intensive suffering as to amount to torture.

Alleged ill-treatment at the Basra Airport base

658. I referred earlier to Mr Al-Waheed's allegations that at Basra Airport he was made to sit on the stony ground for a long time wearing only a torn T-shirt, despite the cold, and that stones were thrown at him intermittently. There is evidence which contradicts Mr Al-Waheed's account of what he was wearing in that the photographs taken of him at Basra Airport show him wearing a long-sleeved garment. Nor can I accept that stones were thrown at him as this allegation is based solely on his testimony.

Sensory deprivation

659. The MOD does not dispute, however, that throughout the journey to the Basra Airport base and while he was detained there (except while he was being photographed, medically examined and undergoing tactical questioning) Mr Al-Waheed was made to wear blacked out goggles and ear defenders so that he could not see or hear. This sensory deprivation continued during the journey to the Shaibah detention facility.

660. By the time of Mr Al-Waheed's detention in February 2007, the practice of hooding any captured or detained person was specifically prohibited by UK military doctrine: see Joint Doctrine Publication 1-10 on "Prisoners of War, Internees and Detainees" (2nd Edn, May 2006), paras 209(b) and 210(c). The policy in relation to restriction of vision was as follows:

> "In order to maintain operational security, it might in some cases be necessary to obscure the vision of captured or detained persons (e.g. when transporting through or past militarily sensitive sites or activity). Ordinarily, this can easily be achieved by travelling in enclosed vehicles, or vehicles with opaque glass. Where this is not practicable, any captured or detained person may be required to wear blacked out goggles specifically issued for that purpose, but only for the time and extent necessary to preserve operational security."

A similar policy applied to the restriction of hearing: see paras 210(c) + (d). The policy guidance further stated (para 211):

> "The concurrent use of blacked out goggles and ear defenders should only be used in exceptional circumstances, and then only for the time and extent necessary to preserve operational security. … A record should be made of every occasion when sensory deprivation, such as blacked out goggles and/or the application of ear defenders, takes place: this is to include the

> date/time, a brief explanation of the circumstances and the justification, and this information should be included in the detention record of the person concerned."

661. In April 2006 the Provost Martial (Army) carried out an inspection of the Brigade Processing Facility at Basra Airport. In his inspection report dated 8 May 2006, the Provost Martial found that water was available to internees at all times and food as required, and that there was a process in place for ensuring that internees could use toilets which were within reasonable distance. However, he also found that there was no substantial shelter from the elements for internees, who were required to sit on coarse stones on the ground. He further found that internees were kept blindfolded and wearing ear protectors throughout their time in the processing areas, and that:

> "Taken in combination, the discomfort and sensory deprivation of internees may be interpreted as deliberate conditioning."

The Provost Martial recommended that internees should not wear ear protectors other than to protect them from loud noises (e.g. during transit by helicopter) and that "blindfolds should be removed except when moving through sensitive areas". He also recommended that more substantial protection from the elements should be provided together with some form of flat flooring for detainees to sit on.

662. On a follow-up visit in October 2006, the Provost Martial found that these recommendations had not been implemented. He emphasised, in particular, that he did not agree that both blindfolds and ear protectors needed to be routinely placed on the detainees, which could be perceived as conditioning.

663. On his next inspection on June 2007 the Provost Martial (Army) found that his recommendation with regard to sensory deprivation had still not been implemented. He wrote in his report (at para 36):

> "Internees are required to wear blacked out goggles and ear-protectors concurrently, throughout their time in the holding areas of the B[rigade] P[rocessing] F[acility]. Goggles and ear protectors are removed during medical examination and Tactical Questioning. PM (A) considered the concurrent deprivation of both senses (sight and hearing) to be unnecessary and that this may be interpreted as deliberate conditioning, in order to maximise vulnerability and the 'shock of capture'."

He again advised that "this practice should cease" and commented that it was "surprising and disappointing" that remedial action had not been taken in the light of his previous inspection reports. The Provost Martial's recommendations were finally accepted in August 2007: see "Iraqi: Op Telic: Treatment of Detained Persons", August 2007. Thus, in his next inspection report dated 26 November 2007 the Provost Martial noted that "the default is now no sensory deprivation, except during movement around the BPF and then only the use of blacked out goggles."

664. The MOD did not call any witness or rely on any evidence to suggest that forcing Mr Al-Waheed to wear blacked out goggles and ear defenders throughout the journey to

Basra Airport and while at the Basra Airport base was necessary in order to maintain "operational security". The back of a Snatch Land Rover did not have windows. Moreover, even if he could have seen out, there is no suggestion that the convoy passed anything on the way to the airport which it was necessary to prevent Mr Al-Waheed from seeing. The fact that the British army was based at Basra Airport was common knowledge. No doubt there were areas of the BPF which were militarily sensitive. But there is no evidence that any such areas were visible from the location where detainees were held. Furthermore, I cannot think of any reason of "operational security" which could possibly be said to justify depriving detainees of hearing. Certainly, no justification for it was offered at the trial.

665. In these circumstances, the practice of depriving detainees of both sight and hearing was inconsistent with the MOD's published doctrine. I am driven to conclude that the reason why the practice was adopted was that suggested by the Provost Martial (Army) in his reports written at the time: namely, that it was done as a form of deliberate 'conditioning', in order to maximise vulnerability and the 'shock of capture'. It also seems to me that a practice which prevented detainees who were already defenceless from being able to see (or hear) exactly what was being done to them or by whom was not only calculated to make the detainees feel more vulnerable but also – by dehumanising them and giving their captors a cloak of invisibility – to increase the risk of physical abuse.

666. I conclude that depriving Mr Al-Waheed of vision and hearing for long periods between the time of his arrest and his arrival at the Shaibah detention facility some 12 hours later for improper reasons was a form of degrading treatment. It was also an assault because it involved bodily interference without his consent or any lawful excuse.

Harsh interrogation

667. The tactical questioning at the Basra Airport Brigade Processing Facility took place in a tent. As described by Mr Al-Waheed in his witness statement, the officer who conducted the questioning stood in front of Mr Al-Waheed, very close to his face. An interpreter, who spoke with a Lebanese accent, stood behind him. Whatever the officer said would be repeated by the interpreter in the same manner: when the officer shouted, so would the interpreter. According to Mr Al-Waheed:

> "The officer spoke very loudly and his language was so disgusting that I cannot bear to repeat what he said. He cursed me, and insulted my sisters, my mother and my wife, and he insulted my honour and my dignity when he said those things."

Mr Al-Waheed also alleged that during the questioning the officer deliberately spat in his face a number of times.

668. Although I have explained why Mr Al-Waheed's evidence is unreliable, his account of how the questioning was conducted was not challenged in cross-examination and is consistent with descriptions of the "harsh" interrogation technique which was permitted by the MOD at the time. For example, the report of the Baha Mousa inquiry found:

> "The teaching of the 'harsh' permitted insults not just of the performance of the captured prisoner but personal and abusive insults including racist and homophobic language. The 'harsh' was designed to show anger on the part of the questioner. It ran the risk of being a form of intimidation to coerce answers from prisoners. It involved forms of threats which, while in some senses indirect, were designed to instil in prisoners a fear of what might happen to them, including physically."[45]

669. In *Hussein v Secretary of State for Defence* [2013] EWHC 95 (Admin) at para 7, Collins J said:

> "There can be no doubt that the practices carried out under the guidelines then in place were unacceptable. The harsh technique included the following elements which could be deployed as the questioner considered necessary. The shouting could be as loud as possible. There could be what was described as uncontrolled fury, shouting with cold menace and then developing, the questioner's voice and actions showing psychotic tendencies, and there could be personal abuse. Other techniques were described as cynical derision and malicious humiliation, involving personal attacks on the detainee's physical and mental attitudes and capabilities. He could be taunted and goaded as an attack on his pride and ego and to make him feel insecure. Finally, he could be confused by high speed questioning, interrupting his answers, perhaps misquoting his reply."

670. The original claimant in the *Hussein* case was an Iraqi national who was arrested and questioned by British forces in Basra in April 2007 (i.e. very shortly after Mr Al-Waheed was detained) and who complained that he had been shouted at for substantial periods of time during questioning. The description of the "harsh" technique in the judgment of Collins J which I have quoted above was given after the Divisional Court had seen extracts from the claimant's questioning (see para 8 of the judgment).

671. As mentioned earlier, the MOD has not located any of the recordings or notes of Mr Al-Waheed's tactical questioning. But no attempt was made to contradict the allegation that the "harsh" interrogation technique was used. The MOD did not call any witness to address how tactical questioning was generally conducted at the relevant time and did not dispute that the practices described in the report of the Baha Mousa inquiry and in the *Hussein* case were routinely deployed in questioning detainees on their arrival at the Basra Airport base.

672. There is also positive evidence that the harsh method was used at the Shaibah detention facility. The policy on the questioning of internees applicable at the time stated that "the style of questioning may include a 'harsh approach'", although "this

---

[45] See Vol II, Part VI, para 6.346.

must last for no longer than is absolutely necessary."[46] The report of Mr Al-Waheed's second interrogation session at Shaibah states that in that session "the occasional harsh" was used.

673. On this state of the evidence I find it probable that Mr Al-Waheed was subjected to "harsh" tactical questioning at Basra Airport which involved deliberately insulting and abusing him.

674. In the report of the Baha Mousa inquiry Sir William Gage stated that it was not appropriate for him to rule on the legality of the harsh approach, but recommended that:

> "The harsh approach should no longer have a place in tactical questioning. The MOD should forbid tactical questioners from using what is currently known as the harsh approach and this should be made clear in the tactical questioning policy and in all relevant materials." (recommendation 23)

675. In the light of this recommendation the harsh approach was abolished in 2012 and replaced with a method of interrogation known as "challenge direct," which is much more tightly controlled. In the *Hussein* case the new approach was held to be lawful. Although the legality of the harsh approach was not in issue, both the Divisional Court and the Court of Appeal identified significant differences between the harsh approach and challenge direct and made it clear that they regarded the harsh approach as unacceptable: *Hussein v Secretary of State for Defence* [2013] EWHC 95 (Admin); [2014] EWCA Civ 1087.

676. I have no doubt that the use of the harsh approach when conducting tactical questioning amounted to degrading treatment, which violated article 3 of the European Convention.

Alleged ill-treatment at the Shaibah detention facility

677. Mr Al-Waheed makes the following allegations of ill-treatment in relation to his detention during the period of 13 days that he was held in the north compound of the Shaibah detention facility:

i) That he was imprisoned in a tiny cell, measuring only about 1.5m by 2m, which was dirty and cold;

ii) That there was no natural light in his cell, and an artificial light was kept on at all times;

iii) That he was held in solitary confinement;

iv) That he was deprived of sleep, repeatedly taken for interrogation at night and, when not being interrogated, was deliberately kept awake by soldiers banging on the cell door;

---

[46] See Annex D to Operational Directive – Divisional Temporary Detention Facility, MND(SE) 3082, 15 July 2006 at para 6.

v) That he was subjected to sensory deprivation whenever he left his cell to be taken for questioning or escorted to the toilet; and

vi) That he was watched and mocked while using the toilet and on one occasion was forced to urinate in his cell because soldiers did not take him to the toilet.

678. In keeping with my general approach, I do not accept the factual accuracy of these complaints in so far as they are based solely on Mr Al-Waheed's testimony. The unreliability of his evidence is illustrated by his description of the cell in which he was held, which is contradicted by other evidence.

Cell conditions

679. On Mr Al-Waheed's behalf, reliance was placed on guidance given by the European Court in *Ananyev v Russia* (2012) 55 EHRR 18, para 148, about the minimum standards for prison cells, which include a requirement that each detainee must have at least 3 square metres of floor space. Failure to meet this standard was said by the European Court to create a presumption that the conditions of detention amounted to degrading treatment and were in breach of article 3. As mentioned, Mr Al-Waheed said that his cell measured only about 1.5m by 2m and therefore was at the absolute minimum acceptable size.

680. This allegation is, however, contradicted by other evidence. Mr Al-Waheed's brother recalled entering one of the cells to interpret for a prisoner during the brief period that he worked at Shaibah. He remembered the cell being approximately 2-2.5 metres by 2-2.5 metres and having a small window as well as an electric light. That recollection accords with evidence given to the Al-Sweady inquiry that the cells were about 10 feet long by 6-8 feet wide. I was also provided with a video film which showed the inside of one of the cells, which appeared to me to be at least 2 metres by 3 metres, and showed it as having a window. Although the cells were small, I do not accept that they fell below the minimum standard of accommodation for a prisoner.

681. The three allegations made by Mr Al-Waheed for which there is independent support and which require further consideration are: (i) that, while detained in the north compound, he was segregated from other prisoners and not permitted any contact with his family; (ii) that whenever he left his cell he was made to wear blacked out goggles and ear defenders so that he could not see or hear; and (iii) that he was deliberately deprived of sleep.

Solitary confinement

682. The Operational Directive for the Shaibah detention facility in force at the time stated:

> "During an internee's period in the [north compound] he/she is to be afforded all the rights of mainstream internees, with the exception that he/she is denied all visits, provision of legal advice and association with other internees."

See Operational Directive – Divisional Temporary Detention Facility, MND(SE)/3082, 15 July 2006, para 20(c). Although the purpose of these restrictions is not stated and was not explained by any witness called by the MOD, I infer that it

was to prevent internees from being influenced by other people in their responses to questioning.

683. The criteria which determine whether solitary confinement violates article 3 of the Convention are now well established in case law of the European Court of Human Rights which has been endorsed by the Supreme Court. As stated by the European Court in *Ahmad v United Kingdom* [2013] 56 EHRR 1, para 209:

> "whilst prolonged removal from association with others is undesirable, whether such a measure falls within the ambit of article 3 of the Convention depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned."

In applying these criteria, the European Court has never specified a period of time beyond which solitary confinement will attain the minimum level of severity necessary to infringe article 3. Cases in which violations have been found, however, have involved far longer periods than the period of 13 days during which Mr Al-Waheed was segregated from other prisoners. In *Shahid v Scottish Ministers* [2015] UKSC 58, [2016] AC 429, the Supreme Court held that segregation (albeit not complete) from other prisoners with a total duration of four years eight months did not violate article 3, although there was found to be a violation of the right to respect for private life guaranteed by article 8. International reports referred to in the judgment of the Supreme Court at paras 78-80 express concern about the potentially harmful effects of (total) solitary confinement exceeding 14 or 15 days. Even by that standard, the period of Mr Al-Waheed's segregation was not excessive.

684. Furthermore, Mr Al-Waheed was not isolated from all human contact. In particular, he had frequent contact with the soldiers who questioned him (through an interpreter). Increasingly in these interrogation sessions as time went on, a "friendly" approach was adopted. Judging by the video recordings of the two later interrogation sessions which I have seen, Mr Al-Waheed developed a reasonable rapport with the interrogation team. Nor did his evidence suggest to me that his segregation from other prisoners was a matter which caused him distress – certainly in comparison with other aspects of his treatment about which he complains.

685. So far as article 8 is concerned, it seems to me that the policy of segregating internees while they were undergoing interrogation pursued a legitimate aim – namely avoiding exposure to outside influence which might diminish the effectiveness of questioning. In view of the limited length of time for which internees could be held in the north compound, the policy cannot be regarded as oppressive or coercive. Leaving aside the prevention of access to legal advice, which raises other issues, I accept that it was a necessary and proportionate means of pursuing a legitimate objective.

686. In these circumstances I find that Mr Al-Waheed's segregation from other prisoners and from contact with his family during the first 13 days of his internment did not violate article 3 or article 8.

Sensory deprivation

687. During this period Mr Al-Waheed was deprived of sight and hearing whenever he was taken out of his cell to use the toilet or to be interrogated or for any other purpose. The video recording of his 16th interrogation session which was viewed during the trial shows Mr Al-Waheed being brought into the interrogation room wearing blacked out goggles and ear defenders before these were removed.

688. I have already found that the use of complete sensory deprivation from the time of Mr Al-Waheed's arrest until his arrival at the Shaibah detention facility (except when his photograph was taken, and during his medical examination and tactical questioning) violated article 3. The policy of sensory deprivation adopted at the north compound also in my view involved such a violation. Being deprived of sight and hearing is calculated to cause feelings of disorientation and anxiety. The suggestion was again made that the policy was justified for reasons of "operational security". But the MOD did not adduce any evidence to explain what these reasons were nor why this measure was allegedly necessary. It was certainly not necessary to prevent escape, since prisoners were handcuffed and guarded whenever they were taken out of their cells. In the absence of evidence giving any different explanation, the inference that I draw is that the measure was used as a form of conditioning of internees, to make them more pliable when questioned. That is not a legitimate purpose.

Sleep deprivation

689. One of the five techniques mentioned earlier which were prohibited by the British government after their use in Northern Ireland was challenged on an application to the European Court was sleep deprivation. It is well known that depriving a person of sleep for a long period causes disorientation, difficulty in concentrating and thinking clearly, mood changes and other detrimental effects. The MOD policy in relation to the questioning of internees at the Shaibah detention facility at the time of Mr Al-Waheed's detention was that during the period of questioning internees should not be deprived of sleep and, specifically, should be allowed at least four hours uninterrupted sleep in each 24 hour period.[47]

690. There is no independent evidence to support Mr Al-Waheed's claim that he was deliberately kept awake by guards banging on his cell door. However, the times of his interrogations were recorded and are set out in paragraph 566 above. When Mr Al-Waheed arrived at Shaibah he had had no sleep the previous night and had already undergone tactical questioning in the early hours of that morning. When he was first interrogated at 14.38 on 12 February 2007, he must have been awake for at least the previous 30 hours. During the following 30 hours he was interrogated ten times, including regularly throughout the night. Between 19.53 on 12 February and 05.07 on 13 February he was interrogated six times, with the longest break between sessions being less than two hours.

691. Again, the MOD did not adduce any evidence to justify the approach used. In the absence of such evidence, I conclude that during the first day and a half of his

---

[47] See Annex D to Operational Directive – Divisional Temporary Detention Facility, MND(SE) 3082, 15 July 2006, para 3.

detention Mr Al-Waheed was deliberately deprived of sleep to an extent which was unacceptable and was calculated to cause, and did in fact cause, undue suffering. I find that this treatment also violated article 3.

Conditions in the main compound

692. No allegation is made in the particulars of Mr Al-Waheed's claim that the conditions in which he was held after he was transferred to the general population of prisoners in the main compound at the Shaibah detention facility amounted to inhuman or degrading treatment.

Was Mr Al-Waheed's detention lawful?

693. I have found in part III of this judgment that, at the time when Mr Al-Waheed was detained in 2007, the internment of any person by a national contingent of the MNF for security reasons was regulated by CPA Memorandum No 3, as revised with effect from 27 June 2004. Memorandum 3 was drafted on the basis that there was a power of internment where this was necessary for imperative reasons of security pursuant to UN Security Council Resolution 1546. However, I have found that UN Security Council Resolution 1546 was not part of the domestic law of Iraq and that British forces had no power to intern people for security reasons under Iraqi law. It follows that Mr Al-Waheed's detention was unlawful as a matter of Iraqi law.

694. I have also referred in part II to the decision of the Supreme Court in *Mohammed (No 2) v Ministry of Defence* [2017] UKSC 2, [2017] AC 821, which addressed how article 5 is to be interpreted and applied in the context of a non-international armed conflict and specifically in Mr Al-Waheed's case. The Supreme Court held that in such a context article 5(1) should be read so as to accommodate, as a permissible ground, detention in accordance with a power of internment in international law conferred by a resolution of the UN Security Council. Hence, article 5(1) permitted UK forces to detain Mr Al-Waheed if this was necessary for imperative reasons of security.

695. In determining whether Mr Al-Waheed's detention was compatible with article 5(1), the court is not conducting a judicial review of an administrative decision, but deciding whether an individual's rights have been infringed. The court must therefore make its own determination of whether Mr Al-Waheed's detention was necessary for imperative reasons of security. Naturally, in making that determination, the court will give "appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice": *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, para 16 (Lord Bingham). But the judgments of such persons cannot be decisive. Ultimately, it is for the court to decide whether or not there was a violation of Mr Al-Waheed's right not to be arbitrarily detained: see the *Huang* case, para 11; *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420, paras 15, 31, 44; *E v Chief Constable of the Royal Ulster Constabulary* [2008] UKHL 66, [2009] 1 AC 536, para 13; *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621, para 61.

696. Mr Al-Waheed was not the individual who was targeted in the operation in which he was arrested and it is apparent that there was no intelligence linking him to any

insurgent group. But he was found in the same house as a partly constructed IED and a substantial quantity of explosives. His presence in the house certainly gave reasonable grounds for suspicion and called for an explanation. In these circumstances there can in my view be no doubt – and it was not disputed at the trial – that his initial arrest and the decision to intern him made on 12 February 2007 were necessary for imperative reasons of security.

697. By 15 February 2007, however, the initial reports that Mr Al-Waheed had been seen in the same room as the IED had been shown to be false. Statements made by Lance Corporal Raper, who was the first soldier to enter the house, and Private P, who was the detaining soldier, made it clear that Mr Al-Waheed was not in the room where the IED was found. Furthermore, analysis of a swab taken from Mr Al-Waheed on arrival at Basra Airport had produced a reading of one bar for RDX – an insignificant amount, which meant that he had not been close to an explosive. Although Lieutenant Fulton had not at that stage been asked to make a further statement, that had evidently been considered unnecessary in view of his confirmation that he had not entered the house until after Mr Al-Waheed had been arrested.

698. In addition, Mr Al-Waheed had given an explanation for his presence in the house which was consistent with his innocence. He had explained that he did not live there, that he had only known the owner of the house and suspected bomb-maker, Ali Jaleel, for a few months since his marriage to Ali Jaleel's sister and that he was present in the house only because he was visiting his new wife who was convalescing there. That explanation was independently supported by information which Mr Al-Waheed's brother had given to the legal officer when he visited the Basra Airport base to plead for Mr Al-Waheed's release. There was no possibility of collusion between them as Mr Al-Waheed was at that time being held incommunicado.

699. It was certainly appropriate to scrutinise this account and test whether there was any reason to disbelieve Mr Al-Waheed and to think that he was involved in bomb-making. That was done. As detailed above, Mr Al-Waheed was subjected to intensive interrogation following his arrest. By 20 February 2007 the interrogation team had concluded that Mr Al-Waheed was telling the truth and had not been involved in any militant activities and also that he had provided them with all the information that he could.

700. As stated earlier, when Mr Al-Waheed's detention was reviewed by the DIRC on 22 February 2007, the committee voted (by a majority) to release him. I can see nothing wrong with that decision.

701. Mr Al-Waheed should, in consequence, have been released the following day. Who prevented his release and how is unclear, but I have found that a decision was taken by the DIRC at an *ad hoc* meeting on 24 February 2007 to continue Mr Al-Waheed's internment. I do not consider that there was a reasonable basis for that decision. There had been no relevant change of circumstances since the decision to release Mr Al-Waheed was made two days earlier. In particular, no new information had come to light in the meantime which had not been available to the committee on 22 February 2007. The decision to keep Mr Al-Waheed in custody appears to have been based on a concern of the senior legal officer that the committee may have been misled when it was told that it was now clear that Mr Al-Waheed was not seen in the same room as the IED. However, the committee had not been misled. The only

occasion on which the committee was misled was at the first review meeting on 13 February 2007, when it had falsely been told that Mr Al-Waheed was found "messing about" with the IED. By the time of the 22 February meeting, it had been established that this report was untrue.

702. Nor did any further evidence emerge subsequently to suggest that Mr Al-Waheed posed a threat to security. To the contrary, the second statement obtained from Lieutenant Fulton, which was available to the DIRC on 12 March 2007, merely confirmed that the committee had indeed taken its decision to release Mr Al-Waheed on a correct factual basis. The reasons given on that occasion for keeping Mr Al-Waheed in detention despite this confirmation were misconceived. The first reason recorded in the minutes was that the ordnance found in the house had been sent for forensic testing which might produce evidence to link Mr Al-Waheed to the ordnance. Internment cannot, however, be justified on the basis that, although no evidence exists which implicates the internee in militant activity, such evidence might be obtained in future. The second reason given was that the composition of the DIRC was different in that three members of the committee which had taken the original decision to release Mr Al-Waheed were not present. This reason was even more spurious than the first. No doubt continuity of decision-makers is desirable other things being equal, but the fact that some of the people who previously decided that he ought to be released are not available cannot be a good reason for keeping someone in custody without any evidential basis.

703. I conclude that there were no imperative reasons of security which required Mr Al-Waheed to be kept in detention from 23 February until 28 March 2007. His detention during that period therefore lacked any lawful basis and was contrary to article 5(1).

Lack of procedural safeguards

704. It was also contended on behalf of Mr Al-Waheed that there was a breach of article 5(4) of the Convention because he had no effective means of challenging the lawfulness of his detention. In the light of the decision of the Supreme Court in the *Mohammed (No 2)* case, that contention is in my view unanswerable. The Supreme Court did not consider the system of review of detention which operated in Mr Al-Waheed's case, as that was not yet in evidence. But the court did consider the system of review operated in Afghanistan, which was similar in relevant respects. The majority agreed with the view of Lord Sumption that the system had two critical failings. These were, first, that it lacked independence and, second, that it made no provision for the participation of the detainee. The same failings are apparent in the procedure adopted in Mr Al-Waheed's case.

Lack of independence

705. The initial decision to authorise internment was made "on the delegated authority of the GOC" and the authority to detain or release subsequently lay with the DIRC. As mentioned earlier, the DIRC comprised the General Officer Commanding (GOC), the Chief of Staff, the Chief Intelligence Officer, the Policy Advisor to the GOC and the senior legal officer. Accordingly, rather than being independent of the detaining authority whose decisions it was to review, the DIRC was squarely within the same chain of command and was chaired by the same person who was ultimately responsible for the internment decisions which were under review. This did not

provide the institutional guarantees of impartiality which have been held by the Supreme Court to be necessary in the *Mohammed (No 2)* case.

706. In addition, the Policy Advisor at the relevant time, Ms White, who gave evidence at the trial, was an official in the MOD and explained that her role involved managing "[t]he image and reputation of defence" and "supporting the media cell in developing responses to questions we might receive about operations" - which included responsibility for ensuring that "what was put into these sorts of media lines … was consistent with Government policy". Ms White very fairly accepted that there was "a potential for tension" between her responsibility for media lines and presentation and her involvement in individual detention decisions on the DIRC.

Lack of opportunity for the detainee to participate

707. In the *Mohammed (No 2)* case Lord Sumption (at para 107) observed that some basic principles must be regarded as essential to any fair process of adjudication. He continued:

> "In the present context the minimum conditions for fairness were (i) that the internee should be told, so far as possible without compromising secret material, the gist of the facts which are said to make his detention necessary for imperative reasons of security; (ii) that the review procedure should be explained to him; (iii) that he should be allowed sufficient contact with the outside world to be able to obtain evidence of his own; and (iv) that he should be entitled to make representations, preferably in person but if that is impractical then in some other effective manner."

Lord Sumption considered it a more debatable question whether an internee should be allowed access to legal advice and assistance but noted that there was no evidence to suggest that the restrictions on access to such assistance imposed by the British authorities in Afghanistan were necessary and that British practice conflicted with the position taken by the United Nations and by the International Committee of the Red Cross.

708. The procedure operated in Iraq at the time of Mr Al-Waheed's internment did not meet any of these minimum conditions for a fair process. In particular:

i) Internees were not even informed after a review of their internment had taken place, let alone beforehand, of the reasons why their internment was considered necessary. As mentioned earlier (see paragraph 608 above), a document disclosed by the MOD, which appears to be a copy of a letter given to Mr Al-Waheed after the review of his internment on 22 February 2007 and which I take to be a standard form of letter issued to internees after decisions to continue their internment were taken, stated only that the DIRC had decided that his continued internment was necessary for imperative reasons of security. Even if the DIRC had taken such a decision (which on that particular occasion it in fact had not), the letter gave no indication of the grounds on which the decision was based. That said, Mr Al-Waheed must certainly have been aware from his interrogation sessions that a partly assembled IED and other ordnance

had been found in the house where he was arrested and that he was suspected on that basis of involvement in terrorist activity.

ii) There is no suggestion that the review procedure was explained to internees (or specifically to Mr Al-Waheed).

iii) No opportunity was afforded to internees to obtain or present evidence of their own – albeit that Mr Al-Waheed's brother, when he discovered what had happened, independently and of his own initiative did his best to provide evidence to the British authorities to prove Mr Al-Waheed's innocence.

iv) Most importantly of all, internees were not permitted to attend meetings of the DIRC at which their case was reviewed nor to be represented at such meetings. The only form of representation allowed was to write a letter to the committee, though there is no evidence that Mr Al-Waheed was informed even of that right or given any facility to write a letter and have it translated into English.

v) Mr Al-Waheed was not given access to any legal assistance or advice. Further, as mentioned earlier, internees were specifically prohibited from having access to legal advice during the first 14 days of their detention.

709. The defective nature of the process was recognised at the time. As mentioned earlier, in April 2006 the Provost Martial (Army) conducted an inspection of the Shaibah detention facility. In his report following this inspection, he identified as a "fundamental flaw" in the internment review process the absence of any provision for internees who could not afford to pay for their own legal counsel to obtain legal assistance without payment. The Provost Martial also expressed concern that internees were not given an opportunity to present their case in person to the DIRC. He wrote:

> "Without these basic safeguards, there is the potential for an illiterate, inarticulate or poor internee to be wrongly held in internment. The inability to present their case to the DIRC remains one of the most frustrating issues for many internees and was raised constantly with PM(A)."

For these reasons, to the question "*Is there a transparent and just process for conducting regular reviews of internment in place?*" the answer given by Provost Martial in his report was: "*No*". His report contained the following recommendation:

> "Make provision for internees and legal advisers to present cases to review bodies. Consider provision of free legal advice for those unable to pay."

710. In June 2007 (some three months after Mr Al-Waheed's release) the Provost Martial carried out a further inspection. He observed that there had been "some positive progress" in that internees were now interviewed by legal officers who assisted them in understanding the reasons for their internment and sought to explain the results of internment reviews by the DIRC. However, he remained concerned that "basic safeguards are not in place for illiterate, inarticulate or poor internees to represent their cases in a meaningful way". He wrote:

> "Internees are still not able to represent themselves in person to review bodies and this is exacerbated by the particularly poor standard of translation of legal letters from Arabic into English, submitted by internees. In some cases the grammar and syntax used by the translator is such a 'pidgin level' of English so as to render the content of the letter virtually worthless. This substantially undermines the duty of care UK owes to those in internment and reinforces the concerns raised by PM(A) in his last report."

711. I conclude that, in addition to the lack of independence of the review committee, there was a further breach of article 5(4) in that Mr Al-Waheed was given no meaningful opportunity to participate in the reviews of his internment and to make representations.

712. These procedural deficiencies did not prevent the DIRC from deciding, after reviewing the evidence at its meeting on 22 February 2007, that the evidence did not show that Mr Al-Waheed's continued detention was necessary for imperative reasons of security and that he should be released. Nor is it possible to know for sure what would have happened subsequently if the review process had been fair and independent. Nevertheless, I think it reasonable to infer that, had a fair and independent review process been in place, Mr Al-Waheed would not have been kept in custody for reasons which were patently bad for a further 33 days after the original decision had been made to release him.

Crown act of state

713. Whether my finding that Mr Al-Waheed's detention was unlawful as a matter of Iraqi law means that Mr Al-Waheed has a claim in tort which is enforceable in the English courts depends on whether his detention was a Crown act of state. As in the case of the other claimants, the detention of Mr Al-Waheed was without doubt an exercise of sovereign power, inherently governmental in nature, done outside the UK in the conduct of a military operation. Whether it was a Crown act of state depends on whether it was authorised by the Crown.

714. The relevant MOD doctrine at the time was Joint Doctrine Publication 1-10 "Prisoners of War, Internees and Detainees", which was published in May 2006. In relation to internment during hostilities not amounting to an international armed conflict, this stated (at para 113(a)):

> "**Internees.** UK Forces operating abroad may have a power to intern civilians under a host nation's law where they pose an imperative threat to the security of the force; such power may derive from the host state's own domestic law or from a UN Security Council Resolution."

715. Procedures for the operation of the Divisional Temporary Detention Facility at the Shaibah Logistics Base applicable at the time of Mr Al-Waheed's detention were set out in the Operational Directive MND (SE) 3082 dated 15 July 2006. As described earlier, this directive provided (amongst other things) for review of internment by the DIRC.

716. Counsel for the MOD argued that Mr Al-Waheed's detention was plainly within the authority conferred by the Crown in circumstances where: the decision to arrest him was taken by an officer who was authorised to decide whether it was necessary to detain him for imperative reasons of security; his internment at Shaibah detention facility was similarly authorised; and thereafter his internment was continued as a result of decisions taken by the DIRC, which was authorised to take such decisions under the system of review established by the Operational Directive.

717. I do not accept this argument even on its own terms, as the DIRC decided on 22 February 2007 to release Mr Al-Waheed and there was then a period of two days during which he was detained without any authorisation until the DIRC once again authorised his continued internment on 24 February 2007. But the more substantial reason for rejecting this argument is that the power conferred by the UN Security Council on the UK to intern persons was a power to do so only when it was necessary for imperative reasons of security. There was no power to intern an individual in the absence of such necessity. There is nothing to suggest that the UK government intended to confer on individual officers and on the review committee charged with taking decisions regarding internment any authority which exceeded the UK's powers under international law. The grant of any wider authority would in any event have been unlawful under UK domestic law because – for reasons indicated above – detention which was not necessary for imperative reasons of security was contrary to article 5 of the European Convention and was therefore unlawful by reason of the Human Rights Act. By the same token, the UK government could not lawfully authorise internment in accordance with a process which was incompatible with the standards of fairness required by article 5 and hence by the Human Rights Act.

718. The upshot is that Mr Al-Waheed was detained pursuant to a valid authority from the Crown in so far but only in so far and for such time as his detention was consistent with Resolution 1546 and with article 5 of the European Convention. I have found that this was the case until the DIRC decided on 22 February 2007 to release Mr Al-Waheed, but not thereafter. It follows that any claim in tort in relation to his arrest and the initial period of his detention is barred by the doctrine of Crown act of state but that a claim in tort in respect of his detention after 22 February 2007 is not.

Conclusions

719. In summary, I have found that Mr Al-Waheed was subjected to inhuman and/or degrading treatment which violated article 3 of the Convention in the following respects:

i) While he was being transported to the Basra Airport base following his arrest, he was repeatedly beaten on the upper back and arms by British soldiers (probably with rifle butts). He was also punched in the face and sustained a painful finger injury.

ii) From shortly after his arrest at around 0030 until his arrival at the Shaibah detention facility at around 1300 on 12 February 2007 (except while being photographed, medically examined and questioned at the Basra Airport base) he was completely deprived of sight and hearing by being made to wear blacked out goggles and ear defenders. This practice continued during the first 13 days of his detention whenever Mr Al-Waheed was taken out of his cell.

iii) At the Basra Airport base he was subjected to tactical questioning using the "harsh" interrogation approach which involved a deliberate attempt to humiliate the detainee by shouting insults and personal abuse at him.

iv) During the first day and a half of his detention he was deliberately deprived of sleep for the purpose of interrogation.

720. I have also concluded that Mr Al-Waheed's arrest and initial period of detention were lawful, but that his continued detention after the review committee had voted to release him on 22 February 2007 until his actual release on 28 March 2007 violated article 5 of the Convention and also gave rise to a claim against the MOD in tort.

VII. LIMITATION

721. The conclusions about the liability of the MOD which I have reached so far in this judgment are all subject to the question whether the proceedings have been brought in time. The claims of MRE and KSU were both issued on 22 December 2010. Those of Mr Alseran and Mr Al-Waheed were issued on 27 March 2013. The MOD maintains that it has a defence to all four claims on the ground that they were all begun after the relevant time limits for starting proceedings had expired.

722. Different time limits apply to the tort claims governed by Iraqi law and to the claims made under the Human Rights Act. I will address the tort claims first.

Iraqi law claims

723. Section 1(1) of the Foreign Limitation Periods Act 1984 enacts a general rule that, where in English proceedings the law of another country falls to be taken into account in the determination of any matter:

> "(a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings … ; and
>
> (b) … the law of England and Wales relating to limitation shall not so apply."

Section 4 of the Act makes it clear that the law of any country "relating to limitation" includes any law relating to, and to the effect of, the "application, extension, reduction or interruption" of any limitation period.

724. As the law applicable to the tort claims in these proceedings is the law of Iraq, the starting point is therefore to consider the Iraqi law relating to limitation and whether the claims have been brought within any relevant limitation period prescribed by Iraqi law.

Primary limitation period in Iraqi law

725. In Iraqi law the limitation period for tort claims is established by article 232 of the Civil Code, which provides:

> "A claim for damages resulting from whatever (kind) of unlawful act shall not be heard after the lapse of three years from the day on which the injured person became aware of the injury and of the person who caused it; in all cases the claim will not be heard after the lapse of 15 years from the day of occurrence of the unlawful act."

726. The Iraqi law experts agreed that, where a person is sued on the basis of vicarious liability for the acts of an agent, the claimant need only know the identity of the principal, and not the identity of the agent, in order to be aware of "the person who caused [the injury]" for the purpose of triggering the three year primary limitation period under article 232. Thus, in the present cases in order for time to start running it is sufficient that the claimants knew that their injuries were caused by soldiers of the UK and not necessary for them to have known the identities of the individual soldiers concerned.

727. The experts also agreed that, where the claimant suffers an injury which gets worse over time, the three year limitation period begins on the date when the claimant becomes aware of the original injury (and the person who caused it) and is not extended by the subsequent deterioration of the claimant's condition. It was Professor Al-Dabbagh's opinion, however, that, where the claimant suffers multiple injuries as a result of a single unlawful act, the date when the three year limitation period begins must be determined separately for each injury. It was also his opinion that a claimant only has the knowledge required to start time running when he knows with certainty that he has sustained a particular injury as a result of the defendant's act – which may only be on receipt of a medical diagnosis. On this basis the claimants argued that, in relation to the psychiatric injuries for which they are claiming compensation, time only began to run when they saw a psychiatrist who diagnosed their condition.

728. By contrast, in Professor Hamoudi's view there is only one primary limitation period for claims for damages arising from a particular act, which begins when the claimant has sufficient knowledge to file a suit against the defendant.

729. I have found the reasoning of Professor Hamoudi on these points compelling and cannot accept Professor Al-Dabbagh's interpretation of article 232. In particular:

i) A distinction between different injuries caused by the same act and a single injury which changes over time is one which it would often be very difficult to draw in practice and I can no justification in principle for trying to draw it.

ii) So far as the experts have found, the distinction is not one which has been drawn by any commentator or by a court in any case.

iii) Whether harm was caused to the claimant by the defendant's act may only be established at the end of a trial and it would be unrealistic to require certain knowledge before proceedings are brought.

730. Even if a distinction were to be drawn between physical and psychological injuries, all the claimants in these cases knew when they were released from detention that their mental health had been affected. Whilst evidence from psychiatrists is relevant in establishing the extent to which persisting psychological problems are likely to be

attributable to the index events, none of the claimants needed to see a psychiatrist nor to be given a label for his condition in order to know that he had suffered psychological harm.

731. A further point on which the experts disagreed is how article 232 applies to a case of unlawful detention. In Professor Hamoudi's opinion, the three year limitation period begins at the time of imprisonment, provided the claimant knows who has imprisoned him. In the opinion of Professor Al-Dabbagh, it is also necessary for the claimant to know that the imprisonment was unlawful. On this point too, I accept Professor Hamoudi's view as correct. The text of article 232 identifies two matters only of which knowledge is required – injury and the identity of the person who caused the injury; it does not state that the injured person must also be aware that the act which caused the injury was unlawful. Professor Al-Dabbagh did not give any convincing reason for implying such an additional requirement. Moreover, he accepted that, in a claim for injury caused by, for example, a physical blow where the defendant asserts that he was acting in self-defence, time begins to run when the blow is struck and not when a court rejects the plea of self-defence and finds that the act was unlawful. I am unable to see a relevant distinction between such a case and one in which there is an issue about whether the claimant's detention was lawful.

732. I accordingly find that in each of the present cases the three year primary limitation period prescribed by article 232 began when the claimant was detained and suffered the mistreatment of which he complains. Unless the limitation period was suspended or interrupted, therefore, it expired three years after the date on which the claimant was released from detention or was mistreated.

Suspension of time under article 435 of the Iraqi Civil Code

733. There are two relevant provisions of Iraqi limitation law which can stop time running. The one on which the claimants principally rely is article 435 of the Civil Code, which provides for the suspension of the limitation period in certain circumstances. Article 435 states:

> "(1) The time limit barring the hearing of the case is suspended by a lawful excuse such as where the claimant is a minor or lacks legal capacity and has no guardian or is absent in a distant foreign country, or where the case is between spouses or ascendants and descendants, or if there is another impediment rendering it impossible for the claimant to claim his right.
>
> (2) The period which elapses while the excuse still exists (lasts) shall not be taken into account for the running of the time limitation."

<u>The preliminary issue</u>

734. Article 435 has already been the subject of preliminary issues in this litigation. One of those issues was:

> "As a matter of Iraqi law, and in respect of those heads of claim brought pursuant to rights under Iraqi law, was the primary

> limitation period of three years provided for in article 232 of the Iraqi Civil Code suspended by operation of article 435(1) of the Code as a result of the fact that CPA Order 17 rendered it impossible for the claimants to claim their rights in Iraq?"

735. It is common ground between the parties that CPA Order 17 rendered it impossible for the claimants to claim their rights in Iraq by conferring immunity from suit in Iraq on British forces (and other MNF personnel). The question debated at the trial of the preliminary issues was whether as a matter of Iraqi law article 435, properly interpreted, refers to (a) an impediment rendering it impossible for the claimant to sue in Iraq or (b) an impediment which makes it impossible for the claimant to sue in the jurisdiction in which the claim is in fact brought. I accepted the view of the claimants' expert that, properly interpreted, article 435 is concerned only with the possibility of bringing proceedings in Iraq. I therefore concluded that, as a matter of Iraqi law, the primary limitation period of three years was suspended as a result of the fact that CPA Order 17 rendered it impossible for the claimants to claim their rights in Iraq: see *Iraqi Civilian Litigation v Ministry of Defence* [2015] EWHC 116 (QB).

736. The MOD appealed from that decision to the Court of Appeal, which allowed the appeal: see *Iraqi Civilians v Ministry of Defence (No 2)* [2015] EWCA 1241, [2015] 1 WLR 1290. The Court of Appeal did so on the ground (not argued in this court) that CPA Order 17 is a purely procedural bar to bringing proceedings in Iraq which must be disregarded by the English court because it is not itself a law relating to limitation within the meaning of sections 1(1) and 4 of the Foreign Limitation Periods Act 1984 nor is it a substantive rule of Iraqi law. As section 14(3)(b) of the Private International Law (Miscellaneous Provisions) Act 1995 makes clear, it is only substantive rules of foreign law which are rendered applicable by that Act, as matters of procedure are governed by the law of the forum.

737. The claimants in turn appealed to the Supreme Court, which dismissed the appeal but reached that result on a different basis again: see *Iraqi Civilians v Ministry of Defence (No 2)* [2016] UKSC 25, [2016] 1 WLR 2001. Lord Sumption (with whom the other Justices agreed) rejected the reasoning of the Court of Appeal. He held that, although CPA Order 17 is a procedural rule which has no legal effect in an English court, an English court is not giving legal effect to CPA Order 17 in finding that it is impossible for a claimant to sue in an Iraqi court; it is simply recognising what the position is as a matter of fact. Recognising the existence of this factual impediment does not involve giving effect to the rule of Iraqi law in question.

738. Lord Sumption also considered that the answer to the question of Iraqi law addressed in this court was obvious: manifestly, article 435 of the Iraqi Civil Code is a procedural rule of Iraqi law which applies only to proceedings in Iraq. But he saw the important question as being one of English law (not argued in the courts below) about the effect of the Foreign Limitation Periods Act. He reasoned that applying the foreign law of limitation to proceedings in England in accordance with that Act "necessarily involves a process of transposition" (see para 13). Thus, the relevant facts to which the law must be applied are facts applicable to the actual proceedings brought in England and not to some hypothetical proceedings that the claimants have not brought, and in this case could not have brought, in Iraq.

739. On this basis, the Supreme Court held that the fact that CPA Order 17 has prevented the claimants from bringing proceedings in Iraq is irrelevant because an English court applying article 435 is concerned only with whether there are impediments to English proceedings and CPA Order 17 has never impeded resort to the English courts.

740. In the light of this guidance from the Supreme Court, the evidence and argument at these trials has been directed to the question of whether there was as a matter of fact at any relevant time in each case any impediment to the claimant suing in England which amounted to a lawful excuse for the purpose of article 435 so as to suspend the running of time for as long as the excuse lasted.

The concept of a "lawful excuse"

741. The Iraqi law experts were in substantial agreement about the interpretation of article 435. In particular, the experts agreed that the matters specified in article 435 are examples only and do not limit the impediments which can constitute a lawful excuse. They also agreed that there is no significant difference between article 435 of the Iraqi Civil Code, which refers to any impediment which renders it "impossible" for the claimant to claim his right, and the equivalent provision in the Egyptian Code, which refers to an impediment which renders it "impracticable" for a claimant to claim his right. Under Iraqi law, as under Egyptian law, the test is one of practical possibility. Both rules, in the view of Sanhuri, can be equated with the rule of French law according to which a limitation period does not run against a person who has been prevented from acting (*contra non valentem agere non currit praescriptio*).

742. Professor Al-Dabbagh explained that the term translated as "lawful excuse" (*al-odr al-sharii*) is borrowed from the Ottoman Civil Code. He characterised it as an intentionally vague and flexible standard which is designed to give a discretionary authority to the judge dealing with the case. The kind of legal standard which I understood Professor Al-Dabbagh to be describing has been well encapsulated by Julius Stone:

> "In all legal orders, legal standards or models such as 'good faith', 'fair dealing', 'the reasonable man', or 'the conscionable man' play an important role. They provide by their vagueness and indeterminacy legal norms tolerant of conflicting solutions in broad penumbral areas, even while in the core area they admit into the law the more coherent insights of the society's widely shared convictions."[48]

743. Professor Al-Dabbagh also made the point, which I accept, that the criterion of a "lawful excuse" calls attention to the fact that the concept of suspending the limitation period is founded on fairness. The legislation aims to protect people who are prevented by an obstacle or impediment from making a claim. At the same time, suspending the limitation period risks compromising the principles of legal certainty and stability on which the law of limitation is based. In interpreting and applying the concept of a "lawful excuse", the judge must try to reconcile these competing private and public interests.

---

[48] See J Stone, "Legal Systems and Lawyers' Reasonings" (1968) at pp21–22.

744. The experts agreed that there are two types of impediment which may amount to a lawful excuse under article 435. One type consists of personal impediments. These relate to characteristics or particular circumstances of the claimant. As the examples given in article 435 show, personal impediments may arise from lack of capacity ("where the claimant is a minor or lacks legal capacity and has no guardian"), the claimant's physical situation ("where the claimant … is absent in a distant foreign country") or the claimant's relationship with the defendant ("where the case is between spouses or ascendants and descendants"). The second type consists of material impediments. These are external circumstances which are general and not particular to the situation of the claimant, and have been compared by some commentators to events of *force majeure*. For example, Sanhuri writes:

> "The impediment may not relate to the person, but to material, compulsory circumstances, similar to *force majeure*, which render it impossible for the claimant to claim his right. … Of this type are the beginning of a war, the outbreak of civil strife, or the declaration of martial law. If something of this sort prevents the courts from doing their work, then it is not possible for the claimant to make a claim to the judiciary for his right."

745. As regards absence in a "distant foreign country", one commentator cited by Professor Al-Dabbagh, Judge Al-Khayoun, observes that this amounts to a lawful excuse if the absent person is in a situation where he or she cannot assert a claim, adding that this is a matter of fact for the trial judge to assess.[49] The experts referred to a number of judicial decisions in which it was held that absence abroad did not suspend the limitation period because the claimant could have appointed an attorney to pursue the case on his or her behalf. Thus, in one case the Court of Cassation held that even being sentenced to death *in absentia* was not a lawful excuse because the claimant could have instructed an Iraqi lawyer to represent him by going to a public notary in the country where he was residing. Similarly, in another case the fact that a retired person was travelling abroad was not considered a lawful excuse for failing to bring a claim for payment of a pension because the law allowed such a claim to be made by an attorney.

746. The experts agreed that, in the case of material impediments, the test of impossibility is an objective one, measured against the abstract standard of a reasonable person (*al-shakhss al-moutad*). Professor Al-Dabbagh explained that the concept of the reasonable person in Iraqi law is similar to that of a *bon père de famille* in French law (or *bonus pater familias* in Roman law). This person is taken to be neither very clever nor very stupid – a person of average intelligence and capability.

747. In relation to factors relied on by the claimants, the experts agreed that practical, financial and logistical difficulties in commencing proceedings in the relevant forum are material circumstances and not personal ones. They likewise agreed that the availability of lawyers willing and able to act in proceedings against the defendant in the relevant forum is a material and not a personal circumstance. Accordingly, if such

---

[49] See Ahmad Al-Khayoun, "The displacement of the limitation period and its application by the Iraqi judiciary" (Baghdad, 2010) at p107.

difficulties are so severe that they do not give a reasonable person a practical opportunity to claim his right, the limitation period will be suspended for as long as the difficulties are of such severity. However, if it is hard but not impossible for a reasonable person in the circumstances of the claimant to commence proceedings, then there is no lawful excuse under article 435.

748. The experts further agreed that psychological harm is a personal circumstance which is capable of amounting to a lawful excuse but that it will only do so if deprives the claimant of capacity to make a claim.

749. The only disagreement of any substance between the experts concerned the test to be applied in deciding when fear of harmful consequences amounts to a lawful excuse. The experts agreed that fear of severe consequences (such as physical harm or imprisonment) for the claimant or a member of his family if suit is brought can suspend the limitation period. However, they disagreed about whether the relevant standard is a subjective one based simply on what the claimant actually believes (as Professor Al-Dabbagh maintained) or whether the standard is objective, based on what a reasonable person in the circumstances of the claimant would fear (which was Professor Hamoudi's view). In support of his view, Professor al-Dabbagh drew an analogy with duress and gave the example of a threat of black magic, which could create sufficient fear to be a lawful excuse in an uneducated person living in a rural area but not in an educated city dweller.

750. It seems to me that this disagreement really came down to whether fear can itself be regarded as a personal impediment, similar to an illness, or whether the relevant impediment is regarded, not as the claimant's fear, but as the circumstance which gives rise to that fear. I also consider that, in accordance with the principles agreed between the experts, the claimant's fear cannot itself be regarded as a personal impediment unless it is of a truly pathological nature which deprives the claimant of capacity to make a claim. Subject only to this, I think that Professor Hamoudi must be right in regarding the relevant impediment as whatever causes the claimant's fear rather than the claimant's state of mind. I also accept Professor Hamoudi's view – on which he was not challenged – that the extent of the impediment is in principle to be measured by reference to the actual facts and not by reference to what the claimant honestly but mistakenly believes the facts to be.

Background to these claims

751. The first legal proceedings brought in England and Wales arising out of actions of UK forces in Iraq were proceedings for judicial review. The law firm Public Interest Lawyers ("PIL") first issued such proceedings on behalf of 13 claimants in May 2004 and subsequently issued many more claims for judicial review in the Administrative Court. In those cases the claimants were seeking orders requiring the MOD to establish independent inquiries into allegations of unlawful killing and mistreatment of Iraqi civilians.[50]

[50] One claim form issued by PIL in the Administrative Court on 12 August 2010 on behalf of 47 claimants included claims for damages. But it does not appear that there was ever any realistic intention of pursuing the damages claims. The claims were stayed and on 12 May 2015 the claimants undertook to re-issue them as proceedings in the Queen's Bench Division, but have never done so. In addition, on 14 July 2014 PIL issued a

752. In 2004 Leigh Day made contact with four lawyers based in Iraq to ask if they would be interested in working with Leigh Day. One of these lawyers (Dr Bassim) provided Leigh Day in August 2004 with brief details of 15 potential cases, of which eight were accepted. In January 2005 Dr Bassim provided details of two further claims which Leigh Day did not accept. In February 2005 Leigh Day sent a letter of claim to the MOD in six of the cases referred by Dr Bassim. However, the claims were not pursued further after a letter of response denying liability was received from the MOD in August 2005. Leigh Day did not receive any further referrals from Dr Bassim.

753. After the cases referred by Dr Bassim, the next Iraqi claims which Leigh Day accepted were cases referred by PIL under an agreement made in January 2006 under which Leigh Day agreed to take on private law claims for damages for personal injury on behalf of clients of PIL. In the summer of 2007, Leigh Day sent letters of claim on behalf of a number of prospective claimants. Claim forms were issued by Leigh Day in July 2007, October 2007, April 2008, October 2008 and November 2008. By the end of 2008 some 25 claims had been issued, which included the 'Baha Mousa' and 'Camp Breadbasket' claims, amongst others. In total, PIL referred 79 cases to Leigh Day, of which 51 were accepted by Leigh Day; in the other cases Leigh Day either declined to accept the case or acted as PIL's agents in pursuing a personal injury claim for a limited period without entering into a direct retainer with the client.

754. It appears that many cases were referred to PIL by a man called Mazin Younis. He was based in the UK but worked with another individual based in Basra called Abu Jamal. Members of Leigh Day first met Abu Jamal in person in January 2008 when Leigh Day and PIL went to Istanbul to interview clients.

755. In April 2008 Mazin Younis contacted Leigh Day in relation to a number of potential new cases and suggested that Leigh Day enter into a referral agreement directly with him. After various discussions such an agreement was concluded in March 2009. Between March 2009 and March 2013 Mazin Younis and Abu Jamal referred approximately 1,240 claims to Leigh Day, of which some 896 were accepted and 344 were declined. There was an interruption in referrals at the end of 2010, when Leigh Day decided that (except in the most extreme cases) they would no longer consider any potential claim where the incident giving rise to it had occurred more than three years previously. That policy changed in August 2012 after the cases of *Al Jedda* and *Al Skeini* were decided by the European Court of Human Rights. Leigh Day then reconsidered cases which had been referred to them since 2010 and continued to accept new cases from Mazin Younis and Abu Jamal until the end of March 2013.

756. Between March 2009 and December 2010 Leigh Day issued some 319 claims in this litigation. A further tranche of 612 claims was issued in March 2013. Since then, with the exception of 10 claims issued on 16 December 2014, no further claims have been issued by Leigh Day. One reason for this is that on 1 April 2013 the law changed so that, for claims commenced after that date, the costs which a successful claimant can recover from the defendant no longer include a success fee payable to the claimant's lawyer under a conditional fee agreement.

---

claim form in the Queen's Bench Division containing claims for damages on behalf of a further 187 claimants. These claims were stayed on 12 May 2015.

Commencement of the present claims

757. KSU first learnt some time in 2010 that it might be possible to bring a claim for compensation when someone living in his neighbourhood who had also been detained by coalition forces put him in touch with Abu Jamal. KSU in turn contacted MRE and took him to meet Abu Jamal. Leigh Day received details of their cases on 28 October 2010 and agreed to accept their instructions on 9 December 2010. As mentioned, both claims were commenced on 22 December 2010.

758. Mr Alseran also heard about Abu Jamal and the possibility of claiming compensation from another former detainee. Mr Alseran then approached Abu Jamal and provided him with relevant documents. He cannot remember when this occurred but, based on the date on which he signed a conditional fee agreement with Leigh Day, he estimates that it was around the end of 2012. His account of when and how he learned that he could bring a claim is consistent with the accounts given by his witnesses who heard about Abu Jamal at about the same time from each other (except for Mr Mhalhal who only learnt about Abu Jamal in about 2014 from Mr Alseran).

759. Mr Alseran's details were passed to Leigh Day on 20 February 2013 and they accepted his instructions on 2 March 2013. His claim was issued on 27 March 2013.

760. Some time in 2011, Mr Al-Waheed heard from a colleague who had also been detained that there was a man in the local area who was helping people to contact lawyers in the UK so that they could complain about British forces. The man was Abu Jamal. Mr Al-Waheed contacted Abu Jamal but was told that the English lawyers might not accept his claim because more than three years had passed from the date of his release. Abu Jamal said that he would nonetheless pass on Mr Al-Waheed's information. Mr Al-Waheed then heard nothing further. Some time later, in what must have been the later part of 2012, Mr Al-Waheed learnt that Abu Jamal was now taking cases again. He contacted Abu Jamal who said he would pass on Mr Al-Waheed's details to the law firm in Britain.

761. Abu Jamal passed Mr Al-Waheed's details to Leigh Day on 7 January 2013, together with those of a large number of other prospective claimants. Leigh Day agreed to act for Mr Al-Waheed on 3 March 2013, when he signed a conditional fee agreement. His claim was also commenced on 27 March 2013.

The claimants' case on lawful excuse

762. The claimants' case is that it was in practice impossible for them to bring claims for compensation in the English courts without the assistance of English lawyers and that they had no practical opportunity to instruct an English lawyer to bring such a claim on their behalf until in each case they heard about the possibility of claiming compensation from another former detainee and made contact with Abu Jamal, who referred them to Leigh Day.

763. In support of this case, the claimants relied on evidence from Mr Al-Attabi, an Iraqi lawyer practising in Basra, and from Dr George who gave expert evidence on conditions in Iraq. Both experts expressed the opinion that it would not have occurred to Iraqi citizens that they might be able to bring a claim for compensation against the British government in a UK court. The reasons for this included: (i) the fact that

under the regime of Saddam Hussein it would have been unthinkable for an Iraqi citizen to have brought a claim against the state seeking compensation for unlawful detention and mistreatment; (ii) the lack of any meaningful understanding, particularly among those in lower income groups, of life in the UK, the UK legal system and its independence from the state; and (iii) the fact that it would be thought self-evidently pointless to seek redress in the courts of a state which had invaded and occupied their country for alleged misdeeds of that state's soldiers.

764. The claimants also relied on evidence from Mr Al-Attabi and Dr George that, within Iraq, access to legal advice is very limited and many Iraqis cannot afford even to consider retaining a lawyer. Particularly in rural areas, it is more common to use traditional methods of resolving disputes through tribal mechanisms than to go to court. Access to the courts was further impeded in the aftermath of the invasion and again in the period from 2006 to 2008 by the dangerous security situation in Basra. Moreover, even if a potential claimant had consulted an Iraqi lawyer, Mr Al-Attabi said that it was unlikely that any Iraqi lawyer would have considered or advised that there was a realistic possibility of bringing a claim for compensation in England. The reasons for this included:

i) The lack of any understanding among Iraqi lawyers of English law or procedure;

ii) Lack of awareness of how to identify any English lawyer who might be willing and able to provide assistance compounded by the fact that most Iraqi lawyers do not speak English;

iii) A belief that, even if it were technically possible, the cost and other practical difficulties of bringing a lawsuit in England would be prohibitive; and

iv) A general belief which existed among Iraqi lawyers and the wider community that the British forces were immune from suit.

765. Dr George explained the practical and logistical difficulties for an Iraqi citizen of bringing proceedings in England including the difficulty of obtaining a visa to enter the UK. Less than 10% of the Iraqi population even have a passport. Until 2013, in order to apply for a visa to travel to the UK, it was necessary for Iraqi nationals to travel to Amman. Dr George described how difficult and dangerous this journey was and how costly the visa application process. The prospect of obtaining a visa, even if applied for, may be judged by the fact (mentioned in paragraph 27 of this judgment) that, for the first of these trials, the claimants and their witnesses were refused visas to travel to the UK to attend court even though all their expenses, including return flights, were being funded by Leigh Day, and visas were only granted after judicial review proceedings had been issued to challenge the refusal.

The MOD's case on lawful excuse

766. The MOD's case is that, notwithstanding all the alleged difficulties, it has always been possible to bring claims against the MOD in the English courts, as evidenced by the fact that many such claims have been brought by Iraqi citizens since 2004.

767. The MOD also relied on a witness statement from Mr Benjamin Sanders, an official at the MOD, who expressed the opinion that there was a general awareness among the Iraqi population of the possibility of bringing claims for compensation against the British Army. However, I do not consider that Mr Sanders had either any relevant expertise or any factual basis for giving this opinion. In so far as his opinion was based on the existence of an Area Claims Office at the British base in Basra, there is no evidence that any attempt was made to publicise the existence of that office. Nor, for those Iraqi citizens who did become aware of the Area Claims Office, did its existence indicate that it was possible to bring court proceedings against the MOD in England. The evidence shows that, of a total of 3,262 claims made to the Area Claims Office, the vast majority were claims for compensation for damage to property; and Mr Roberts, who gave evidence about this, could not recall any claim for compensation for alleged ill-treatment or unlawful detention. Although Mr Sanders confidently asserted that there was extensive media reporting in Iraq of the Baha Mousa and Al Sweady inquiries, the sole basis for this assertion proved to be a small number of English language media reports in Al-Jazeera. Mr Al-Attabi said that the only case which became a matter of public knowledge was that of Baha Mousa. He said that he learnt about this case "from conversations at the courthouse" and that the first time that he had seen any media reports in Iraq of compensation claims brought by Iraqi citizens in the English courts was in 2016 in anticipation of the first of these trials.

768. The only earlier media coverage in Iraq of proceedings in the English courts which has been identified consists of two articles published in October 2009, in newspapers called *The Middle East* and *The Voice of Iraq*. These articles resulted from a press release issued by Leigh Day in connection with claims brought on behalf of Iraqi citizens who had worked as interpreters for the British Army. I accept Mr Al-Attabi's evidence that neither newspaper is widely read in Iraq.

Findings on lawful excuse

769. The issue is whether in each case, applying the principles of Iraqi law identified above, there was at any time a lawful excuse which suspended the running of the three year primary limitation period and, if so, how long the excuse lasted. In analysing the claimants' case on this issue, it is necessary in my view to distinguish two kinds of impediment to the bringing of their claims. One kind of impediment consists in the practical difficulties for an Iraqi citizen of suing the MOD for compensation for allegedly unlawful detention and/or ill treatment in the English courts. The other kind of impediment consists of lack of knowledge of the possibility and means of bringing such a claim.

770. As to the first, I accept that it was and has at all material times been practically impossible for the present claimants or for the hypothetical reasonable person living in Iraq to bring a claim for compensation against the MOD in the English courts without the assistance of Leigh Day. That is evidenced by the fact that no Iraqi citizen other than the claimants represented by Leigh Day has brought such a claim.[51]

---

[51] I leave aside the claims issued by PIL on 12 August 2010 and 14 July 2014 which have not been pursued further.

771. The reasons which made this practically impossible are, in short:

i) No ordinary Iraqi citizen or even Iraqi lawyer, living in Iraq, would be capable of conducting litigation in the English courts unless assisted by an English lawyer.

ii) As a matter of practical reality, the only way in which an ordinary Iraqi citizen could make contact with an English lawyer who would potentially be willing to represent them was through a local lawyer or other local agent in Iraq who was in a position to refer them to such an English lawyer.

iii) No ordinary Iraqi citizen could afford the cost of litigation in England and of instructing an English lawyer to represent them without either public funding or the services of a law firm willing to act under a conditional fee agreement. Public funding is not generally available for personal injury claims and there is no evidence that any Iraqi citizen has been granted legal aid to bring a claim for damages for personal injury (as opposed to a claim for judicial review) against the British government. Nor is there evidence that any law firm other than Leigh Day has been willing to act for Iraqi claimants on a conditional fee basis.

772. From mid-2004 until its demise last year, another English law firm, PIL, was also willing to act for Iraqi claimants and bring claims against the MOD. However, making contact with PIL would not by itself have enabled a claimant to claim the rights under the Iraqi law of tort which are claimed in this litigation. As I have indicated, the claims issued by PIL were claims for judicial review in which the claimants were in each case seeking an independent investigation into an allegation of mistreatment or unlawful killing. Apart from certain claims asserted in two claim forms which were never pursued any further, PIL did not advance any claims for damages in tort.

773. Although Leigh Day contacted four lawyers based in Iraq in 2004 and one of these lawyers referred a few cases to Leigh Day (none of which actually led to any proceedings being issued), these contacts were one off. They did not establish a continuing relationship through which claims could be made. The position changed in January 2006 when Leigh Day entered into a referral agreement with PIL under which Leigh Day agreed to take on claims for damages on behalf of clients of PIL. From that time an avenue was open – at first via PIL and later directly from Abu Jamal – through which it was possible for an Iraqi citizen who had a personal injury claim to sue the MOD for damages in the English courts with the benefit of a conditional fee agreement. This avenue was closed at the end of 2010 when, as mentioned earlier, Leigh Day decided that (except in the most extreme cases) they would no longer consider any potential claim where the incident giving rise to it had occurred more than three years previously. It reopened in August 2012 when Leigh Day again began to accept new cases.

774. At all times when Leigh Day was accepting referrals from PIL or from Mazin Younis and Abu Jamal it cannot be said to have been impossible to bring a claim for compensation against the MOD in the English courts. To the contrary, there was an available means of doing so and many Iraqi citizens brought such claims. The difficulty which potential claimants had was in learning about this possibility. Leigh

Day did not advertise for business in Iraq. Nor does it appear that at any relevant time there was any significant publicity given to this litigation in the Iraqi media from which potential claimants might have learned that there was a means of bringing a law suit in the UK against the British government. The evidence indicates that the only way in which potential claimants acquired such knowledge in practice was when they heard about Abu Jamal and made contact with him. The only way in which potential claimants heard about Abu Jamal was by word of mouth.

775. It was not through any fault of the present claimants that they did not hear about Abu Jamal and discover the possibility that they might be able to bring a claim for compensation in England sooner than they did. Nor do I think it possible to identify any date by which it can be said that a reasonable person who had a potential claim for damages against the MOD could be expected to have acquired knowledge of the possibility and means of bringing such a claim in England. Whether or when a potential claimant heard about Abu Jamal was essentially a matter of luck depending on who they knew and happened to speak to.

776. The key question, as I see it, is whether lack of knowledge (actual or constructive) of the possibility and means of bringing such a claim amounted to a lawful excuse which suspended the limitation period under article 435 of the Iraqi Civil Code. For the following reasons, I do not think it did:

i) Neither of the experts on Iraqi law expressed the view or referred to any commentary or case which would support the view that lack of such knowledge is capable of constituting a lawful excuse under article 435.

ii) Lack of such knowledge cannot be characterised as a material impediment (which, as discussed, must be an external cause or event tantamount to *force majeure*) nor a personal impediment (which must be an objective characteristic or feature of the claimant's situation such as their age, mental capacity, relationship with the defendant or physical location).

iii) Under Iraqi law there is a requirement of knowledge which must be satisfied before time begins to run for the purpose of limitation. This requirement is contained in article 232 (see paragraph 725 above). However, the matters of which knowledge is required do not include the possibility and means of bringing court proceedings in the relevant forum. In these circumstances it seems to me implicit in the scheme of the legislation that lack of knowledge of those matters does not prevent time from running.

777. I conclude that the fact that the claimants did not contemplate, and could not reasonably have contemplated, the possibility of bringing a claim for compensation in the English courts or have known how it was possible to bring such a claim until they heard about Abu Jamal is not capable of providing a lawful excuse which suspended the limitation period under article 435 of the Iraqi Civil Code.

Alleged personal impediments

778. The claimants also allege that, in each of their cases, there were personal impediments which made it practically impossible for them to bring proceedings for several years. These impediments are said to consist of (1) fear of the British authorities and (2) the

psychological trauma from which the claimants were suffering after they were released from detention.

779. I do not accept that fear was a relevant factor. I have concluded earlier that, unless it is pathological, fear as a state of mind is not capable of constituting a personal impediment and the relevant question is whether a reasonable person in the position of the claimant would be prevented from bringing a claim by fear of severe consequences if they did so. I accept that there were dangers in being seen to visit the British base in Basra. It has not been suggested, however, that there was any actual or perceived risk at any time attached to bringing a claim in the English courts through Leigh Day. I see no reason to think that any of the claimants (or a reasonable person in their position) would have perceived a risk of harm or other severe consequence in contacting Abu Jamal or another local agent who could have referred them to Leigh Day, if they had learnt of such a possibility sooner than they did at any time after their release from detention.

780. I also see no basis for inferring that the psychological condition of any of the claimants deprived them of the capacity to seek redress at any relevant time.

781. It was suggested by Professor Katona, the expert psychiatrist instructed by the claimants, that MRE may have been deterred from making a claim sooner by feelings of trauma and shame. However, MRE said himself in his evidence that he wanted to complain about his treatment to the military tribunal which authorised his release from Camp Bucca, including "the way I had been captured, about the stripping part and the physical injuries". There is nothing to suggest that the post-traumatic stress disorder from which he undoubtedly suffered would have prevented him from contacting Abu Jamal or Leigh Day sooner than he did, if the opportunity had presented itself; nor for that matter that his symptoms were significantly better in 2010, when he heard about Abu Jamal, than they had been three years earlier.

782. It is equally clear that KSU would have made a claim at any time after his release if he had known how to do so. He said in his witness statement:

> "If I had known that there was a complaint office I would have filed a complaint. It was not a matter of fear. After all the humiliation and injustice there is no doubt I would have filed a complaint."

If KSU would have filed a complaint directly with the British authorities, had he known about the Area Claims Office, it can safely be inferred that he would have made a civil claim for damages with the assistance of Leigh Day.

783. Mr Alseran stated that, when he was released from detention, he was really upset and angry about his detention and the way he had been treated by the British forces. He explained why he never imagined that it might be possible to bring a claim against the British forces and had no means of doing so before he heard about Abu Jamal. As soon as he learnt of that possibility, he pursued it. Mr Alseran did not suggest that there was any reason why he would not have instructed an English lawyer to make a claim on his behalf sooner, if he had known any way of doing so.

784. The same applies to Mr Al-Waheed. At the time of his arrest Mr Al-Waheed had with him his national identity card and those of his children, and these were among items of property seized during the house raid. Despite a request made by Mr Al-Waheed in writing with the help of an interpreter, the identity cards were not returned when he was released. Their loss caused real problems because, without them, Mr Al-Waheed could not register his children for school. To try to get the documents back, Mr Al-Waheed visited the Basra Airport base in June 2008, despite the dangers of doing so. He was told that, before the British authorities would accept a complaint about the missing property, he would have to provide evidence to show that he had made a complaint to an Iraqi court. Mr Al-Waheed found out from a friend who was a lawyer that this would require him to obtain evidence from his wife, Nazhat, and her family and for the police to inspect her house. Because his relations with Nazhat's family had completely broken down by this stage, he did not pursue the matter further. This episode indicates, however, Mr Al-Waheed would not have been inhibited by fear or by his psychological condition from making a claim against the British forces following his release if he had known that this was a practical possibility.

Conclusions

785. I conclude that, in the cases of Mr Alseran, MRE and KSU, the limitation period was suspended pursuant to article 435 of the Civil Code during their detention and following their release from detention because it was in practice impossible at the time for an ordinary Iraqi citizen to bring a claim for damages against the MOD in the English courts. I have found that it became possible to do so from January 2006 when Leigh Day began to accept instructions from Iraqi claimants who were referred to them by PIL. Accordingly, time started to run then for bringing a claim. It follows that, in these cases, the limitation period expired in January 2009. The claims of Mr Alseran, MRE and KSU were therefore commenced out of time.

786. In the case of Mr Al-Waheed, subject to a further argument which I consider next, I find that time began to run when he was released from detention at the end of March 2007 because a practical means of bringing a claim for damages against the MOD in the English courts existed at that time. The limitation period therefore expired in his case at the end of March 2010. Mr Al-Waheed's claim was therefore also commenced out of time.

Interruption of the limitation period by making a claim

787. In the case of Mr Al-Waheed (though not in the other cases) reliance was also placed on a provision of the Iraqi Civil Code under which the limitation period is interrupted by making a claim. Article 437(1) of the Civil Code provides:

> "The limitation period is interrupted by a claim made to the judicial authorities, even when, owing to an excusable error, the claim is made in a court which is not competent. Thus if a creditor begins proceedings in court against his debtor, but the case is not decided until after the time limit has expired, the case shall be heard thereafter."

This needs to be read with article 439(1), which provides:

> "If the limitation period has been interrupted, a new limitation period equivalent to the original limitation period starts to run."

788. On behalf of Mr Al-Waheed, the following argument was advanced:

i) The limitation period is interrupted under article 437 by the commencement of criminal proceedings.

ii) As a matter of Iraqi law, criminal proceedings were commenced and the limitation period therefore interrupted when Mr Al-Waheed's brother made a complaint to a British Army legal officer and/or when the RMP began an investigation into a suspicion that Mr Al-Waheed had been assaulted by British soldiers.

iii) A new limitation period did not start to run until Mr Al-Waheed was informed of the conclusion of the criminal investigation, which did not occur until disclosure was given in the present proceedings on 15 May 2015. Hence his claim in these proceedings was brought in time.

789. In my view, each stage of this argument is flawed.

(i) Effect of criminal proceedings

790. The expression used in the Arabic text of article 437 to describe the event which interrupts the limitation period is "*mutalaba qadha'iyya*". The experts on Iraqi law agreed that this expression refers to a claim made to a judicial authority. They also agreed that, to interrupt the limitation period, the claim must assert the claimant's substantive right and not merely seek interim measures.

791. Professor Hamoudi accepted that under Iraqi criminal procedure the commencement of criminal proceedings can involve the assertion by the victim of a civil right to compensation from the accused person which interrupts the limitation period. Pursuant to articles 9 and 10 of the Iraqi Criminal Procedure Code, a person who has suffered harm as a result of a crime which is also a civil wrong is entitled to claim compensation for the civil wrong in the criminal proceedings. Furthermore, a written criminal complaint is deemed to include such a claim unless it clearly indicates otherwise. However, in Professor Hamoudi's view, it is only where a civil claim is made or deemed to be made under these rules that the commencement of the limitation period is interrupted by criminal proceedings. Where the victim does not make a civil claim in the criminal court, article 437 is not engaged.

792. Professor Al-Dabbagh takes a broader view. He thinks that criminal proceedings always interrupt the limitation period for any civil claim to which the criminal offence gives rise. This is so regardless of whether the victim pursues a civil claim in the criminal court or chooses not to do so.

793. Impressed as I have been by Professor Al-Dabbagh's learning, I cannot accept that he is right on this point. Professor Al-Dabbagh did not explain how conceptually the commencement of criminal proceedings can satisfy the requirements of article 437 if no claim asserting a right to compensation under the Civil Code is made or deemed to be made to the criminal court. I can see that if the victim of an alleged crime makes a

complaint to the judicial authorities which is deemed to include a civil claim, but states that she does not wish to have the civil claim decided by the criminal court and expressly reserves the right to pursue it in the civil courts after the criminal case has been decided, the view could be taken that a claim has been made which interrupts the limitation period. This may be the explanation of decisions of the Court of Cassation to which Professor Al-Dabbagh referred holding that civil proceedings begun within three years of the final judgment of the criminal court were not barred by limitation. In each of these cases the claimant had in the criminal proceedings reserved the right to claim compensation before the civil court. But if, for example, a criminal investigation is triggered by a third party reporting an alleged crime and the victim does not make any civil claim in the course of the criminal proceedings, I am unable to see how it can be said that the limitation period has been interrupted.

794. It was not clear whether a passage in the commentary of Sanhuri to which Professor Al-Dabbagh also referred was directed to the Iraqi rules of criminal procedure (or an equivalent regime). But if it was, it seemed to me only to make sense on the assumption that the victim had asserted a civil claim but had chosen not to pursue it before the criminal court and had reserved the right to do so instead before the civil courts after the criminal trial had concluded.

795. Professor Al-Dabbagh sought to justify his view that the commencement of criminal proceedings automatically causes the limitation period to be interrupted by referring to article 26 of the Criminal Procedure Code, which provides that "the civil court must suspend any decision on the case in order to await judgment in the criminal proceedings, on which the level of award in the civil case will be based." Professor Al-Dabbagh also referred to his own professional experience when he was practising in Iraq to the effect that, when a civil claim is brought in respect of an act that is also a crime, the civil judge will check whether criminal proceedings have been started and, if so, will suspend the civil case until the criminal case has been decided.

796. I have not been able to follow, however, how as a matter of legal analysis a stay of civil proceedings ordered pursuant to article 26 of the Criminal Procedure Code can interrupt the limitation period under article 437. Article 26 has to be read alongside articles 25 and 27 of the Criminal Procedure Code, which provide:

> "Article 25
>
> (a) If the civil claimant lodges his case with the civil court before the criminal proceedings have been lodged, he may bring his civil case before the criminal court, on condition that the civil court be asked to drop the case. …
>
> (b) If the civil claimant lodges his case with the civil court after lodging criminal proceedings, he may not subsequently lodge it with the criminal court, unless he requests that the civil court drop the case.
>
> Article 27
>
> If the decision on a civil case is suspended in accordance with article 26 and the criminal case is subsequently terminated, the

> civil court must proceed with the civil case and issue a judgment."

797. It is apparent from these provisions, first, that the existence of criminal proceedings does not prevent a civil claim from being lodged with a civil court and, second, that it is only when a civil claim has been lodged with a civil court (whether before or after the commencement of criminal proceedings) that any decision on the case by the civil court will be suspended in accordance with article 26. It thus seems to me that, in any case where a civil case is suspended pursuant to article 26, the limitation period must already have been interrupted by the commencement of the civil case. In any event I cannot see how, conceptually, the suspension of civil proceedings in order to await judgment in related criminal proceedings can be said to constitute "a claim made to the judicial authorities" which interrupts the limitation period under article 437.

798. I therefore accept the view of Professor Hamoudi on this point and find that the limitation period is interrupted by criminal proceedings only where a civil claim is made in those proceedings.

(ii) Commencement of criminal proceedings

799. The experts devoted considerable attention to the question of when and how, as a matter or Iraqi criminal procedure, criminal proceedings are commenced. Article 1 of the Criminal Procedure Code provides:

> "A criminal suit is initiated by an oral or written complaint presented to an investigative judge, an investigator, a responsible person within a police station, or any member of the judicial service, by the party injured from the crime, one standing in his place legally, or any person with knowledge of its occurrence …"

800. The "members of the judicial service" are defined in article 39. They comprise police officers and four other categories of person. The last category, specified at clause 5 of article 39, consists of:

> "Public servants authorised to investigate crimes and take steps in connection therewith within the limits of the powers granted to them by specific laws."

801. The duties of "members of the judicial service" are spelt out in subsequent provisions of the Criminal Procedure Code. In summary, their duties are to accept complaints and reports, detain suspects, preserve evidence and pass on all information obtained to the investigative judge. Pursuant to article 40, they undertake their duties under the supervision of public prosecutors and are subject to the oversight of the investigative judge.

802. It is obvious that the procedural rules contained in the Criminal Procedure Code are concerned solely with the investigation and prosecution of suspected violations of Iraqi criminal law and not with the investigation of whether criminal offences have been committed under any foreign system of law. Thus, I think it clear that the

"specific laws" referred to in clause 5 of article 39 are laws of Iraq and not laws of any other country.

803. Professor Al-Dabbagh nevertheless suggested that legal officers in the British army and members of the RMP could be said to fall within clause 5 of the definition in article 39 of the Criminal Procedure Code of "members of the judicial service". He argued that such persons (or at any rate members of the RMP) were authorised to investigate crimes in Iraq by section 2(4) of CPA Order 17. While section 2(1) of CPA Order 17 gave MNF personnel immunity from Iraqi legal process, section 2(4) recognised the right of their Sending States to "exercise within Iraq any criminal and disciplinary jurisdiction conferred on them by the law of that Sending State over all persons subject to the military law of that Sending State". Professor Al-Dabbagh characterised this provision as giving the RMP "jurisdiction to operate in Iraq as an investigative authority". It is plain from its wording, however, that section 2(4) of CPA Order 17 merely allowed the RMP to exercise within Iraq powers conferred on them by UK law to investigate whether British military personnel serving abroad have committed offences under UK criminal law. Section 2(4) did not itself grant any investigative powers to the RMP, let alone any powers to investigate whether criminal offences had been committed under Iraqi law. It was indeed a key purpose of CPA Order 17 to ensure that British military personnel could <u>not</u> be subject to Iraqi criminal procedure.

804. Thus, any investigation by the RMP or other action taken following a complaint about the conduct of British soldiers was not an Iraqi criminal proceeding and did not fall within the scope of the Iraqi Criminal Procedure Code. It was not therefore a proceeding in which a claim under Iraqi civil law could be pursued in accordance with articles 9 and 10 of the Criminal Procedure Code. Nor for that matter did it require an Iraqi civil court to suspend any decision in a related civil case pursuant to article 26 of the Criminal Procedure Code. It follows that such an investigation could not interrupt the limitation period for bringing a civil claim on either expert's view of the effect of article 437 of the Civil Code.

805. There is equally no scope for suggesting that an investigation by the RMP or complaint made to a British army legal officer could interrupt the limitation period by a process of transposition when article 437 is applied to a claim brought in the courts of England and Wales. There is no procedure in English law comparable to the procedure in Iraqi law which allows a civil claim to be decided by a criminal court in the context of criminal proceedings. Nor under English law does the existence of a criminal investigation or proceeding result in an automatic stay of any related civil suit.

806. I conclude that neither a complaint made to the British authorities nor an investigation by the RMP into the conduct of British soldiers (nor any criminal proceeding which could have resulted from such a complaint or investigation) was capable of interrupting the limitation period pursuant to article 437 of the Iraqi Civil Code.

<u>(iii) Termination of the investigation</u>

807. The experts agreed that, where the limitation period is interrupted by a claim made to the judicial authorities under article 437, a new three year period begins when the judicial proceedings which cause the interruption come to an end. So, for example,

when a criminal case in which a civil claim was raised is dismissed by a criminal court, a new three year period for making a civil claim begins at that point.

808. The RMP investigation into the possible assault on Mr Al-Waheed was terminated on 15 February 2007, the day after it began. Accordingly, even if (contrary to my conclusion) the limitation period was interrupted by the investigation, a new limitation period started to run on that date.

809. I do not accept Mr Al-Waheed's assertions that he believed that the investigation was going to continue and did not know that it had been terminated until disclosure was given by the MOD in these proceedings on 20 May 2015. I am sure that he did not think that the investigation would continue after he had made a signed statement saying that he had not been ill-treated either physically or mentally by British soldiers and would not be pursuing any complaint against members of MNF forces. It is in any case inconceivable that for the next eight years Mr Al-Waheed was labouring under the belief that there might be an ongoing criminal investigation or proceeding taking place without his input or knowledge and that it was only when disclosure was given in these proceedings that the scales fell from his eyes.

810. I also do not accept that, as a matter of Iraqi law, knowledge that criminal proceedings have been concluded is necessary in order for the limitation period to recommence. In support of that view Professor Al-Dabbagh referred to a decision of the Egyptian Court of Cassation quashing a judgment in which it had been held that the limitation period began when the defendant was convicted of a criminal offence. In the court's view, it could not necessarily be inferred that the victim actually knew when the criminal court reached its decision that damage had occurred and who had caused it – as required by the Egyptian equivalent of article 232 of the Iraqi Civil Code – in circumstances where the victim was not represented in the criminal proceedings.

811. The specific facts of this case are not reported, but it is easy to envisage a case in which the knowledge requirements of article 232 are not satisfied because, for example, the victim did not know the identity of someone who robbed her until she was informed of criminal proceedings in which an identified person had been convicted of the offence. This is not the position, however, in Mr Al-Waheed's case. I have already concluded that Mr Al-Waheed had the knowledge required by article 232 from the time when he suffered injuries at the hands of British soldiers. There was nothing further that he needed to know which depended on the outcome of the RMP investigation. Nor would knowledge that the investigation had been terminated (if, contrary to my view, Mr Al-Waheed was unaware of that fact) have taken him any further forward. I can therefore see no basis for arguing that, until Mr Al-Waheed was informed of the fact that the investigation had been terminated, time did not begin to run.

Conclusion

812. For all these reasons, I regard as hopeless the attempt made in Mr Al-Waheed's case to rely on articles 437 and 439 of the Iraqi Civil Code to argue that his claim was brought in time.

Should the Iraqi limitation law be disapplied?

813. I have concluded that the tort claims of all four claimants, which are governed by Iraqi law, are time barred under the Iraqi law of limitation. As noted earlier, section 1 of the Foreign Limitation Periods Act 1984 requires an English court in determining matters governed by the law of another country to apply that country's law relating to limitation and not the law of England and Wales relating to limitation.

814. To this general rule, however, there is one major exception. Section 2(1) of the 1984 Act provides that section 1 does not apply to the extent that its application would conflict with public policy in any case. Moreover, pursuant to section 2(2), the application of section 1 is deemed to conflict with public policy to the extent that it would cause "undue hardship" to a party to the proceedings. The claimants rely on both limbs of section 2. It was argued on their behalf that they would suffer undue hardship if Iraqi limitation law were to be applied; alternatively, that to apply Iraqi limitation law would in any event conflict with public policy.

The English limitation law

815. Before considering these arguments, it is useful to note the provisions of the English law relating to limitation which would apply if the tort claims made in these proceedings were governed by English law.

816. The relevant primary limitation period in English law is provided by section 11 of the Limitation Act 1980, which establishes a special time limit for actions for damages for "negligence, nuisance or breach of duty" where the damages claimed "consist of or include damages in respect of personal injuries". The time limit for bringing such an action is three years from the later of (a) the date when the cause of action accrued and (b) the date of the claimant's "knowledge". The date of "knowledge" is defined for this purpose in section 14(1) as the date on which the claimant first had knowledge:

> "(a) that the injury in question was significant; and
>
> (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
>
> (c) the identity of the defendant …"

817. In *A v Hoare* [2008] UKHL 6, [2008] 1 AC 844, the House of Lords held that section 11 applies to claims for damages in tort arising from trespass to the person. This covers the present claims, which (in English law terms) seek damages in tort for assault and false imprisonment. The damages sought by the claimants for false imprisonment, as well as those claimed for assault, include damages in respect of "personal injuries", as the claimants are seeking compensation for psychological injury and mental distress allegedly caused by their false imprisonment and the definition of "personal injuries" in section 38(1) of the Limitation Act includes "any impairment of a person's physical or mental condition".

818. The time limit specified in section 11 is very similar to the three year primary limitation period in Iraqi law and, in relation to the present claims, I think it clear that it ended on the same dates as the Iraqi primary limitation period.

819. Under section 33 of the Limitation Act 1980 the court has a discretion to disapply the time limit provided by section 11 and allow an action to proceed, if it appears to the court that it would be equitable to do so having regard to the degree to which (a) applying the section 11 time limit would prejudice the claimant and (b) disapplying it would prejudice the defendant. In deciding whether to exercise this discretion, the court is directed by section 33(3) to have regard to all the circumstances of the case and in particular to six factors:

> "(a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 …;
>
> (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

820. Thus, if the English law relating to limitation were applicable in the present cases, the critical question would be whether the court should exercise its broad discretion under section 33 of the Limitation Act to extend the basic three year time limit. I mention this not because I think that there is any question of applying the English law of limitation. As I will explain later, the result of disapplying the Iraqi limitation period would not, in my view, be to require English limitation law to be applied. The result would simply be that the claims are not time-barred. I have referred to the English statute of limitation because, in considering the arguments that the Iraqi law is contrary to English public policy, it is useful to have in mind how far the relevant Iraqi law differs from the corresponding English law and the extent to which it is similar.

Undue hardship

821. The main ground on which the claimants contended that the Iraqi law of limitation conflicts with public policy is that its application would cause them undue hardship. The expression "undue hardship" was previously used in section 27 of the Arbitration Act 1950, which gave the court power to extend a contractual time limit for bringing arbitration proceedings "if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused." In *Liberian Shipping Corp "Pegasus" v A King and Sons Ltd* [1967] 2 QB 86 at 98, Lord Denning MR explained the meaning of the expression in that context as follows:

> "Undue … simply means excessive. It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault."

In *Jones v Trollope Colls Cementation Overseas Ltd* (Times, 26 January 1990) the Court of Appeal held that this is also what "undue hardship" means in section 2(2) of the Foreign Limitation Periods Act 1984.

822. In *Harley v Smith* [2010] EWCA Civ 78 at para 55, the Court of Appeal approved the following propositions which Foskett J at first instance[52] had derived from the *Jones* case and later authorities:

> "(i) That it is not sufficient to cross the 'undue hardship' threshold by reason only of the fact that the foreign limitation period is less generous than that of the English jurisdiction.
>
> (ii) That the claimant must satisfy the court that he or she will suffer greater hardship in the particular circumstances than would normally be the case.
>
> (iii) That in considering (ii) the focus is on the interests of the individual claimant or claimants and is not a balancing exercise between the interests of the claimants on one hand and the defendant on the other."

823. In *Naraji v Shelbourne* [2011] EWHC 3298 (QB) at para 176, Popplewell J identified the relevant question as:

> "whether the time period prescribed by the limitation provision is such that its application would deprive the claimant of his claim in circumstances where he did not have a reasonable opportunity to pursue it if acting with reasonable diligence and with knowledge of its potential application."

In *Bank St Petersburg v Arkhangelsky* [2014] EWCA Civ 593, [2014] 1 WLR 4360, para 19, the Court of Appeal agreed with this description of the question and also

---

52 See *Harley v Smith* [2009] EWHC 56 (QB) at para 94.

cited as providing relevant guidance the other authorities to which I have referred above.

824. A recent case which I have found instructive is *KXL v Murphy* [2016] EWHC 3102. The claimants in this case claimed damages for personal injury caused by sexual abuse allegedly committed by the first defendant in Uganda on various dates between thirteen and twenty years before the action was commenced. The claims were governed by Ugandan law which had a three year limitation period running from the date when the cause of action arose or (if later) the date when the claimant reached the age of 18. The proceedings in England were begun some seven years after the youngest of the three claimants had reached the age of 18, and the claims were therefore all time-barred under Ugandan law. Wilkie J held that the application of section 1 of the Foreign Limitation Periods Act 1984 would not cause undue hardship to the claimants. A significant factor in his conclusion was that there was an alternative route open to the claimants to seek redress from the defendant, including financial redress, by way of a complaint to the Ugandan Human Rights Commission (see para 65).

825. From these authorities, and as a matter of statutory interpretation, I derive the following principles.

826. First, the only person whose situation is relevant for the purposes of section 2(2) is the party who is complaining that the application of the foreign limitation law would cause them undue hardship. That could be the defendant, complaining of undue hardship on the basis that the claim is stale and either there is no applicable limitation period under the foreign law or the foreign limitation period is unduly liberal. But where, as in the present cases, the party asserting undue hardship is the claimant – arguing that the foreign limitation law is unduly restrictive, it is only the impact on the claimant of applying the foreign law that can be taken into account. The court cannot take account of whether disapplying the foreign law would prejudice the defendant because that is not part of the statutory test. Hence the statement in *Harley v Smith* that the exercise is not a balancing exercise between the interests of the claimant on one hand and the defendant on the other.

827. Second, the requirement of showing "undue" hardship impliedly recognises that the application of a time limit may often be said to cause hardship to a party who is thereby deprived of the opportunity of pursuing a claim (or who is forced to defend a stale claim), but that the existence of such hardship is not by itself a sufficient reason to disapply the time limit. Moreover, the case law makes it clear that the English courts are not so parochial as to treat any limitation law which differs from our own as contrary to English public policy. Hence the further statement in *Harley v Smith* that it is not sufficient to amount to "undue hardship" that the foreign limitation period is less generous than that of the English jurisdiction. Private international law is founded on principles of comity and mutual respect and on the recognition that in many areas of law different approaches may be reasonably taken. That is obviously true in the field of limitation law, which involves striking a balance between allowing claimants to assert their legal rights and protecting defendants against stale claims. Different legal systems may legitimately strike this balance in different ways. An English court should for this reason be very slow to substitute its own view for the solution adopted by a foreign legislature.

828. Third, the cases indicate that to amount to "undue" hardship what is required is some type or degree of hardship which goes beyond what is "normal" or warranted by the circumstances. I take this to mean that there must be something about the application of the foreign limitation law which makes it manifestly unjust to treat the claim as barred by that law in the particular circumstances.

829. Fourth, in judging whether this test is satisfied, there are, as it seems to me, two dimensions which need to be considered. One is the nature and scope of the relevant foreign limitation law. Does it afford a reasonable opportunity to a potential claimant who is aware of it and acts with reasonable diligence to bring a claim? The other is the conduct and situation of the individual claimant. To what extent (if any) is the delay in bringing the claim attributable to the fault of the claimant? These two aspects need to be considered in conjunction with each other to determine whether the application of the foreign limitation period would cause the claimant undue hardship in the circumstances of the particular case.

830. A final point, which is illustrated by the case of *KXL v Murphy*, is that, in assessing the degree of hardship which the claimant would suffer if the foreign limitation law is applied so as to bar the claim, a significant factor is whether there is some other means of redress still potentially available to the claimant.

Application to the present claims

831. Applying these principles, I start by considering the length and degree of latitude afforded by the relevant Iraqi limitation period. As noted earlier, the three year primary limitation period under Iraqi law is more or less identical to the primary limitation period in English law. Just as in English law, this time limit is not absolute and there is an exception where its operation would lead to injustice. However, whereas in English law the court is given a broad discretion to extend the time limit where in the court's opinion it would be equitable to do so, balancing the comparative prejudice to the claimant and to the defendant, the law of Iraq adopts a different approach and treats the limitation period as suspended by a lawful excuse when there is an impediment which makes it impossible for the claimant to claim his right. The Iraqi law gives less protection to the claimant than section 33 of the Limitation Act in so far as what can count as a lawful excuse is narrower than the range of factors which can be taken into account under section 33; but at the same time the Iraqi law is more favourable to the claimant in that the suspension of the limitation period depends only on the claimant's situation and the impact of the delay on the defendant is not weighed in the scale.

832. I have found that in the cases of Mr Alseran, MRE and KSU the Iraqi time limit was suspended by a lawful excuse for over two and a half years before time began to run. More importantly, in all four cases the effect of the Iraqi law is that the claimant had a period of three years during which I have found that it was – not just in theory but in practice – possible for ordinary Iraqi citizens to bring a claim for compensation against the MOD in England with the assistance of Leigh Day. From one point of view, this can be regarded as a reasonable opportunity to pursue a claim.

833. These cases, however, have the unusual feature that on my findings the only means by it was in practice possible for the claimants to bring such a claim was an avenue which they did not and could not reasonably be expected to have known about and

pursued until they happened to hear about it through word of mouth – which in each case was not until after the Iraqi limitation period had expired. It therefore cannot be said that the delay in bringing these claims was the result of any fault or lack of diligence on the part of the claimants.

834. If the consequence of applying the Iraqi limitation law in these circumstances were to leave the claimants without any possible remedy for the injuries they claim to have suffered as a result of the wrongs allegedly done to them by British forces, I am inclined to think that this would amount to undue hardship. However, a very significant factor, in my view, is that the claimants are not confined in this litigation to claims in tort under Iraqi law. They also have parallel claims arising out of the same facts under the UK Human Rights Act. As discussed in the earlier parts of this judgment, the claims under the Human Rights Act are not on all fours with the claims in tort. Thus, not every application of force which constitutes an assault giving rise to liability in tort amounts to inhuman or degrading treatment under article 3 and, conversely, there can be a breach of article 3 – for example, through imprisonment in inhuman or degrading conditions – which does not necessarily involve an assault. Similarly, there is not a complete symmetry between the claims for wrongful detention based on article 5 and in tort. Nevertheless, as the analysis in this judgment has shown, there is a very high degree of overlap between the tort claims and the claims made under the Human Rights Act in these proceedings.

835. As discussed below, although the period during which a victim has a right to bring proceedings under the Human Rights Act is only one year, the court has a wide discretion to extend time for such period as the court considers equitable in the circumstances of the case. For the reasons given below, I have concluded that the court should exercise this discretion in the claimants' favour in the present cases.

836. In these circumstances the main, if not the only, disadvantage which the claimants will suffer if they are prevented by the Iraqi rules of limitation from pursuing their claims in tort is that, as noted in the final part of this judgment, the levels of damages awarded under the Human Rights Act as compensation for injury other than financial loss tend to be lower than the amounts of damages awarded in corresponding claims in tort. I accept that, for this reason, applying the Iraqi rules of limitation has the result of causing some hardship to the claimants. However, when account is taken of all the relevant circumstances identified above including the length of the delay in bringing these claims, it cannot in my opinion be said that this hardship is disproportionate or excessive.

837. Accordingly, I reject the claimants' contention that the application of Iraqi limitation law in their cases would cause them undue hardship.

Public policy

838. This conclusion leaves little room for arguing that the application of Iraqi limitation law would conflict with public policy. Nevertheless, as well as and in the alternative to relying on section 2(2) of the Foreign Limitation Periods Act, the claimants also relied on the broader public policy exception provided by section 2(1).

839. The most detailed consideration of the public policy exception (albeit *obiter*) is to be found in the judgment of Moses J in *Gotha City v Sotherby's* (The Times, 8 October

1998). In that case, the judge derived from the Law Commission report and earlier authorities the following principles:

i) Public policy should be invoked for the purposes of disapplying the foreign limitation period only in exceptional circumstances. Too ready a resort to public policy would frustrate our system of private international law which exists to fulfil foreign rights not destroy them.

ii) Foreign law should only be disapplied where it is contrary to a fundamental principle of justice.

iii) The fundamental principle of justice with which it is said foreign law conflicts must be clearly identifiable. The process of identification must not depend upon a judge's individual notion of expediency or fairness but upon the possibility of recognising, with clarity, a principle derived from our own law of limitation or some other clearly recognised principle of public policy. English courts should not invoke public policy save in cases where foreign law is manifestly incompatible with public policy.

These principles were endorsed by Wilkie J in the *KXL* case at para 45, and I adopt them.

840. The Law Commission expressed the view that there are fundamental principles of justice in the context of the law of limitation which courts can discern from the English law of limitation for the purpose of deciding whether application of a foreign limitation period would in a particular case offend against public policy. Thus, the English law of limitation serves the basic purposes of protecting defendants from stale claims, encouraging claimants to institute proceedings without unreasonable delay and conferring on a potential defendant the confidence that after the lapse of a specific period of time an incident which might have led to a claim is finally closed: see Law Commission Report No 114, para 4.44. At the same time, the Law Commission considered that:

> "Justice requires and our law provides that those basic purposes be qualified in certain cases: for example, reasonable allowance must be made for periods of limitation to differ according to the cause of action (a shorter period being appropriate, for example, for a personal injuries claim than for an action concerning the title for land) and for the extension of the periods to cover such matters as the incapacity of a claimant through nonage or unsoundness of mind, or the concealment by the fraud of the defendant of the facts giving rise to the cause of action; and latent injury unknown to a claimant."

See Law Commission Report No 114, para 4.45. The Law Commissioners expressed the view that these basic principles of the English law of limitation could be used to test the application of a foreign law of limitation against fundamental principles of justice.

841. Judged in this way, it cannot in my view be said that the application of the Iraqi law of limitation in the present cases offends any fundamental principle of justice. I

cannot discern from the English law of limitation any fundamental principle that a claim must not be barred by the passage of time before the claimant has acquired actual or constructive knowledge of a means by which it is in practice possible for him to bring a claim. In any event, it cannot in my view be said that the application of the Iraqi law of limitation conflicts with public policy for this reason in a case where it has been found that its application would not cause the claimant undue hardship.

842. The claimants' argument to that effect was based principally on the importance of the rights at stake in these cases. Counsel for the claimants submitted that it is contrary to English public policy to shut the claimants out from a remedy for violations of their fundamental rights not to be subjected to inhuman and degrading treatment or to arbitrary detention. However, the fact that a claim in tort involves an alleged infringement of either of these or any other fundamental human rights is not in itself regarded in our own law as necessitating a longer or more generous period of limitation. Nor can I see any reason why, as a general rule, it should do so. Special considerations arguably apply where a case involves wrongdoing of a particularly grave nature, such as torture or a crime against humanity. However, on the findings I have made, none of these cases falls into that category.

843. Accordingly, I also reject the claimants' broader argument that the application of Iraqi limitation law in their cases would conflict with public policy.

The effect of disapplying Iraqi law

844. It was assumed by both parties that, if it were held that the limitation period prescribed by Iraqi law does not apply because its application would conflict with public policy, the consequence would be that the limitation period prescribed by English law would apply instead. Although it is not necessary on the conclusions that I have reached to decide the point, I do not think that this view is correct.

845. It was certainly not the understanding or intention of the Law Commission when proposing the legislation that it would operate in this way. In their final report the Law Commissioners considered as a possible approach a suggestion made during consultation that, in a case where the court concluded that the application of the foreign limitation period would be contrary to public policy, the equivalent English period would automatically be applied. They rejected this approach "on the fundamental ground that it fails to take into account the manner in which considerations of public policy are intended to operate under our recommendations in this report": see Law Commission Report No 114 (1982), para 4.40. To explain their approach, the Law Commissioners gave an example of an action brought in England to recover a debt due under a contract governed by Ruritanian law, where Ruritanian law prescribes a period of one week within which to commence proceedings but the action is not commenced until seven years have elapsed from the date on which the debt fell due. They advised that, if the court decided that in all the circumstances the application of the Ruritanian limitation period would be contrary to public policy, then the claim would not be barred. That would be so notwithstanding that, if English law were applied, the relevant limitation period would be six years.

846. It seems to me that this is indeed the effect of the 1984 Act. Section 2(1) provides that "[i]n any case in which the application of section 1 above … would to any extent conflict with public policy, that section shall not apply to the extent that its

application would so conflict" (emphasis added). Accordingly, if the court concludes that in the case before it application of the foreign limitation law would conflict with public policy, the effect of section 2(1) is that section 1 will not apply to that extent. In other words, section 1(a), which would otherwise have required the court to apply the foreign limitation law, will not apply. But that does not affect the negative aspect of section 1, contained in subsection (b), which provides that the law of England and Wales relating to limitation shall not apply. I find it difficult to see that, at least in a case where the complaint is that the foreign limitation period is too short, public policy could ever be said positively to require English rules of limitation to be applied. As the Law Commission's Ruritanian example illustrates, if the court disapplies the foreign limitation law, it will have decided that in the circumstances of the particular case treating the claim as barred by that law would cause undue hardship to the claimant or would otherwise conflict with public policy, whether or not the claim would have been time-barred under English law. If on the other hand the court applies the foreign law, the English limitation law is likewise irrelevant.

847. Thus, had I come to the conclusion in the present cases that the application of the Iraqi law of limitation would cause undue hardship or would otherwise conflict with English public policy, it would in my view have followed that the claims were not time-barred and would not have been necessary to apply the English law relating to limitation.

Conclusion

848. I conclude that the application of section 1 of the Foreign Limitation Periods Act 1984 in these cases would not cause undue hardship to the claimants nor would it for any other reason conflict with public policy. It follows that the Iraqi law relating to limitation applies to the claims in tort made by the claimants. Accordingly, those claims are all time-barred.

Time limit under the Human Rights Act

849. Pursuant to section 7(5) of the Human Rights Act, proceedings under the Human Rights Act must be brought before the end of: (a) the period of one year beginning with the date on which the act complained of took place; or (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances.

850. In *Dunn v Parole Board* [2008] EWCA Civ 374, [2009] 1 WLR 728, paras 30–32, 43, 48, the Court of Appeal held that it is not appropriate for the courts to put any gloss on the words of section 7(5)(b), nor to fetter the very wide discretion given to the court by listing the factors which should to be taken into account or by stating which factors as a matter of general approach should have greater weight or lesser weight. The court should examine in the circumstances of each case all the relevant factors and then decide whether it is equitable to provide for a longer period.

851. This approach was confirmed by the Supreme Court in *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72, where Lord Dyson (with whose judgment the other justices agreed) said at para 75:

> "The court has a wide discretion in determining whether it is equitable to extend time in the particular circumstances of the

> case. It will often be appropriate to take into account factors of the type listed in section 33(3) of the Limitation Act 1980 as being relevant when deciding whether to extend time for a domestic law action in respect of personal injury or death. These may include the length of and reasons for the delay in issuing the proceedings; the extent to which, having regard to the delay, the evidence in the case is or is likely to be less cogent than it would have been if the proceedings had been issued within the one-year period; and the conduct of the public authority after the right of claim arose, including the extent (if any) to which it responded to requests reasonably made by the claimant for information for the purpose of ascertaining facts which are or might be relevant. However, I agree with what the Court of Appeal said in *Dunn v Parole Board* [2009] 1 WLR 728, paras 31, 43 and 48 that the words of section 7(5)(b) of the HRA mean what they say and the court should not attempt to rewrite them. There can be no question of interpreting section 7(5)(b) as if it contained the language of section 33(3) of the Limitation Act 1980."

852. In the light of this guidance, I think it relevant, in deciding whether it is equitable to extend the time for bringing the present cases, to have regard to the factors listed in section 33(3) of the Limitation Act 1980 (quoted at paragraph 819 above) without treating them as exhaustive or necessarily conclusive.

Length of delay

853. In each of the present cases the delay in bringing proceedings was substantial. In the cases of MRE and KSU over five and half years elapsed from when the one year period referred to in section 7(5)(a) of the Human Rights Act expired in late March and early April 2004 until the claims were issued in December 2010. In the case of Mr Alseran, the delay was even longer, being almost nine years. The delay in Mr Al-Waheed's case was some five years from when the one year period expired in February/March 2008 until his claim was commenced in March 2013.

Reasons for delay

854. I consider that there are, however, good reasons for the delay on the part of the claimants. As mentioned earlier, the effect of CPA Order 17, which was enacted into Iraqi law by the Coalition Provisional Authority established by the US, the UK and their coalition partners, has at all relevant times been to make it impossible for the claimants to bring proceedings against the MOD in Iraq by conferring immunity from suit in Iraq on British forces (and other MNF personnel). This has meant that the only jurisdiction in which a claim for compensation for alleged injury can be brought against the MOD is England and Wales. I have found earlier that it was in practice impossible for an ordinary Iraqi citizen to bring proceedings against the MOD in this jurisdiction claiming damages for personal injury unless they could find an English law firm willing to represent them under a conditional fee agreement. I also found that the only law firm shown to have been willing to act for Iraqi claimants on this basis at any material time is Leigh Day. Furthermore, the only way in which in practice potential claimants could find out about and make contact with Leigh Day

(either directly or through referral from PIL) was with the assistance of a local agent in Basra called Abu Jamal. I have also found that whether or when a potential claimant heard about Abu Jamal was essentially a matter of luck depending on who they knew or happened to speak to and that it was not through any fault of the present claimants that they did not hear about Abu Jamal or discover how they might, through him, be able to bring a claim for compensation in England sooner than they did.

855. I have found that under Iraqi law a claimant's lack of knowledge of the possibility and means of bringing a claim was not a matter that was capable of suspending the limitation period. But there is nothing which prevents a court from taking this factor into account in exercising its discretion under section 7(5)(b) of the Human Rights Act. It is, in my view, an important consideration that, on my findings, the claimants could not reasonably be expected to have discovered the only means by which they could in practice bring these claims any earlier than they in fact did. I am satisfied that each of the claimants acted promptly and reasonably as soon as he made that discovery. In the case of Mr Al-Waheed, there was a delay after he first contacted Abu Jamal (some time in 2011) until his claim was referred to Leigh Day (in January 2013); but that was because Leigh Day were not accepting instructions during this period so that it was in practice impossible for Mr Al-Waheed to bring proceedings until January 2013. In short, the delay in bringing proceedings was not the result of any fault or lack of diligence on the part of these claimants.

Prejudice to the defendant

856. The MOD has argued that it has suffered "evidential prejudice" as a result of the delay because witnesses have become untraceable or, where traceable, their memories have faded as a result of the passage of time. I think it reasonable to assume that the length of time which elapsed before these claims were notified to the MOD will have made it harder to locate witnesses and there is no doubt that memory fades with time. To determine whether the prejudice suffered by the MOD has been significant, however, it is necessary to consider the steps actually taken by the MOD to investigate the claims and the nature and cogency of the evidence available to the MOD in each case.

857. Mr Alseran's factual case was set out in detail in his particulars of claim dated 3 October 2013. This statement of case described where Mr Alseran lived on the outskirts of Abu Al-Khasib close to the 51st Tank Division Iraqi army base. It described how Mr Alseran was captured in his family home (although his capture was alleged to have occurred at around 4am on 25 March 2003 whereas I have found that the actual date was 30 March 2003). The particulars of claim described how Mr Alseran and other detainees were taken in lorries to the old Iraqi military base at Al-Seeba, which was being used as a camp by British forces. It described their alleged mistreatment at this camp. And it described how Mr Alseran and the other detainees were then transported to Umm Qasr and interned at Camp Bucca.

858. From the MOD's defence dated 8 December 2013 it does not appear that any attempt was made by the MOD before the defence was served to investigate Mr Alseran's allegations apart from locating records of his detention at Camp Bucca, which (as discussed in part III) showed his date of capture (incorrectly) as 28 March 2003 and the dates of his internment at Camp Bucca (correctly) as from 1 April until 7 May 2003. Although amendments were later made to the defence, including an

amendment to allege evidential prejudice, no specific case in answer to Mr Alseran's allegations was ever pleaded. When the plea of evidential prejudice was introduced on 20 May 2016, shortly before the trial, the MOD asserted that it had been "unable to trace any witnesses who were involved with the claimant's arrest and detention". There is no evidence to suggest, however, that the MOD had, at any stage of the proceedings, made any serious attempt to trace any such witnesses or otherwise to investigate Mr Alseran's allegations.

859. After the MOD amended its defence to allege evidential prejudice, the claimant's solicitors requested information about the steps taken by the MOD to trace any witnesses who were involved in Mr Alseran's arrest and detention. The response indicated that only a handful of individuals had been identified as having potentially relevant knowledge. Although the response did not state exactly when the exercise of trying to identify and contact such individuals was begun, it was apparent that this had been left to the very last moment before the start of the trial in June 2016. For example, the MOD indicated that contact had first been made with Mr Parker on 7 April 2016.

860. The inadequacy of the MOD's efforts is also apparent from the fact that, as discussed in part IV, the MOD required Mr Alseran to prove that the forces who captured him were British, despite the fact that it was or should have been well known to the MOD that Abu Al-Khasib was secured by Royal Marines in what was probably the most significant engagement involving British forces during the advance on Basra. I am quite unable to accept that it was impossible for the MOD to trace any of the several hundred British service personnel who were involved in that operation. It is apparent from the number and range of witnesses from whom evidence was adduced by the MOD at the second trial that it would have been possible for the MOD to find individuals who served in the Royal Marines. Indeed, one of the witnesses from whom a statement was obtained for that trial was Lieutenant General Dutton, who was in command of 3 Commando Brigade, Royal Marines, and actually described in his statement how forces under his command approached Basra through Abu Al-Khasib. As it was, the only witness of fact from whom the MOD adduced evidence in Mr Alseran's case was the Chief of Staff of the 7th Armoured Brigade, whose area of operation did not include Abu Al-Khasib.

861. If, despite using its best endeavours, the MOD had been unable to trace any current or former member of the British armed forces who was present at the Al-Seeba camp when Mr Alseran and other detainees were held there, this would have been a relevant factor to take into account. Equally, if through the use of such endeavours the MOD had found and adduced evidence from one or more such witnesses, it would have been possible to make an informed assessment of the extent to which the quality of their evidence was likely to have been diminished by the delay in bringing the proceedings. As it is, the lack of any adequate effort by the MOD to investigate Mr Alseran's claim means that the MOD cannot show that it has suffered evidential prejudice. I cannot be satisfied that its failure to adduce any factual evidence to answer Mr Alseran's allegations is a consequence of the delay in bringing the claim rather than its own lack of diligence.

862. The factual allegations made by MRE and KSU were likewise set out in detail in their particulars of claim, which were served on 29 November 2013. Again, it does not appear that any serious attempt was made by the MOD to investigate those allegations

at the time of preparing its defence. Vastly greater efforts were, however, made by the MOD to trace potential witnesses in these cases when preparing for the trial. Those efforts were described in two witness statements made by Mr Stephen Clough, the person within the MOD responsible for handling these claims, dated 7 October 2016 and 15 March 2017. In his first statement Mr Clough said that he had made contact with approximately 35 individuals in connection with the claims of MRE and KSU. In his second witness statement he reported that, since making his first statement, he had identified over 70 further individuals as having potentially useful information in relation to the claimants' allegations and that the Government Legal Department had made contact with at least 38 witnesses. Mr Clough also said that the MOD and Government Legal Department had between them been in contact with approximately 150 individuals in order to obtain witness evidence in these cases. As mentioned in part I of this judgment, the MOD adduced evidence in these cases from a total of 34 factual witnesses.

863. The MOD did not adduce any evidence from any witness who was involved with the claimants' capture and detention. But that was unsurprising as the MOD advanced a positive case that the forces who captured MRE and KSU were not British forces. In support of that case, the MOD adduced evidence from a wide range of witnesses who were involved in different aspects of Operation Telic. These included witnesses who served in 539 ASRM, which the claimants suggested was likely to have been the unit which captured them; witnesses who were present in Umm Qasr port at the relevant time; witnesses who were involved in boarding vessels south of Umm Qasr; witnesses who were serving on ships which the claimants suggested could have been the large military ship on which they were detained overnight; and witnesses who were able to give evidence about the specifications of warships, boats and equipment used by British forces. This evidence was extensive and largely uncontested. I do not consider that, in the areas which it covered, the cogency of this evidence was significantly reduced by the passage of time.

864. The MOD did not adduce evidence from any witness who was involved in transporting the claimants (or any other prisoners) from Umm Qasr to Camp Bucca or in guarding prisoners at Camp Bucca. Accordingly, there was no witness who was able to address the claimants' allegations that they were mistreated by British soldiers when they came ashore at Umm Qasr port on the morning after their capture or MRE's allegation that he was kicked in the knee by a soldier during his detention at Camp Bucca. There is no evidence to indicate, however, that the MOD made any attempt to investigate those allegations, which were very much secondary to the claimants' main complaint about the serious ill-treatment suffered on the big ship. Moreover, if the claims of MRE and KSU had been issued within a year of the acts complained of instead of some six and a half years after the expiry of the one year period, and the proceedings had then followed the same timeline as the actual proceedings, there would still have been a lapse of almost seven years from when the relevant events occurred before the MOD began its search for witnesses. I doubt that the allegations would have been much easier to investigate at that stage than they were by the time the MOD actually investigated the claims.

865. The case of Mr Al-Waheed who was detained in February 2007 differs from those of the claimants who were detained during the invasion of Iraq in that there is a substantial body of documentary evidence relating to his arrest and detention and

relevant to his allegations of ill-treatment. This documentary evidence includes: statements from soldiers who took part in the house raid in which Mr Al-Waheed was arrested, made immediately after the raid or during an investigation carried out by the RMP very shortly afterwards; contemporaneous medical records; photographs taken of Mr Al-Waheed on the night of this capture; records of his interrogations including video recordings of two of the interrogation sessions; internal emails sent by British military personnel in which Mr Al-Waheed's case was discussed; records of meetings of the Divisional Internment Review Committee at which Mr Al-Waheed's internment was reviewed; and documents evidencing the conditions in which detainees were held at the relevant time, as well as the policies applicable to their detention.

866. The MOD also called eight factual witnesses at the trial comprising four soldiers who took part in the house raid in which Mr Al-Waheed was arrested, the two doctors who examined him shortly afterwards, the senior officer with overall responsibility for the RMP investigation and a member of the DIRC. The memories of these witnesses were naturally affected by the passage of time but I think it unlikely that their memories would have been much better if the proceedings had been commenced and the trial had taken place four years earlier – which would still have been over four years after the relevant events. Studies of memory as well as common experience show that the accuracy and completeness of a person's recollection of events declines steeply to begin with and then much more gradually. As in most cases where there is a good documentary record, it seems to me that the contemporaneous documents would always have provided much better evidence of what occurred than testimony based on subsequent recollection.

867. Accordingly, I see no reason to think that in Mr Al-Waheed's case the delay in bringing proceedings caused the MOD significant evidential prejudice.

Merits of the claim

868. In the *Rabone* case at para 79, Lord Dyson described as the "most important of all" the points which militated in favour of extending time in that case the fact that, as he had concluded, the claimants had a good claim for breach of a Convention right. Similarly, Lady Hale at para 108 thought it "important that fundamental human rights be vindicated". In the *Rabone* case the Supreme Court was satisfied that the defendant had suffered no prejudice from the delay in issue of proceedings, which was less than four months.

869. In a case where the delay in bringing proceedings has caused significant evidential prejudice to the defendant, it would plainly be wrong to treat the merits of the claim as a factor weighing in the claimant's favour – at least insofar as the court's assessment of the merits is based on findings of fact which might have been different if the claim had been begun promptly and the defendant had not been disadvantaged. In the present cases, however, it has not been shown that the MOD has suffered significant evidential prejudice as a result of the claimants' delay in bringing the proceedings. In these circumstances it seems to me legitimate to take into account in deciding whether to exercise the discretion to extend time the fact that a refusal to do so would prevent the claimants from obtaining any redress for proven violations of their fundamental human rights not to be subjected to inhuman or degrading treatment and not to be unlawfully and arbitrarily detained.

Conclusion

870. Having regard to all the circumstances, I consider that in each of the present cases it is equitable to permit the claims under the Human Rights Act to be brought, notwithstanding the substantial periods which elapsed from when the acts complained of occurred before the claims were issued.

VIII. DAMAGES

871. In this last part of the judgment I will assess the damages which the MOD is liable to pay to each of the four claimants. Although the claims in tort have failed because I have found that those claims were not brought in time, I will first identify the principles and guidelines that would have governed the assessment of damages in tort. I will cover this ground both because it may be relevant for other pending claims in this litigation and also because it is relevant to consider what damages would have been recoverable by the claimants in tort when deciding what award of damages to make on the same facts under the Human Rights Act.

Damages in tort: applicable law

872. As discussed in the first part of this judgment, pursuant to Part III of the Private International Law (Miscellaneous Provisions) Act 1995, the law to be used for determining issues relating to tort in these proceedings (the "applicable law") is the law of Iraq. This is subject, however, to section 14(3)(b) of the Act, which provides that nothing in Part III "authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum." A distinction is thus drawn between questions of substance governed by the applicable law (in this case the law of Iraq) and questions of procedure, which are governed by the law of the forum (i.e. the law of the jurisdiction in which the claim is being heard – in this case England and Wales).

873. The proper approach to applying this distinction has been considered by the House of Lords in *Harding v Wealands* [2007] 2 AC 1 and by the Supreme Court in *Cox v Ergo Versicherung AG* [2014] AC 1379. Those cases decide that the question whether a particular kind of injury gives rise to liability in tort is a question of substance governed by the applicable law. On the other hand, the availability and provision of a remedy for a particular kind of injury – for example, the question whether the remedy of damages is available and, if so, the assessment of those damages – is a question of procedure governed by English law as the law of the forum.

874. At an earlier stage of these proceedings the court was asked to decide as a preliminary issue "whether the availability of aggravated damages is a matter of procedure governed by English law or a substantive matter governed by Iraqi law." In this context the term "aggravated damages" refers to damages awarded as compensation for mental distress caused by the manner in which a tort has been committed, or the motive with which it was committed, or subsequent conduct of the defendant. Applying the distinction mentioned above, I held that: (1) it is a question of substance governed by the law of Iraq whether mental distress caused by the defendant's conduct or motive in the commission of a tort is a type of injury for which the defendant can be held liable; but (2) if it is, assessing any damages payable as compensation for such an injury is a matter of procedure governed by English law:

see *Iraqi Civilians v Ministry of Defence*: [2014] EWHC 3686 (QB), paras 33-41. There has been no appeal from that decision.

Types of injury

875. Although the question whether the MOD is liable to compensate the claimants for particular types of injury is governed by Iraqi law, I think it useful to begin by identifying the different types of injury for which, in English law, damages can be awarded as compensation for the torts of assault and false imprisonment. Five different types of injury can be distinguished. As I will explain, each of these categories is also recognised in Iraqi law. It will later be seen that they are also all types of injury for which damages can be awarded under the Human Rights Act.

876. First of all, where a person is a victim of an assault or false imprisonment, the wrong itself – that is to say, the interference with the claimant's bodily integrity or liberty – is an injury for which the claimant is entitled to be compensated in English law whether or not the interference has resulted in any "actual harm" to the claimant. As Lord Rodger said in *Ashley v Chief Constable of Sussex Police* [2008] AC 962 at para 60: "battery or trespass to the person is actionable without proof that the victim has suffered anything other than the infringement of his right to bodily integrity." See also *Watkins v Secretary of State for Home Department* [2006] 2 AC 395, para 68. Likewise it is well established that loss of liberty is itself an injury for which a claimant is entitled to be compensated apart from any damage which has resulted from the loss of liberty: see e.g. *R v Governor of Brockhill Prison, ex p Evans (No 2)* [1999] QB 1043, 1060. This kind of injury which is inherent in the wrong itself is often referred to as "moral injury".

877. Second, an assault or false imprisonment may cause identifiable physical or psychiatric injury. In such circumstances damages are awarded in English law for what is conventionally referred to as "pain and suffering" and any loss of amenity.

878. A third kind of injury is injury to feelings. This includes the distress, misery, humiliation, anger and indignation that such a tort may cause. The distinction between this kind of injury and what I am calling "psychiatric injury" is that psychiatric injury refers to a recognised medical condition (such as clinical depression or post-traumatic stress disorder) whereas injury to feelings refers to mental suffering which does not amount to such a medical condition. Each of these types of injury is a separate head of damage but in awarding damages where both are suffered it is obviously important to avoid double counting.

879. Fourth, English law recognises that injury to the feelings of the victim of an assault or false imprisonment may be increased by the defendant's motivation in committing the tort if the defendant shows particular malice towards the victim, or by other particularly egregious features of the defendant's conduct in committing the tort or subsequent behaviour towards the victim: see *Rookes v Barnard (No 1)* [1964] AC 1129, 1221; and the report of the Law Commission on "*Aggravated, Exemplary and Restitutionary Damages*" (September 1997), pp10-11, paras 1.1 and 1.4. As already mentioned, the damages which, in English law, may be awarded for such additional injury to feelings are referred to as "aggravated damages". Such damages, which are intended solely to compensate the claimant, must not be confused with "exemplary"

or "punitive" damages, which in certain exceptional circumstances only may be awarded in English law in order to punish or make an example of the defendant.

880. A fifth kind of injury which may be suffered is financial loss – consisting, for example, of the cost of medical treatment or loss of earnings if the assault or false imprisonment prevents the claimant from working.

The scope of liability in Iraqi law

881. It was ultimately not in dispute in these cases that all these five kinds of injury are kinds of injury for which the perpetrator of an assault or wrongful imprisonment is in principle liable to compensate the victim under Iraqi law.

882. As discussed in part II (see paragraph 105 above), article 205 of the Iraqi Civil Code expressly provides that:

> "The right to compensation also covers moral injury: any wrongful interference with the freedom, moral standing, honour, reputation, social standing or financial position (creditworthiness) of another person renders the perpetrator liable to pay compensation."

Hence loss of liberty, as well as interference with bodily integrity, is itself a form of compensable harm, whether or not there is any identifiable physical or psychiatric injury or injury to feelings caused by the defendant's wrongdoing. It was also agreed by the expert witnesses on Iraqi law and accepted by the MOD that injury to feelings caused by the defendant's motive or conduct in the commission of a tort is a type of injury for which the perpetrator can be held liable in Iraqi law, such that "aggravated damages" in the sense identified above can be awarded.

883. For their part, the claimants accepted that exemplary or punitive damages are not available.

Quantification of damages in tort

884. I have explained that, once it is established that the claimant has suffered a kind of injury for which, under Iraqi law, he is entitled to receive a remedy, the availability and assessment of damages for the injury is characterised under the 1995 Act as a matter of procedure governed by English law.

885. There is no doubt that under English law the court has power to award damages as a remedy for each of the five kinds of injury identified above. Where the injury consists of financial loss, the assessment of damages simply involves calculating the amount of the loss and ordering the defendant to pay an equivalent amount to the claimant. But the other four kinds of injury mentioned are non-financial in nature. Damages awarded for such injuries are not capable of arithmetical computation. No sum of money is comparable to loss of liberty or to physical or psychiatric injury or mental distress. Nevertheless, given the ubiquity of money as a measure of value in modern society, awarding a sum of money is the best that a court can do by way of compensation. The aim is to award a sum which would generally be perceived as fairly reflecting the gravity of the injury suffered by the claimant.

886. Of course, people will differ, often widely, in their perceptions of what sum of money would represent, or would be seen by fair-minded members of society to represent, appropriate compensation for any particular injury or kind of injury. In these circumstances it is important that judges should not simply award a sum of money which they think appropriate but should strive for consistency. As Lord Woolf MR, giving the judgment of the Court of Appeal in *Heil v Rankin* [2001] QB 272, said (at para 25):

> "Consistency is important, because it assists in achieving justice between one claimant and another and one defendant and another. It also assists to achieve justice by facilitating settlements."

887. The doctrine of precedent requires English courts to try to ensure that the amounts of damages which they award are consistent with amounts previously awarded in factually similar cases. In addition, the consistency and predictability of damages awards have been markedly increased in recent times by the promulgation of various scales and guidelines. The most important and comprehensive of these are the *Guidelines on the Assessment of General Damages in Personal Injury Cases* published by the Judicial College (the "Judicial College Guidelines"), which are now in their 14th edition. These guidelines indicate appropriate levels of award across the whole range of physical and psychiatric injuries to the person.

Awards for loss of liberty

888. Guidance has also been given as to the appropriate levels of awards for moral damage and injury to feelings in certain kinds of case. In *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, 515, para (5), the Court of Appeal gave the following specific guidance as to the appropriate level of such awards in cases of deprivation of liberty:

> "In a straightforward case of wrongful arrest and imprisonment the starting point is likely to be about £500 for the first hour during which the plaintiff has been deprived of his or her liberty. After the first hour an additional sum is to be awarded, but that sum should be on a reducing scale so as to keep the damages proportionate with those payable in personal injury cases and because the plaintiff is entitled to have a higher rate of compensation for the initial shock of being arrested. As a guideline we consider, for example, that a plaintiff who has been wrongly kept in custody for 24 hours should for this alone normally be regarded as entitled to an award of about £3,000. For subsequent days the daily rate will be on a progressively reducing scale."

The Court of Appeal emphasised that the figures indicated were not intended to be applied in a mechanistic manner and that the assessment of damages should be sensitive to the facts of the particular case and the degree of harm suffered by the particular claimant.

889. In addition to such "basic" damages, the Court of Appeal also commented at para 10 on the appropriate level of aggravated damages:

> "We consider that where it is appropriate to award aggravated damages the figure is unlikely to be less than a £1,000. We do not think it is possible to indicate a precise arithmetical relationship between basic damages and aggravated damages because the circumstances will vary from case to case. In the ordinary way, however, we would not expect the aggravated damages to be as much as twice the basic damages except perhaps where, on the particular facts, the basic damages are modest."

890. The guidance given in the *Thompson* case was directed at a situation where the detention of the claimant was unlawful from the outset. As is implicit in the guidance, lower awards are appropriate in cases where the claimant was lawfully detained for a certain period but should have been released sooner. In *R v Governor of Brockhill Prison ex parte Evans (No 2)* [1999] QB 1043, owing to an incorrect interpretation of the statutory provisions governing the calculation of her release date, the claimant was kept in custody for an additional 59 days when serving a two year sentence of imprisonment for robbery and other offences. The Court of Appeal increased the amount of damages awarded by the judge for this period of unlawful detention from £2,000 to £5,000, and this decision was upheld by the House of Lords: see *R v Governor of Brockhill Prison ex parte Evans (No 2)* [2001] 2 AC 19. In determining the appropriate amount of damages, the Court of Appeal took account of the fact that, as a result of the period when she was lawfully imprisoned, the claimant "would have already made the necessary adjustments to serving a prison sentence": see [1999] QB 1043, 1060. While emphasising that no two cases are the same, Lord Woolf MR also observed that the shorter the period of unlawful imprisonment the larger can be the *pro rata* rate and that the length of the lawful period of imprisonment is also a relevant factor.

Awards for injury to feelings in cases of ill-treatment

891. The Court of Appeal has also given guidance on the appropriate levels of awards for injury to feelings. In *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871, [2003] ICR 318, para 65, three broad bands of compensation for injury to feelings in cases of discriminatory harassment were delineated: a top band of between £15,000 and £25,000 for the most serious cases, such as where there has been a lengthy campaign of harassment; a middle band of between £5,000 and £15,000; and a lower band of between £500 and £5,000 for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. The Court of Appeal indicated that awards of less than £500 are generally to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings. In the *Vento* case itself the court awarded aggravated damages and damages for psychiatric injury as well as damages for injury to feelings.

892. In *Da'Bell v NSPCC* [2009] UKEAT 0227_09_2809, [2010] IRLR 19, the Employment Appeal Tribunal revisited the *Vento* bands and uprated them to take account of inflation (as measured by the increase in the Retail Price Index). Some further uprating of the figures is required to reflect subsequent inflation: see *Roberts v*

Bank of Scotland Plc (Rev 1) [2013] EWCA Civ 882, para 62. Allowing for the increase in the RPI over the 15 years since December 2002 when the *Vento* case was decided (from 178.5 to 275.8), comparable current round figures are:

i) £23,000 to £38,000 for the top band;

ii) £7,500 to £23,000 for the middle band; and

iii) £750 to £7,500 for the lower band.

893. The *Vento* bands (as subsequently uprated) have been adopted by the courts in assessing damages in cases of assault. For example, in *BDA v Domenico Quirino* [2015] EWHC 2974 (QB), a case involving the sexual abuse of a girl by her karate teacher between the ages of 15 and 17, the court awarded £16,000 to the claimant for injury to feelings by reference to the middle *Vento* band (see paras 44-46), as well as damages of £30,000 for psychiatric injury and additional aggravated damages of £9,000. The *Vento* bands were also used in *Mohidin v Commissioner of the Police of the Metropolis* [2015] EWHC 2740 (QB). One of the claimants in that case (Basil Khan), a 16 year old youth, was struck and wrestled violently to the floor by police officers during a wrongful arrest and was then made to kneel in handcuffs; he was also subjected to racist abuse and an unjustified strip search (see para 379). Gilbart J put this claimant's case at the top of the lowest *Vento* band and awarded £7,200 for injury to feelings, as well as further sums for physical pain and suffering and false imprisonment.

The 10% uplift

894. In *Simmons v Castle* [2012] EWCA Civ 1039 and 1288, [2013] 1 WLR 1239, the Court of Appeal declared that, with effect from 1 April 2013, the proper level of general damages in all civil claims for pain and suffering, loss of amenity, physical inconvenience and discomfort, social discredit or mental distress would be 10% higher than previously. This uplift does not apply, however, to claimants falling within section 44(6) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 who have entered into conditional fee agreements before 1 April 2013. My understanding is that all the claimants in this litigation have entered into such agreements and therefore would not qualify for this uplift.

Should damages be reduced because the claimants live in Iraq?

895. Counsel for the MOD submitted that, although the quantification of any damages awarded in tort is governed by English law, in circumstances where the claimants are Iraqi citizens an adjustment should be made to the level of any damages awarded for non-financial injury to reflect the fact that the general standard and cost of living in Iraq is lower than in the UK. They pointed out that, according to the United Nations Development Programme, Iraq ranks 121st out of 188 countries in its Human Development Index and has gross national income *per capita* of US$11,608. (In contrast, the UK is ranked 16th and has gross national income *per capita* of US$37,931.) Counsel for the MOD submitted that to award damages for non-pecuniary harm assessed at UK levels would overcompensate the claimants, as a sum of money which is equivalent to, say, a month's average income in the UK would be equivalent to several times that for an Iraq civilian. Borrowing words of Lord

Bingham MR (albeit used in a different context), they cautioned against awarding these claimants sums of money which in their country would be "so large as to bear no relation to the ordinary values of life": *John v MGN Ltd* [1997] QB 586, 611. They invited the court not to award English levels of damages for non-pecuniary injuries but to make a deduction to take account, albeit in a rough and ready way, of the very different economic and social conditions pertaining in Iraq.

896. I regard this as a legitimate and real concern. But once it is accepted that the quantum of damages is to be decided in accordance with English law, there is no scope for reducing the amount of any award by reference to the claimant's economic or social circumstances. When awarding damages as compensation for pain and suffering, mental distress or other harm of a non-financial nature, English courts do not have regard to whether the claimant is rich or poor, nor to the standard or cost of living in the place where the claimant habitually resides.[53] Damages are not reduced if the claimant lives in a deprived region of the country, nor increased if the claimant lives in London on the ground that living costs there are higher. Nor if, for example, a foreigner visiting the UK is injured in a road traffic accident and is awarded damages for pain and suffering, are the damages scaled down because the claimant comes from a poor country or bumped up because the claimant comes from a country with a significantly higher gross national income *per capita* than the UK (such a Norway or Monaco). The claimant's economic and social situation is irrelevant see e.g. *Fletcher v Autocar and Transporters Ltd* [1968] 2 QB 322, 364; *Heil v Rankin* [2001] QB 272, para 33.

897. Counsel for the MOD were unable to point to any case in which an English court has altered the amount of damages awarded for non-financial injury on account of the claimant's country of origin or economic or social circumstances. They sought to draw some support for their argument, however, from *Jag Singh v Toong Fong Omnibus Co* [1964] 1 WLR 1382. This was an appeal to the Privy Council from an award of general damages made by a court in Malaya (as it then was) in a personal injury case. Lord Morris, giving the judgment of the Board, approached the appeal with three considerations in mind (at 1385):

> "(1) That the law as to the factors which must be weighed and taken into account in assessing damages is in general the same as the law in England. (2) That the principles governing and defining the approach of an appellate court that is invited to hold that damages should be increased or reduced are the same as those of the law in England. (3) That to the extent to which regard should be had to the range of awards in other cases which are comparable such cases should as a rule be those which have been determined in the same jurisdiction or in a neighbouring locality where similar social, economic and industrial conditions exist."

---

[53] It appears that a different approach is taken in some civil law jurisdictions, including Denmark, Switzerland and Japan: see R Garnett, *Substance and Procedure in Private International Law* (2012) para 11-30.

In light of the third of these considerations, the Privy Council took account of awards made in comparable cases decided in Singapore as well as Malaya in coming to the conclusion that "the award in the present case was so much out of line with a discernible trend or pattern of awards in reasonably comparable cases that it must be regarded as having been a wholly erroneous estimate" (p1387).

898. This authority, however, does not assist the MOD's argument. It says nothing to suggest that, if the claimant had come from a locality where the social and economic conditions were different from those in Malaya, it would have been appropriate to increase or reduce the damages awarded to him for that reason. The judgment merely recognises that the level of damages awarded by the courts in a particular jurisdiction can be expected to reflect the general economic and social conditions in that jurisdiction. That is indubitable. As Lord Woolf MR, giving the judgment of the Court of Appeal in *Heil v Rankin* [2001] QB 272 noted, the decision as to what is the fair, reasonable and just equivalent in monetary terms of an injury "has to be taken against the background of the society in which the court makes the award" (para 38). Lord Woolf illustrated this point by referring to decisions of the courts of Hong Kong. As the prosperity of Hong Kong expanded, the courts by stages increased their tariff for damages so that it approached the level in England: see *Chan Pui-ki v Leung On* [1996] 2 HKLR 401, 406-408. The Privy Council in the *Jag Singh* case was doing no more than recognising this reality. Awards made in Singapore as "a neighbouring locality where similar social, economic and industrial conditions exist" were relevant when assessing damages in accordance with the law of Malaya only in the same way that awards made in Scotland or Northern Ireland, for example, could be taken into account by a court assessing damages in accordance with the law of England and Wales.

899. Accordingly, once the position is reached that damages are to be assessed in accordance with English law, the court must apply the guidance and use the standards of comparison which have been developed in this jurisdiction in the light of the general economic and social conditions in our own society to establish levels of compensation for non-financial injury. There is no basis in principle or authority for reducing the damages awarded on the ground that the claimants in the present cases reside or that their injuries were suffered in another country, namely, Iraq.

900. Reasoning backwards from this conclusion, what the MOD's argument in my view supports is the case for assessing damages not in accordance with the law of the forum but in accordance with the law applicable to the tort. The justification for applying the law of the forum to procedural questions even when a claim is governed by foreign law is that litigants cannot reasonably expect courts to conduct proceedings differently or to make different procedures available just because the parties' rights are governed by foreign law. For example, if an English court has to decide a personal injury claim governed by the law of Texas, the English court cannot reasonably be expected to arrange a jury trial just because that is how the case would be decided in Texas. Considerations of efficiency and convenience dictate that rules of procedure should be applied in all cases irrespective of their subject matter. By contrast, questions about the existence and extent of the rights and liabilities of the parties ought in principle to be decided by applying the same rules of law irrespective of where the proceedings are brought. As stated by La Forest J in a decision of the Canadian Supreme Court, the purpose of classifying a rule as procedural or

substantive is "to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties": *Tolofson v Jensen* [1994] 3 SCR 1022, (1994) 120 DLR (4th) 289, 321.

901. Looked at in this way, what sum of money represents appropriate compensation for an injury caused by the defendant's wrongful act seems to me, in principle, just as much a matter of substance as the question whether the defendant is liable to pay damages for that type of injury. Indeed, there is no clear or logical dividing line between the two questions. Both are determinative of the extent of the parties' rights and liabilities.

902. That is the approach which has been taken by the High Court of Australia: see *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503. It is also now the approach that applies in the UK. For claims arising out of events occurring after 11 January 2009 which fall within the ambit of the Rome II Regulation, article 15(c) provides that "the nature and assessment of damage" is a matter for the law applicable to the obligation (and is no longer treated as a matter of procedure governed by the law of the forum). Had the events giving rise to the present claims, therefore, occurred after 11 January 2009, an English court assessing damages would be required to apply Iraqi law as the law applicable to the tort and would seek to reflect, as accurately as possible with the help of expert evidence, the level of damages that would be awarded by an Iraqi court. Although no such expert evidence has been adduced, in the light of the social and economic conditions in Iraq it is reasonable to expect that the amount of damages for non-pecuniary harm awarded by an Iraqi court would be lower than the amount that an English court applying English law would award.

903. As it is, the events giving rise to the present claims occurred before 11 January 2009. The claims are therefore governed by the 1995 Act. As discussed above, that Act, as it has been authoritatively interpreted, requires the court to assess damages in accordance with English law. It follows that, if the claims in tort made in these cases had succeeded, the damages would have to be assessed in just the same way and by applying the same principles as would be applied in a case where liability in tort has arisen under English law.

Damages under the Human Rights Act

904. I turn from the legal principles governing the assessment of damages in tort to consider the basis on which damages may be awarded under the Human Rights Act.

905. Where the court finds that a public authority has acted in a way which is unlawful because it violates a right protected by the European Convention, section 8(1) of the Human Rights Act provides for the grant of such relief or remedy as the court considers just and appropriate. Where the court has power to award damages, or to order the payment of compensation, in civil proceedings, damages may be awarded: see sub-section (2). This is subject to sub-sections (3) and (4) which state:

> "(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including— (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and (b) the consequences of any decision (of that or any other court) in respect of that act,

> the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
>
> (4) In determining— (a) whether to award damages, or (b) the amount of an award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under article 41 of the Convention."

906. Article 41 of the Convention states:

> "If the [European Court of Human Rights] finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

907. As is clear from the language of section 8, whereas on a claim in tort if injury is shown the remedy of damages is available as of right, there is no automatic right to damages under the Human Rights Act. Pursuant to section 8(3), damages may only be awarded if the court is satisfied that the award is "necessary to afford just satisfaction" to the claimant. The use of the term "just satisfaction" establishes a link with the approach of the European Court under section 41 of the Convention – a link reinforced by subsection (4), which requires the court to "take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under article 41". Following the decisions of the House of Lords in *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673, and of the Supreme Court in *R (Sturnham) v Parole Board for England and Wales* [2013] UKSC 47, [2013] 2 AC 254, paras 30-31, 35-36, 39, the term "principles" in this context is to be understood in a broad sense. As stated by Lord Reed in the *Sturnham* case at para 31:

> "It is not confined to articulated statements of principle. … The focus is rather upon how the court applies article 41: the factors which lead it to make an award of damages or to withhold such an award, and its practice in relation to the level of awards in different circumstances."

As a starting point, it is therefore necessary to identify the relevant practice of the European Court in applying article 41.

The practice of the European Court

908. The practice of the European Court in dealing with just satisfaction claims is outlined in a Practice Direction issued by the President of the Court on 28 March 2007. It has also been considered in several English cases including *D v Commissioner of Police of the Metropolis* [2014] EWHC 2493 (QB), [2015] 1 WLR 1833, where the judgment of Green J contains a helpful discussion at paras 16-41. For present purposes, eight relevant principles can be identified.

909. First, the award of just satisfaction is not an automatic consequence of a finding that there has been a violation of a Convention right. The Court may decide that, for some heads of alleged prejudice, the finding of a violation constitutes in itself sufficient just satisfaction without there being any call to afford financial compensation or that there are reasons of equity to award less than the value of the actual damage sustained, or even not to make any award at all: see Practice Direction, paras 1-2.

910. Second, before the Court will award financial compensation, a clear causal link must be established between the damage claimed and a violation found by the Court: see Practice Direction, paras 7-8. As stated in *Kingsley v United Kingdom* (2002) EHRR 10 at para 40:

> "The Court recalls that it is well established that the principle underlying the provision of just satisfaction for a breach of article 6 is that the applicant should as far as possible be put in the position he would have enjoyed had the proceedings complied with the Convention's requirements … The Court will award monetary compensation under article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found, since the state cannot be required to pay damages in respect of losses for which it is not responsible."

911. Third, where it is shown that the violation has caused "pecuniary damage" (i.e. financial loss) to the applicant, the Court will normally award the full amount of the loss as just satisfaction: see Practice Direction, paras 10-12. As stated in para 10 of the Practice Direction:

> "The principle with regard to pecuniary damage is that the applicant should be placed, as far as possible, in a position in which he or she would have been had the violation found not taken place, in other words, *restitutio in integrum*."

912. Fourth, it is also the practice of the Court to award financial compensation for "non-pecuniary damage", such as mental or physical suffering, where the existence of such damage is established: see Practice Direction, paras 13-14. If the Court considers that a monetary award is necessary, the Practice Direction states that it will make an assessment "on an equitable basis, having regard to the standards which emerge from its case law": see para 14. The case law of the European Court shows that awards for mental suffering are by no means confined to cases where there is medical evidence that the applicant has suffered psychological harm and that compensation may be awarded for injury to feelings variously described as distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life or powerlessness. The case law also shows that the Court will often be ready to infer from the nature of the violation that such injury to feelings has been suffered. Applicants who wish to be compensated for non-pecuniary damage are invited by the Court to specify a sum which in their view would be equitable: see Practice Direction, para 15.

913. Fifth, the purpose of an award under article 41 is to compensate the applicant and not to punish the state responsible for the violation. Hence it is not the practice of the Court to award punitive or exemplary damages: see Practice Direction, para 9.

914. Sixth, in deciding what, if any, award is necessary to afford just satisfaction, the Court does not consider only the loss or damage actually sustained by the applicant but takes into account the "overall context" in which the breach of a Convention right occurred in deciding what is just and equitable in all the circumstances of the case. This may require account to be taken of moral injury. As stated by the Grand Chamber in *Varnava v Turkey* [2009] ECHR 1313 at para 224, in some situations "the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further." The Court further explained:

> "Such elements do not lend themselves to a process of calculation or precise quantification. Nor is it the Court's role to function akin to a domestic tort mechanism in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party concerned."

See also *Al-Jedda v United Kingdom* (2011) 53 EHRR 23, para 114.

915. Seventh, as part of the overall context, the Court may take account of the state's conduct. Thus, in *Anufrijeva v Southwark London BC* [2003] EWCA Civ 1406, [2004] QB 1124, para 68, the Court of Appeal noted that, as well as the seriousness of the violation, the manner in which the violation took place may be taken into account. This is similar to the English law concept of aggravated damages discussed earlier.

916. Eighth, the Court also takes account of the applicant's conduct and may find reasons in equity to award less that the full value of the actual damage sustained or even not to make any award at all. This may be the case if, for example, the situation complained of or the amount of damage is due to the applicant's own fault: see Practice Direction, para 2. A striking example is the case of *McCann v United Kingdom* (1995) 21 EHRR 97, in which the European Court found that the killing of IRA gunmen in Gibraltar by British soldiers involved a breach of article 2 but declined to make any award under article 41 "having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar" (see para 219).

917. Two matters which require more detailed consideration are the relevance in deciding what amount of damages to award under the Human Rights Act of (a) awards made

by the European Court in individual cases and (b) English domestic scales of damages.

Awards made by the European Court

918. In the *Greenfield* case [2005] UKHL 14, [2005] 1 WLR 673 at para 19, Lord Bingham rejected as "legalistic" the contention that the reference in section 8(4) of the Human Rights Act to the "principles" applied by the European Court does not encompass the levels of awards made by that court. He said:

> "The court routinely describes its awards as equitable, which I take to mean that they are not precisely calculated but are judged by the court to be fair in the individual case. Judges in England and Wales must also make a similar judgment in the case before them. They are not inflexibly bound by Strasbourg awards in what may be different cases. But they should not aim to be significantly more or less generous than the court might be expected to be, in a case where it was willing to make an award at all."

919. There are principles applied by the European Court in deciding the quantum of awards, which I have sought to identify above. Any attempt to glean guidance, however, from the size of awards made by the Court in individual cases faces three major difficulties. The first is that the Court deals with cases from 47 different countries and it is part of its practice normally to take into account "the local economic circumstances": see Practice Direction, para 2. Accordingly, as pointed out by Lord Reed in the *Sturnham* case [2013] UKSC 47, [2013] 2 AC 254, para 38, any comparison of awards needs to take into account the relative value of money in the contracting states, as well as the effect of inflation if the award was made some time ago: see also *D v Commissioner of Police of the Metropolis* [2015] EWHC 2493 (QB), [2015] 1 WLR 1833, paras 33-35.

920. Second, with one exception, the European Court has not established or sought to establish in its jurisprudence scales of awards for particular types of case.[54] The Court hardly ever refers to amounts which it has awarded previously in other cases and, when awarding compensation for non-pecuniary damage, the Court generally gives little or no explanation of how it has arrived at a particular figure. Sometimes it is apparent from the judgment that the amount of the award has been influenced by a particular factor – for example, the Court's view of the seriousness of the violation or that the applicant was at fault. In other cases there are no such clues. Given this approach, any attempt to extrapolate from individual awards necessarily involves a process of reconstruction or rationalisation which involves explaining the levels of awards made in particular cases by reference to features of the case and contrasts with other cases which are not mentioned by the Court.

---

[54] The one publicly stated exception concerns cases involving excessive delay in proceedings, in breach of article 6, where the court has established "scales on equitable principles for awards in respect of non-pecuniary damage under Article 41, in order to arrive at equivalent results in similar cases": see *Scordino v Italy (No 1)* (2007) 45 EHRR 7, para 176.

921. The third difficulty is more fundamental. Such a process of reconstruction assumes that there is a latent order or logic underlying awards made by the European Court which has not been articulated but is waiting to be discovered. But that could only be the case if, in making awards of compensation for non-pecuniary damage, the judges of the Court were basing their decisions on comparisons with awards made in other cases. Given the Court's approach, however, of assessing such compensation on an "equitable basis" by reference to such sum as the applicant requests and the Court thinks fair in the individual case, there is no good reason to suppose that this is so. Indeed, there is good reason to think that it is not. As Lord Carnwath, who has himself sat as an *ad hoc* judge of the European Court, explained in the *Sturnham* case at para 105:

> "The great majority of such awards are made on an 'equitable' basis reflecting particular facts. No doubt the judges attempt to achieve a degree of internal consistency. But most of the decisions are not intended to have any precedential effect, and it is a mistake in my view to treat them as if they were."

A book written by a former case lawyer at the European Court of Human Rights which analyses in depth the Court's approach to the assessment of just satisfaction identifies the "main problem" as being that "the judges offer scant reasoning for their awards" and concludes that "the Court's practice lacks consistency and predictability", commenting that "it is difficult to see any logic in the current practice of the Court".[55]

922. In these circumstances, attempts to derive from decisions of the European Court a range of awards for a particular category of case together with a set of factors which will enable a court to locate the facts of the case before it at a suitable point within that range are problematic for two linked reasons. First, this type of analysis does not reflect the practice of the European Court itself. Rather than adhering to the principles applied by the European Court in awarding compensation under article 41, therefore, such an approach is inconsistent with those principles and hence with section 8(4) of the Human Rights Act. Second, because most of the Court's awards are not intended to have any precedential effect, extrapolating from them involves an attempt to find a level of coherence and consistency underlying the awards which simply is not there. The likelihood is that any pattern detected will, like the interpretation of Rorschach blots, lie in the eye of the beholder.

923. For these reasons, I respectfully agree with the view expressed by Judge Pelling QC in *R (Pennington) v The Parole Board* [2010] EWHC 78 (Admin) at paras 16-17, that it would be wrong to attempt to deduce an appropriate sum to award as just satisfaction from decisions of the European Court using a "mathematical and mechanical approach". Rather, awards made by the Court under article 41 should be regarded simply as illustrations of the principles identified earlier and as a cross-check to ensure that the amount of any damages awarded would not, as best as can be judged, be likely to be perceived by the European Court as inadequate or as excessive.

---

[55] O Ichim, *Just Satisfaction under the European Convention on Human Rights* (2015) pp1, 258. See also J Varuhas, *Damages and Human Rights* (2016), pp269-274.

Awards in article 3 cases

924. Happily, no attempt has been made in the present cases to subject the court to what Lord Reed in the *Sturnham* case, at para 103, referred to as "a blizzard of authorities". Counsel for the claimants relied for comparative purposes on only a handful of decisions of the European Court in article 3 cases. Some of these decisions involved violations which were significantly more serious than those which I have found in the present cases and cannot be regarded as at all comparable. For example, in *Cestaro v Italy* (Application No 6884/11)(unreported) 7 April 2015, the applicant had been attacked by police officers who had kicked and hit him with wooden truncheons, causing multiple fractures and leaving him with permanent weakness in his right arm and leg. The Court found that this ill-treatment amounted to torture. Taking account of compensation of €35,000 which the applicant had already obtained in the Italian courts, the European Court awarded €45,000 in respect of non-pecuniary damage. By contrast, however, none of the present claimants was subjected to ill-treatment which amounted to torture or suffered such grievous bodily harm.

925. Four of the decisions relied on by the claimants bear at least some degree of factual similarity with one or more of the present claims:

i) In *Douet v France* (Application No. 16705/10)(unreported) 3 October 2013, the applicant was stopped by the French police after a car chase. He resisted arrest and was struck with a baton which caused heavy bruising and left him unable to work for five days. The Court found a violation of article 3 and awarded €15,000 in respect of non-pecuniary damage.

ii) In *Alberti v Italy* (Application No 15397/11)(unreported) 24 June 2014, the applicant was assaulted by Italian Carabinieri after resisting arrest. He sustained three broken ribs and a haematoma on the right testicle, resulting in twenty days' unfitness for work. The Court found a violation of article 3 and awarded €15,000 in respect of non-pecuniary damage.

iii) In *Saba v Italy* (Application No 36629/10)(unreported) 1 July 2014, the applicant complained of mistreatment of himself and others by prison officers. Some detainees had been forced to strip and had been threatened, insulted, struck and humiliated. The applicant had not himself been physically assaulted but the Court found that he had been subjected to degrading treatment and awarded €15,000 in respect of non-pecuniary damage.

iv) In *Bouyid v Belgium* (2016) 62 EHRR 32, mentioned earlier, the applicants were two young brothers who had been harassed by the police. Each was slapped in the face while in police custody, causing bruising to the left cheek. There was no proper investigation of the incident. The Court found substantive and procedural breaches of article 3 and awarded each of the applicants €5,000 in respect of non-pecuniary damage.

926. Counsel for the MOD did not themselves refer to any decisions of the European Court in article 3 cases and submitted that the decisions cited by the claimants are fact specific and not demonstrative of the appropriate level of award.

927. I would add that in *D v Commissioner of Police of the Metropolis* [2015] EWHC 2493 (QB), [2015] 1 WLR 1833 at paras 69-108, the judge summarised the facts and sums awarded by the European Court in 19 article 3 cases in a discussion which extends over 39 paragraphs and 19 pages of the law reports. In a few of the 19 cases discussed the breach of article 3 involved torture or inhuman and degrading treatment of the applicant by police officers or other agents of the state. In most of the cases, however, the breach of article 3 consisted in a failure by the state to protect the applicant from ill-treatment or in a failure by the state to carry out an effective investigation into allegations of ill-treatment. The facts of the *Commissioner of Police* case itself fell into a third of these categories. The judge sought to identify a range of awards for "relevant" article 3 violations. Neither party in the present proceedings relied on this analysis and it is not clear whether the range of awards was intended to cover cases of ill-treatment directly inflicted by state agents as opposed to the kind of procedural violation for which damages were awarded in the *Commissioner of Police* case itself. At all events, it does not seem to me appropriate to conflate the three categories of case.

Awards in article 5 cases

928. Counsel for the claimants and for the MOD referred to only one decision of the European Court awarding compensation for non-pecuniary damage for a breach of article 5. This was *Al-Jedda v United Kingdom* (2011) 53 EHRR 23, referred to earlier in this judgment. Mr Al-Jedda was detained by British forces in Iraq for a total period of three years, two months and 20 days. The Court held that his detention was in breach of article 5(1). He was awarded compensation of €25,000.

929. At first sight this case may seem to be comparable with the present cases in that it involved the unlawful detention of an individual by British forces in Iraq. The Court stated, however, that in determining the amount of compensation it had regard to factors raised by the UK government (see para 114). Those factors were that the applicant was detained because he was reasonably believed to pose a grave threat to the security of Iraq, that the English court had held that his detention was in compliance with Iraqi law, and that the allegation that he was engaged in terrorist activities in Iraq was subsequently upheld by the Special Immigration Appeals Commission. I therefore think it clear that the Court reduced the compensation awarded in this case by a substantial (though unspecified) amount on account of the applicant's conduct (see the eighth principle identified above). By contrast, in the present cases I have found that the claimants were not detained in compliance with Iraqi law (nor, during the relevant periods, in compliance with international law) and, although there was in each case a reasonable suspicion which justified their initial capture or arrest, none of the claimants was engaged in terrorist activities or posed any threat to the security of Iraq. In these circumstances, no analogy can be drawn with the *Al-Jedda* case.

Relevance of domestic standards

930. In *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673, at para 18, the House of Lords rejected a submission that, in exercising their power to award damages under section 8 of the Human Rights Act, the English courts should apply domestic scales of damages. This does not mean, however, that it is never relevant to consider levels of damages awarded in cases

governed by English domestic law. On the contrary, I think it clear that in certain kinds of case it is not merely relevant but important to do so.

931. In *R (Sturnham) v Parole Board for England and Wales* [2013] UKSC 47, [2014] 2 AC 254, in the Court of Appeal, Laws LJ noted a distinction which he described as "of some significance in the search for principle" (para 15). The distinction is between "cases where the violation of the Convention right has an outcome for the claimant which constitutes or is akin to a private wrong, such as trespass to the person, and cases where the violation has no such consequence." As Laws LJ observed, this distinction was drawn by Lord Bingham in the *Greenfield* case when he contrasted the breach of article 6 which was the subject of that case with violations of articles such as article 3 and article 5: see *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673, para 7. A breach of the right to a fair trial guaranteed by article 6 would not give rise to a claim for damages in tort in English law. In many cases, however, mistreatment which violates article 3 will do so. Similarly, unlawful detention will in many cases give rise to liability in tort as well as to a breach of article 5. In such cases the same basic right – to bodily integrity or to liberty – is protected both by the law of tort and by the Human Rights Act. There is a powerful argument of principle that where, in such cases, a victim is being compensated under section 8 of the Human Rights Act for the defendant's unlawful act, he or she should receive similar compensation for the harm suffered to that which would be awarded on a parallel claim in tort. To award less compensation would be to treat the breach of a fundamental human right guaranteed by the Convention as less serious than breach of the equivalent right protected by the common law of tort. Unless some good reason is shown for taking a different approach, the amount of compensation awarded for the same injury caused by the same wrongful conduct should in principle be the same in each case. This principle seems to me to carry particular weight in the case of non-pecuniary damage for which any amount awarded in compensation can only be symbolic of the value which our society attributes to harm of the relevant kind.

932. Taking into account the practice of the European Court in relation to the award of compensation under article 41 does not require an English court to ignore this principle. That is so, first of all, because it is the practice of the European Court to take into account domestic scales of damages. The Practice Direction referred to earlier states that, when making an award under article 41, the Court "may decide to take guidance from domestic standards", though it is "never bound by them" (para 3). Similarly, in *Z v United Kingdom* (2001) 34 EHRR 97 at paras 120 and 131, the Grand Chamber of the Court described the rates of compensation applied in domestic cases as "relevant" but "not decisive". On any view, the English court is entitled to treat as relevant in assessing damages standards or rates of compensation which the European Court would itself regard as relevant. Secondly, while section 8(4) of the Human Rights Act requires the court to take into account the principles applied by the European Court in determining the amount of an award, it does not require the court to take into account only those principles and to ignore other relevant considerations. In a case where the unlawful act for which damages may be awarded under section 8 is also a tort, an English court would in my view be failing in its duty if it did not have regard to the level of damages which would be awarded as compensation in tort and ask whether it is necessary to award a similar sum to afford just satisfaction to the

claimant or whether there is a good and sufficient reason which makes it just and appropriate to award a different sum.

Should damages be awarded in the present cases?

933. In the *Greenfield* case [2005] UKHL 14, [2005] 1 WLR 673, at para 9, Lord Bingham approved the observations of Lord Woolf MR giving the judgment of the Court of Appeal in *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406, [2004] QB 1124, at paras 52–53 that:

> "the remedy of damages generally plays a less prominent role in actions based on breaches of the articles of the Convention, than in actions based on breaches of private law obligations … Where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance."

In making these remarks, Lord Woolf had in mind that in many cases where breaches of Convention rights are alleged the claimant is seeking an order to compel a public body to take or refrain from taking action or to quash an administrative decision of a public body. There are other cases, however, where the claimant is not seeking an essentially public law remedy of this kind and which fall into the category described by Laws LJ as "cases where the violation of the Convention right has an outcome for the claimant which constitutes or is akin to a private wrong" (see paragraph 931 above). In these cases, where the violation alleged is not continuing but purely historic, the concern is self-evidently not to bring the infringement of the claimant's human rights to an end as the infringement has already ended. In these cases the only remedy which the court can provide is an award of damages to compensate the claimant for the injury caused by the infringement. The question of compensation is therefore of primary, if not sole, importance. To decline to award damages, or to make an award which affords only partial reparation, would be to deny the claimant an effective remedy, contrary to principle and to the UK's obligation under article 13 of the Convention to afford an effective remedy to everyone whose Convention rights are violated.

934. The present cases all fall into this category. As already discussed, the claimants are seeking compensation for injury caused by the violation of rights which are protected both by the European Convention and by the private law of tort. Where I have found that such violations have occurred, it is necessary in each case to award damages in order to provide an effective remedy and afford just satisfaction to the claimant. In addition, where the violation found consists of unlawful detention in breach of article 5 of the Convention, article 5 itself confers a right to compensation by providing in paragraph 5:

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

How the assessment of damages should be approached

935. Assessing compensation for non-pecuniary harm on an equitable basis, as is practice of the European Court (see paragraph 912 above), does not require the adoption of a measure that varies like the Chancellor's foot. As Judge Greenwood stated in a declaration appended to the judgment of the International Court of Justice in *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Compensation, Judgment, ICJ Reports 2012, p692, at para 7:

> "The nature of [non-pecuniary] damage means that specific evidence cannot be required and that the assessment of compensation can only be based upon equitable principles. Nevertheless, just as the damages are no less real because of the difficulty of estimating them, so the determination of compensation should be no less principled because the task is difficult and imprecise. What is required is not the selection of an arbitrary figure but the application of principles which at least enable the reader of the judgment to discern the factors which led the Court to fix the sum awarded. Moreover, those principles must be capable of being applied in a consistent and coherent manner, so that the amount awarded can be regarded as just, not merely by reference to the facts of this case, but by comparison with other cases."

936. In seeking to formulate a principled approach, I regard three considerations as paramount. The first is transparency: the parties and the public are entitled to a reasoned judgment from which it can be seen how the sum awarded in each case has been arrived at. Second, objectivity: although the assessment of damages inescapably involves an exercise of judgment, justice requires the adoption of an approach which is based on external standards and not simply on the intuition of the individual judge. The third paramount consideration is predictability, which is of special and vital importance in the present cases. As noted in part I of this judgment, in addition to these four lead cases there are a further 628 outstanding claims in this litigation. There is a very strong public interest in facilitating the settlement of these claims. It would be not merely undesirable but a denial of justice if the parties had to bring each case to court in order to discover what compensation will be awarded for the claimant's injuries. To do so is in any event impracticable as the court does not have the resources to hold trials in all these cases and as, on the evidence of the present cases, the costs of a trial would be likely substantially to exceed the sums awarded. For the purposes of settlement the parties need to be able to predict with a reasonable measure of accuracy the amount which is likely to be awarded in a particular case.

Approach to the quantification of damages

937. To these ends, I have followed a four-stage approach. The first stage is to identify the injuries which the claimant has suffered as a result of the relevant breach of his Convention rights. In performing this exercise, I have kept in mind the second of the eight principles applied by the European Court set out earlier: that is to say, the requirement of a clear causal link between the damage claimed and the violation found by the court.

938. Having identified the injuries for which compensation is in principle payable, I have then assessed the amount of compensation that would be awarded for those injuries in accordance with the principles of English law applicable to claims in tort. For the reasons given, I do not believe that either section 8 of the Human Rights Act or the authorities which have interpreted that provision preclude the court from taking account of these principles in cases of the present kind. In my opinion, it is just and appropriate to do so for four reasons.

939. First of all, the Judicial College Guidelines and other guidance applicable to personal injury claims in tort provides a ready-made and invaluable resource. It represents an accumulated body of wisdom developed through the common law method of building on the past experience of generations of judges who have decided a vast number and range of cases. Standards forged in this way reflect a collective sense of what level of compensation is fair having regard to the general standard and cost of living in our society. Just as importantly, they also embody a collective judgment about what level of compensation is fair and appropriate for a particular kind of injury relative to the levels awarded for injuries of other kinds. There is no "right" amount of compensation for, say, the loss of an eye. But a system of law that aspires to be rational and coherent seeks to ensure that the damages awarded for such an injury are greater than those awarded for injuries which have a less detrimental impact on the victim's quality of life and smaller than those awarded for even more drastic injuries. As Diplock LJ said in *Wise v Kaye* [1962] 1 QB 638 at 664:

> "Looked at in isolation there is no logical reason why for one week of pain the right award should be £20 rather than £200. All that can be said is that once you accept as a premise or convention that £20 is the right award for one week of pain, the right award for two weeks of similar pain is in the region of £40 and not in the region of £400 …"

Comparisons of this kind between different categories of personal injury are embodied in the Judicial College Guidelines. More broadly, English courts have sought to establish or adjust scales of damages for other kinds of non-financial harm having regard to the levels of awards made for pain and suffering and loss of amenity in personal injury cases.

940. Second, as discussed earlier, it seems to me that where the same basic right to bodily integrity or to liberty is protected both by the law of tort and by the Human Rights Act, there is a compelling argument of principle that the courts should strive for consistency of response.

941. Third, there is the need for predictability which, as I have indicated, is of special importance in this litigation. I am attempting through the decisions made in these lead cases to give as much guidance as I can as to the likely outcome in other cases. But inevitably the four cases before the court only illustrate a narrow range of facts. Using the guidelines applicable in tort cases as a reference point enables the court to provide far greater predictability of result in the remaining cases than would otherwise be possible, as those guidelines extend across a full spectrum of different factual scenarios.

942. My fourth reason for taking the guidance established in English tort law as a starting-point is that there is no alternative set of standards available. As discussed, no relevant scales of damages have been established by the case law of the European Court. The choice is therefore not between having regard to English domestic guidance on the appropriate levels of award for non-pecuniary harm and following guidance established at a supra-national level. It is between using English domestic standards as a benchmark and adopting an essentially arbitrary approach.

943. Having assessed the damages in accordance with the principles applicable to a claim in tort in English law, I have next considered whether to depart from or adjust this sum having regard to wider considerations of what is just and equitable in all the circumstances of the case.

944. I have concluded that in the present cases there is good reason for such a departure. This is that the place where the claimants live and sustained the injuries for which compensation is claimed is Iraq. I noted earlier that English domestic scales of damages do not vary according to the claimant's country of residence or economic situation. But I also explained why it is in my view anomalous that the rules of private international law applicable in these proceedings require English law to be applied to assess the amount of damages to be awarded for an unlawful act committed in another country which is also the country where the victim resides.

945. Under the Human Rights Act the court is not constrained by the choice of law rules or rules for assessing damages which apply to tort claims and has a discretion to adopt the approach which it considers just and appropriate. The court is therefore entitled in this context to take account of the fact that the country where the claimants reside and suffered harm has a lower cost and standard of living than the UK.

946. To do so is also consistent with the practice of the European Court, mentioned earlier (at paragraph 919), of taking into account "local economic circumstances": see Practice Direction, para 2. In the *Sturnham* case at para 38, Lord Reed drew attention to this practice when he said:

> "Awards made by the European Court to applicants from countries where the cost of living is relatively low tend to be low by comparison with awards to applicants from countries where the cost of living is much higher."

It is right to say that in the overwhelming majority of cases with which the European Court has been concerned the country from which the applicant comes is also the respondent state. I have not been referred to any case in which the question has been raised of what approach should be taken in a case where, as here, the local economic circumstances are different in the country where the violation of Convention rights occurred and where the claimant resides from those in the country of the defendant where the claim is brought.

947. In exercising my discretion in the present cases, the approach that I consider just and appropriate is to seek to strike a balance between two competing considerations. On the one hand, I consider it appropriate to take account of the greater purchasing power of money in Iraq than in the UK and to award a lower sum on that account as compensation for non-financial damage than would be awarded if English domestic

scales of damages were applied. On the other hand, I am concerned that the award should not be reduced to a level which might be thought to imply that violating the rights of an Iraqi citizen is less serious than violating the rights of a British citizen, or that the suffering of those who live in poorer countries matters less than the suffering of people who live in richer countries such as the UK. Balancing these factors, the approach that I have thought it equitable to follow in assessing damages for non-financial injury is to award a figure that is around half the amount that would be recoverable on a claim in tort to which English law applied.

948. The fourth and final stage of my assessment has been to ask myself whether there is any reason to think that the sum of money arrived at by this process is significantly more or less generous that the amount which the European Court could be expected to award if the English courts were to provide no redress and the claimant were then to seek just satisfaction from the European Court of Human Rights. When applying this cross-check, I have not seen any reason based on comparison with awards made by the European Court in the cases mentioned earlier or otherwise to alter any of my assessments.

Awards in the individual cases

949. I come finally to explain how I have applied the approach outlined above in each of the four cases before the court and to specify the sums to be awarded under section 8 of the Human Rights Act as damages for the unlawful conduct found in each case.

Mr Alseran

950. In part IV of this judgment I have found that the MOD is liable to Mr Alseran under the Human Rights Act for two breaches of his Convention rights: (i) mistreating him after he was captured on 30 March 2003 in breach of article 3; and (ii) detaining him unlawfully between 10 April and 7 May 2003 in breach of article 5.

Ill-treatment

951. I have found that on the day of his capture and while he was being held at a prisoner collection point at Al-Seeba Mr Alseran was a victim of inhuman and degrading treatment when he (and other prisoners) were made to lie face down on the ground by British soldiers who then ran over the prisoners' backs in their heavy military boots (see paragraphs 198–203 above). Although Mr Alseran alleged that this happened on more than one occasion, I have not found it proved that there was more than one incident of such abuse. It is impossible to know exactly how many times Mr Alseran's back was trodden on in this incident, but I am satisfied that it was a number of times and that several soldiers took part.

952. I accept Mr Alseran's evidence that his back was stiff and sore for several days afterwards, but then recovered. For the purpose of a claim in tort, the injuries would fall within the category described in (B)(c)(iii) of chapter 7 of the Judicial College Guidelines of minor back injuries where a full recovery is made within three months, for which the guideline figure is "up to £1,950". Although Mr Alseran appears to have made a quick recovery, in view of the likely severity of the pain he had to endure during the incident, I would take a figure in the middle of this bracket.

953. As noted in part IV, much worse than the physical pain was the humiliation that Mr Alseran suffered. The nature of the abuse – involving an exercise of power over defenceless prisoners, trampling them underfoot for what appears to have been the sadistic amusement of the assailants and onlookers – showed extreme contempt towards the victims. It is understandable that this ill-treatment left Mr Alseran with deep and enduring feelings of hurt, humiliation and anger. Had I been awarding damages for injury to feelings in tort, I would have placed this case towards the lower end of the middle *Vento* band. I would also have made an additional award of aggravated damages to reflect the malicious nature of the soldiers' conduct.

954. In the circumstances, following the approach outlined above of discounting the level of damages for non-financial harm that would be recoverable under the English law of tort by around one half to take account of the greater value of money in Iraq, I consider that an appropriate award of damages for the physical injury, humiliation and injury to feelings which Mr Alseran has suffered is £10,000.

Unlawful detention

955. I concluded in part IV (paragraph 313) that, although Mr Alseran's detention by British forces on 30 March 2003 was in accordance with international humanitarian law, there was no lawful basis under the Geneva Conventions or otherwise for keeping him interned at Camp Bucca after a review of his detention had taken place. In consequence, his detention between 10 April and 7 May 2003 was contrary to article 5(1) of the European Convention.

956. As is reflected in the guidance that would apply if damages were awarded in tort for false imprisonment in these circumstances (see paragraph 890 above), I consider that the level of compensation awarded for this deprivation of liberty should be set at a significantly lower rate than would have been appropriate if Mr Alseran's detention had been unlawful from the outset. That is because the shock and distress of being captured, taken to a prison camp and interned there are bound to have been much greater than the additional distress suffered as a result of being held at the camp for longer than was permissible under international humanitarian law. It is also reasonable to regard the moral injury caused by detaining a person for an hour or a day or a week without any legal justification at all as significantly greater than the injury caused by erroneously keeping someone who had been lawfully detained in detention for an equivalent additional period.

957. What happened in Mr Alseran's case is not unique. In each of the four lead cases I have found that the claimant was lawfully detained to begin with but was then kept in detention for a further period without any legal basis in breach of article 5 of the European Convention. Amongst the large number of unresolved claims in this litigation there may well be more cases of this kind. I think it appropriate in these circumstances to establish a rate of compensation to be awarded in such cases. Although an attempt could be made to fine tune awards to take account of the circumstances of each individual claimant, I consider it preferable in the interests of certainty and fair in what is in any case an unscientific exercise to treat all claimants equally. Furthermore, where there was a lawful period of detention of a week or more followed by a period of unlawful detention of under, say, two months, I think it reasonable to apply the same daily rate for each day that the claimant was wrongly detained. (In any case where the period of unlawful detention was longer, the daily

rate might reduce.) To select a suitable rate, I have relied on the *Evans* case mentioned earlier (see paragraph 890 above) for guidance, making an adjustment upwards for inflation since that case was decided and downwards in accordance with my general approach of discounting the sum that would be awarded on a tort claim governed by English law by around one half. The rate of compensation that I think it appropriate to apply in cases of this kind is £100 per day. Accordingly, for the 27 days for which he was unlawfully detained at Camp Bucca Mr Alseran will be awarded damages of £2,700.

Psychiatric injury

958. It was agreed by the expert psychiatrists who examined Mr Alseran that, since his internment, he has suffered from anxiety, depression and traumatic symptoms as result of his experiences at the hands of coalition forces. It is not possible, however, to attribute these long term psychiatric effects specifically to his ill-treatment at the Al-Seeba camp or to his unlawful detention after 10 April 2003 (or to the combination of those two factors alone). All that can be said is that his psychiatric injury was a consequence of the whole sequence of traumatic events which Mr Alseran experienced, starting with the shock of being captured by armed soldiers while in bed at home at night and including periods of detention in harsh conditions at Al-Seeba and at Camp Bucca which were lawful. No clear causal link has been established between the breaches of Convention rights which I have found and the psychiatric illness with which Mr Alseran has been diagnosed.

Conclusion

959. Accordingly, Mr Alseran will be awarded damages under the Human Rights Act for:

i) inhuman and degrading treatment following his capture, in a sum of £10,000; and

ii) his unlawful detention for 27 days, in a sum of £2,700.

MRE

960. I have found in part V that the MOD is liable to MRE under the Human Rights Act for breaches of article 3 consisting in: (i) a blow to the head inflicted, probably with a rifle butt, at Umm Qasr dock on 25 March 2003; and (ii) hooding with a sandbag for the duration of the journey from Umm Qasr dock to Camp Bucca on that day. I have also found that MRE's detention at Camp Bucca between 4 and 10 April 2003 was unlawful and in breach of article 5.

Head injury

961. As recorded in part V at paragraph 381 above, it was agreed by experts in neuro-otology instructed by the claimants and by the MOD that as a result of the blow to his head MRE has since suffered from migraine headaches, migraine-related balance disorder, visual vertigo and a central auditory processing disorder.

962. Under the Judicial College Guidelines MRE's head injury would be classified as a "less severe" head injury falling within category (A)(d) of chapter 6, for which there

is a bracket of £12,210 to £34,330. On a claim in tort I would have awarded a sum roughly in the middle of this bracket as compensation for MRE's pain and suffering and longer term disability. I would also have awarded damages for injury to feelings placing this incident for that purpose in the lower *Vento* band but with additional aggravated damages to reflect the gratuitous nature of the attack. Following the approach outlined above of discounting the damages recoverable under English tort law by around one half to take account of the greater value of money in Iraq, the sum that I award is £15,000.

963. In addition to these general damages, MRE has claimed compensation for medical expenses. He has not provided any adequate evidence to support his claim for past medical costs allegedly incurred as a result of his head injury (or any of his injuries). However, it is the agreed view of the neuro-otology experts that he requires treatment for his migraines and vertigo at a cost of £1,440 and this sum will also be awarded.

Hooding / eye injury

964. As described in part V (paragraphs 379–380 and 497), MRE was hooded with a sandbag for the duration of the journey by Land Rover from Umm Qasr dock to Camp Bucca on 25 March 2003, which would have taken around 40 minutes. It is clear that the experience was likely to and did have a traumatic impact on him. It is difficult to separate the physical feelings of discomfort, disorientation and suffocation from the fear, anxiety and other psychological effects of being hooded. Because of this, and as the Judicial College Guidelines do not cover this type of physical suffering, rather than allocating a separate sum for physical pain and suffering, I have treated this element as adding to the moral injury and mental distress sustained by the claimant and have used the *Vento* bands as a benchmark, placing this case towards the upper end of the middle *Vento* band.

965. As a result of having his head covered with a dirty sandbag, MRE also sustained a further injury consisting of a corneal laceration to his left eye. In the joint opinion of the ophthalmology experts this laceration (which has left a permanent corneal scar) was probably caused by a sharp object such as a shard of glass that was inside the sandbag. The experts also agreed that the laceration, together probably with corneal abrasion due to sand or dirt entering his eyes, would have resulted in eye pain and reduced vision which lasted for several days, as described by MRE, and also to what they identify as symptoms of an infective conjunctivitis, which continued until it was treated by a doctor who gave MRE eye drops shortly after his release from detention.

966. The eye injury would fall within category (A)(i) of chapter 5 of the Judicial College Guidelines, which indicates a bracket of £1,760 and £3,150 for transient eye injuries resolving within a few weeks. On a claim in tort, I would have made an award of £2,000.

967. In the circumstances, following the approach I have described of discounting the level of damages for non-financial harm that would be recoverable under the English law of tort by around one half to take account of the greater value of money in Iraq, I consider that an appropriate award of damages for the physical suffering, mental distress and humiliation caused by the hooding of MRE is £10,000, with an additional award of £1,000 in respect of his eye injury.

Unlawful detention

968. I have found that the initial period of MRE's detention by British forces was lawful, but there was a period of six days during which he was unlawfully detained at Camp Bucca. Applying the same rate of compensation as in Mr Alseran's case, MRE will be awarded damages for this breach of article 5 in a sum of £600.

Psychiatric injury

969. Like Mr Alseran, MRE has suffered and continues to suffer from symptoms of post-traumatic stress disorder since he was released from detention. The expert psychiatrists who examined him also agreed that he probably had a major depressive illness following his release, though that has since abated. However, although MRE identified the episode in which he was hooded as one of three occasions during his captivity when he felt that he was going to die, it was far from being the only traumatic event that he experienced. The two other events which on his own account caused him at least as much fear and distress were his capture and violent treatment by the soldiers who boarded his ship at night and the ordeal that he suffered when he was forced to strip naked on the warship where he was held overnight. It has not been established that British soldiers were responsible for these incidents. I have also held that the initial and longer part of MRE's detention at Camp Bucca, which he undoubtedly found very stressful, was lawful. In these circumstances, no clear causal link has been established between the psychiatric injuries sustained by MRE and the violations of his Convention rights for which the MOD has been found liable. (The same applies equally to KSU.)

Conclusion

970. In summary, MRE will be awarded damages under the Human Rights Act for:

i) inhuman and degrading treatment consisting in a blow to his head which has left him with some permanent disability, in a sum of £16,440 (comprising general damages of £15,000 and £1,440 for the cost of medical treatment);

ii) inhuman and degrading treatment consisting in being hooded with a sandbag, in a sum of £11,000 (including £1,000 as damages for an eye injury caused by the hooding); and

iii) his unlawful detention for six days, in a sum of £600.

KSU

971. I have found in part V that the MOD is liable to KSU under the Human Rights Act for two breaches of his Convention rights. First, like MRE, KSU was hooded with a sandbag at Umm Qasr dock and during the journey from there to Camp Bucca on 25 March 2003. I have also accepted his evidence that, after the sandbag was put over his head, he was forced to the ground and made to shuffle forwards on his knees before being shoved and kicked into the back of a Land Rover. For the suffering, humiliation and distress caused by this breach of article 3, he will be awarded the same compensation as MRE of £10,000. (In his case no additional physical injury

was sustained.) Second, KSU was unlawfully detained in breach of article 5 for the same period of six days as MRE, for which he will be awarded damages of £600.

Mr Al-Waheed

972. I have found in part VI that the MOD is liable to Mr Al-Waheed under the Human Rights Act for breaches of article 3 in (i) beating him after his arrest and (ii) subjecting him to further inhuman and degrading treatment during the initial period of his detention; and (iii) for a breach of article 5 in keeping Mr Al-Waheed in detention unlawfully for a period of 33 days after he should have been released.

Beating

973. I have found that following his arrest in the early hours of 12 February 2007, while he was being transported in a Land Rover to the British military base at Basra Airport, Mr Al-Waheed was repeatedly beaten on the upper back and arms by British soldiers with one or more implements which were probably rifle butts. He was also punched in the face and sustained a painful injury to the middle finger of his right hand. The physical injuries caused by this beating fall within the general category described in chapter 13 of the Judicial College Guidelines of "minor injuries", defined as injuries where there is a complete recovery within three months. I think it likely that Mr Al-Waheed had made a complete recovery within around 28 days which, in terms of duration of symptoms, would put his injuries at the top of bracket (b). The top of this bracket is £1,090. Such an award, however, would be appropriate for a single minor injury. The guideline states that "cases where there is significant pain or multiple injuries albeit full recovery within three months may fall outside this chapter." Not only did Mr Al-Waheed receive multiple injuries, but the beating to which he was subjected evidently lasted for a significant period of time (being inflicted over the course of a journey which lasted more than two hours) and must have caused severe pain. In these circumstances on a claim in tort I would have made an award of £5,000 as damages for the pain and suffering caused by his injuries.

974. At the time of the assaults, Mr Al-Waheed was lying on the floor of a Land Rover with his hands tied in plasticuffs and wearing blacked out goggles and ear defenders. The mental distress which he suffered must also have been exacerbated by the fact that the beating was prolonged as well as by the fact that he could not see his assailants, thus creating anxiety as to when and where the blows would land. If awarding damages for mental distress in tort, I would have placed this case towards the top of the middle *Vento* band and would also have made an award of aggravated damages (of £5,000) to reflect the malevolent nature of the soldiers' conduct.

975. Following the same approach as before of discounting the level of damages for non-financial harm that would be recoverable under the English law of tort by a factor of around one half to take account of the greater value of money in Iraq, I consider that an appropriate award of damages for this violation of article 3 is £15,000.

Further ill-treatment

976. I have also found that, during the initial period of his detention, Mr Al-Waheed was subjected to further inhuman and degrading treatment, consisting of "harsh" interrogation at Basra Airport involving a deliberate attempt to humiliate and insult

the prisoner, sleep deprivation during the first day and a half of his detention and deprivation of sight and hearing whenever he was taken out of his cell during the first 13 days of his detention (while he was undergoing interrogation).

977. I regard these three forms of mistreatment as being roughly equivalent to each other in terms of their gravity and the degree of mental distress or other suffering that they are likely to have caused. Had I been awarding damages in tort, I would have placed the harm attributable to each violation towards the lower end of the middle *Vento* band. In making my assessment, I have also used as reference points the sums that I am awarding for other mistreatment in these cases. On this basis the sum awarded for the injury caused by each of these three violations of article 3 will be £5,000, making a total award under this head of £15,000.

Unlawful detention

978. As with the other claimants, I have found that Mr Al-Waheed's arrest and initial period of detention were lawful. However, I have also held that after the review committee had voted to release him on 22 February 2007 his continued detention for a further 33 days until 28 March 2007 was unlawful and violated article 5 of the Convention. Applying the same rate of £100 per day as in the other cases, Mr Al-Waheed will therefore be awarded damages of £3,300.

Psychiatric injury

979. As with the other claimants, I do not think it possible to attribute Mr Al-Waheed's psychiatric injuries specifically to the violations of his Convention rights which have been established. Mr Al-Waheed experienced a series of shocking events, which began when in the middle of the night soldiers burst into the house where he was staying and arrested him at gunpoint. As mentioned, I have held that his arrest was lawful, as was Mr Al-Waheed's detention for the following 10 days in the north compound of the Divisional Temporary Detention Facility at Shaibah and his interrogation during that time. In addition, I think it clear from Mr Al-Waheed's evidence that factors which contributed very significantly to the post-traumatic stress disorder and depression from which he has suffered were his wife's miscarriage, the feud with her family after he was released from detention and his subsequent divorce. It cannot be said that those events flowed from any breach of Mr Al-Waheed's Convention rights. The cause of his arrest and the subsequent rift with his wife's family was the fact that her brother had been engaged in terrorist activities. In these circumstances I conclude that the necessary clear causal link between the violations found and Mr Al-Waheed's psychiatric condition has not been shown.

Other alleged damage

980. The same applies to the other medical conditions and to the financial losses for which Mr Al-Waheed has claimed compensation. In particular, it has not been established that the lower back pain or other joint pain from which Mr Al-Waheed suffers is a consequence of the beating that he received. These complaints as well as other physical symptoms may well be linked to his psychiatric condition but I have rejected his claim for damages for that.

981. Mr Al-Waheed made a claim for loss of earnings on the basis that, although he has remained in the same employment with the state electricity company since his detention, he has allegedly been prevented by his mental health problems from achieving the promotions and level of earnings that would reasonably have been expected. This claim also fails because of my conclusion that Mr Al-Waheed has not established the necessary clear causal link between the proven violations of his Convention rights and his psychiatric condition. In any event, the evidence of Mr Al-Waheed's earnings indicates that they have been increasing since 2007 and that he has been the highest paid employee in his department. I consider the evidence insufficient to show that he has not been promoted or that he has suffered any identifiable loss of income as a result of his psychiatric or other medical conditions.

Conclusion

982. In summary, Mr Al-Waheed is awarded damages under the Human Rights Act for:

i) inhuman and degrading treatment consisting in the beating to which he was subjected following his arrest, in a sum of £15,000;

ii) further inhuman and degrading treatment consisting in "harsh" interrogation, sleep deprivation and sensory deprivation, in a total sum of £15,000; and

iii) his unlawful detention for 33 days in a sum of £3,300.

Endnote

983. This judgment gives the reasons for my decisions in the four cases which have been tried as lead cases in this litigation. As I explained at the start, there are more than 600 outstanding claims. Although there is no assumption that the four cases which are the subject of this judgment are representative of the rest, some of the central conclusions reached – on issues such as whether it was lawful to detain the claimants, whether the conditions in which they were held and certain practices to which they were subjected amounted to inhuman or degrading treatment, whether their claims are time-barred and how any damages should be assessed – are likely to affect many other cases in the litigation. It is therefore not unreasonable to hope that the resolution of these issues will enable the parties to make a realistic assessment of the likely outcome of most of the remaining claims.