Neutral Citation Number: [2019] EWHC 263 (QB)

Case No: HQ18X02173

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 February 2019

Before :

MR JUSTICE MURRAY

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Between :

(1) VERICA TOMANOVIĆ **(2) SNEŽANA MILENKOVIČ** **(3) VESNA KONTIČ** **(4) DANIJELA TODOROVIČ** **(5) OLGA MILOVANOVIČ** **(6) ZLATA VESELINOVIČ** **(7) ZIVORAD JOVANOVIČ** **(8) MARIKA PERIC**	**Claimants**
- and -	
(1) THE EUROPEAN UNION **(2) THE COUNCIL OF THE EUROPEAN UNION** **(3) THE HIGH REPRESENTATIVE OF THE UNION FOR FOREIGN AFFAIRS AND SECURITY POLICY** **(4) THE EUROPEAN UNION RULE OF LAW MISSION IN KOSOVO (EULEX)**	**Defendants**

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Mr Becket Bedford and **Professor Panos Koutrakos** (instructed by **Savic & Co Solicitors**) for the **Claimants**
Mr Nicholas Khan QC (instructed by **the European Commission**, assisted by **Langleys Solicitors LLP**) for the **Defendants**

Hearing dates: 28 and 29 November 2018

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Approved Judgment

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

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MR JUSTICE MURRAY

Mr Justice Murray :

1. I have before me an application by the European Commission on behalf of the first, second and third defendants seeking:

   i) to set aside the service of the claim form and accompanying particulars of claim issued by the claimants on 14 June 2018 against the second and third defendants; and

   ii) a declaration that this court has no jurisdiction to hear the claim brought against the first, second and third defendants.

2. The claim is brought by eight individuals who are immediate family members of nine individuals who were tortured, killed or made to disappear, it is suspected, because they were ethnic Serbs. These crimes occurred during the course of war and inter-ethnic violence in Kosovo between June 1999 and July 1999 and, in one case, March 2000. It is not alleged that any of the defendants was in any way responsible for the crimes themselves. The claim is based on the alleged failure of the fourth defendant, the European Union Rule of Law Mission in Kosovo, known as "EULEX KOSOVO" or simply "EULEX", to investigate the crimes properly or at all.

3. Shortly before the hearing, the claimants indicated that they were discontinuing their claim against EULEX. Further references in this judgment to "the defendants" are to the first three defendants only.

4. By their claim, the claimants are seeking:

   i) a declaration that the defendants are in violation of the claimants' human rights under Articles 2, 4 and 47 of the Charter of Fundamental Rights of the European Union ("the Charter") and Articles 2, 3 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") to the extent that those Articles apply as general principles of the law of the European Union ("EU") under Article 6(3) of the Treaty on European Union ("the TEU") for their failure to investigate and prosecute properly, or at all, war crimes, inter-ethnic crimes or other serious crimes committed against their family members; and

   ii) damages, including aggravated and exemplary damages, for those human rights violations.

5. During the course of the hearing Mr Becket Bedford, counsel for the claimants, made it clear that the claimants were not seeking a declaration under Article 265 of the Treaty on the Functioning of the European Union ("TFEU"), which, among other things, permits, subject to certain conditions, a natural or legal person to bring an action before the Court of Justice to establish that an EU institution, body, office or agency has failed to act. I do not, therefore, address in this judgment submissions made on behalf of the defendants that the claimants have failed to satisfy the requirements of Article 265 TFEU in relation to this action. I note, however, that if this claim were to proceed, it would be necessary to clarify the legal basis on which the claimants are seeking declaratory relief from this court.

6. The European Commission is acting on behalf of the defendants in these proceedings, represented by Mr Nicholas Khan QC, who is a member of the Legal Service of the Commission. The defendants' case on jurisdiction, in a nutshell, is as follows:

    i) Of the defendants, only the first defendant, the EU, has legal personality under English law. For that reason, the service of the claim form on the second and third defendants should be set aside.

    ii) Against the EU, jurisdiction as to declaratory relief lies exclusively with the Court of Justice of the European Union ("the Court of Justice"), comprised of the Court of Justice ("the CJEU") and the General Court ("the GCEU") or, if that is not accepted, in any event this court does not have the power to grant the declaratory relief sought. Jurisdiction to grant damages against the EU for non-contractual liability lies exclusively with the Court of Justice. Accordingly, the application made by the defendants should be granted. If that is not accepted by the court, the court should not determine the issue in the claimants' favour without first making a reference to the Court of Justice under Article 267 TFEU.

7. In this judgment, a reference to "the Treaties" means the TEU and the TFEU.

Background

8. The circumstances giving rise to this claim are tragic and distressing. The emotional suffering of the claimants as a result of the crimes committed against their family members cannot be imagined. It is not necessary for present purposes to attempt to set out the full background supporting the claim that the claimants seek to bring against the defendants. I will merely attempt to sketch out as briefly as possible the principal elements, so that this jurisdictional dispute can be seen in its proper context.

9. During the course of armed conflict that began in 1998 in Kosovo between Serbian forces on one side and the Kosovo Liberation Army and other Kosovo Albanian armed groups on the other side and following the failure of international efforts to resolve the conflict, the North Atlantic Treaty Organisation ("NATO") began air strikes against the Federal Republic of Yugoslavia ("FRY") on 24 March 1999. The air strikes ended on 8 June 1999 when the FRY agreed to withdraw its forces from Kosovo.

10. On 10 June 1999 the Security Council of the United Nations ("UN") adopted its Resolution 1244 (1999) ("Resolution 1244"), authorising the establishment of KFOR, the international security force in Kosovo led by NATO, and the establishment of UNMIK, the international civil presence tasked with providing an interim civil administration in Kosovo to carry out various responsibilities set out in Resolution 1244 to establish and oversee the development of provisional democratic self-governing institutions in Kosovo to allow for a return to peace, stability and normality for its inhabitants. UNMIK assumed, among other things, responsibility for the administration of justice. A Special Representative of the UN Secretary General ("SRSG"), appointed in consultation with the Security Council, was given authority to control UNMIK and was mandated to coordinate closely with KFOR to ensure that both UNMIK and KFOR operated towards the same goals in a mutually supportive manner.

11. On 4 February 2008 EULEX was established by the Council of the European Union ("the EU Council") by Council Joint Action 2008/124/CFSP on the European Rule of Law Mission in Kosovo, EULEX Kosovo [2008] OJ L42/92 ("the EULEX Joint Action"). This decision of the EU Council was taken in the context of the leading role the EU was playing in relation to the resolution of the crisis in Kosovo and the region, given the European ramifications of the crisis and their relevance to the objectives of the EU's common foreign and security policy ("CFSP") under Article 11 TEU, as it then was (now Article 24 TEU). Accordingly, the establishment and activities of EULEX fall within the scope of the CFSP provisions of the TEU. Title V of the TEU deals with the EU's external action (foreign affairs policy). Chapter 2 of Title V (Articles 23 to 46) of the TEU sets out the principal provisions governing the CFSP.

12. On 9 December 2008 UNMIK's responsibility with regard to police and justice in Kosovo ended with EULEX assuming full operational control in the area of rule of law. UNMIK and EULEX agreed handover arrangements in relation to cases, files and related documents involving on-going investigations, prosecutions and other activities undertaken by international judges, prosecutors and police who had been acting for UNMIK.

13. The EULEX Joint Action was amended by the EU Council on a number of occasions, most notably, in 2014 and 2018 to reflect and promote a transition of EULEX's responsibilities and activities to the national authorities in Kosovo. The executive authority of EULEX under the EULEX Joint Action, as amended in 2014, including its mandate in relation to criminal justice, ended on 8 June 2018.

14. In 2006 the SRSG established a panel of independent experts, the Human Rights Advisory Panel ("the HRAP"), to examine complaints brought to it by any person or group of individuals of alleged human rights violations by or attributable to UNMIK in relation to the period 2005 to 2008, and to issue opinions making recommendations to the SRSG for action based on the HRAP's findings. The HRAP was comprised of independent experts. It issued its final report and ceased operations in 2016. The HRAP's opinions were advisory only. The HRAP had no powers to make binding recommendations or to enforce any type of sanction in relation to any human rights violations it found.

15. On 25 April 2013 the HRAP issued its opinion in relation to a complaint brought by the first claimant in relation to the disappearance of her husband, Dr Andrija Tomanović, on 24 June 1999. The HRAP found that there had been a violation by UNMIK of the rights of the victim and his next-of-kin under Articles 2 and 3 of the ECHR by UNMIK in relation to that case and made various recommendations, including that UNMIK urge EULEX and other competent authorities in Kosovo to continue the investigation into Dr Tomanović's disappearance and that UNMIK "take appropriate steps towards" payment of damages in relation to the human rights violations.

16. On 6 June 2013 the HRAP issued its opinion finding, among other things, a violation of the second claimant's rights under Article 2 of the ECHR in relation to a complaint brought by her in respect of UNMIK's failure properly to investigate the abduction and killing of her husband and her son. It made essentially the same recommendations as in the case of Dr Tomanović.

17. On or about 29 October 2009 the defendants established the Human Rights Review Panel ("the HRRP") as a panel of independent experts to review alleged human rights violations by EULEX in the performance of its executive mandate and to formulate recommendations for remedial action. As in the case of the HRAP, the HRRP has been given no power to issue or enforce binding recommendations or to award damages. Its function is purely advisory.

18. Between 11 and 19 March 2014, the second to eighth claimants registered complaints with the HRRP in relation to EULEX's alleged failure to investigate properly or at all the killing of their family members. On 11 June 2014 the first claimant registered her complaint with the HRRP in relation to EULEX's alleged failure to investigate properly or at all the disappearance and presumed death of her husband.

19. On 11 November 2015 the HRRP issued its decision and findings in relation to the first claimant's complaint, finding that there had been violations by EULEX of her human rights under Articles 2, 3, 8 and 13 of the ECHR and making six detailed recommendations, including that EULEX publicly acknowledge its human rights violations.

20. On 19 October 2016 the HRRP issued its decision and findings in relation to the complaints made by the second to eighth claimants finding that there were violations by EULEX of their human rights under Articles 2, 3 and 13 of the ECHR and again making six detailed recommendations, including that EULEX publicly acknowledge its human rights violations.

Procedural history

21. On 18 October 2017 the claimants issued a claim (Claim No. HQ17X03818, "the FCO Claim") against the Foreign and Commonwealth Office ("FCO"), the Ministry of Defence and others in relation to the alleged failure of the UK to take measures in accordance with Articles 7(4) and 10(2) of Council Joint Action 2008/124/CFSP and to ensure that the UK complied with its legal obligations arising under EU law and under the Human Rights Act 1998, in relation to the UK's seconded employee serving as EULEX's Chief Prosecutor of the Special Prosecution Office of the Republic of Kosovo.

22. The claimants issued the present claim against the defendants and EULEX on 14 June 2018. The defendants issued their application disputing jurisdiction on 7 August 2018, and EULEX issued a similar application disputing English jurisdiction and proper service on 31 August 2018. In September 2018 it was agreed between the parties that the applications should be heard together.

23. On 30 October 2018 the claimants applied to join the FCO Claim to the present claim. That application was not pursued by the claimants before me, however, pending the resolution of the question of jurisdiction in this claim.

24. As already noted, the claimants have discontinued their claim against EULEX, and therefore EULEX's application in relation to jurisdiction and service has fallen away.

The claimants' actions before the Court of Justice

25. On 22 July 2015, the first, second and third claimants each lodged with the GCEU an application for legal aid in connection with proposed actions against the EU Council, European Commission and the EU Civil Operations Commander in Kosovo for violations of their human rights on grounds similar to those raised by this claim. In order to qualify for legal aid, an applicant must satisfy a means test and the action must not appear to be manifestly inadmissible or manifestly lacking any foundation in law. On 21 November 2016 the applications by the first claimant (Case T-418/15 AJ *Tomanović v Council*) and the third claimant (Case T-416/15 AJ, *Kontič v Council*) were each rejected by the GCEU as manifestly inadmissible on the basis that "the facts of the proposed actions have not been set out in a coherent and comprehensible manner" in the application.

26. On the same day, however, the application by the second claimant (Case T-266/15 AJ, *Milenkovič v Council*) was granted on the basis that she satisfied the means test and her proposed action did not appear to be manifestly inadmissible in light of the judgment of the CJEU in Case-455/14 P *H v Council* EU:C:2016:469, a case to which I will return in due course. The third claimant did not, however, proceed with her action.

27. On 29 November 2016, the first claimant lodged another application for legal aid in a proposed action relating to the disappearance of her husband (Case T-840/16 AJ, *Tomanović v Council*). On 27 April 2017 the application was granted on the basis that she satisfied the means test and her proposed action did not appear to be manifestly inadmissible. The GCEU referred at paragraph 10 of its order to its order in relation to Case T-266/15 AJ and also to the CJEU's decision in the case of *H*.

28. The first claimant lodged her pleadings in relation to Case T-840/16 AJ on 19 July 2017. On 14 December 2017 the GCEU issued its decision dismissing the action on the basis that the Court manifestly lacked jurisdiction to hear and determine it and because of its manifest inadmissibility. The first claimant did not appeal the decision to the CJEU.

Relevant provisions of the Treaties and the Charter

29. Article 19(3) TEU deals generally with the jurisdiction of the Court of Justice, providing that it shall, in accordance with the Treaties, (i) rule on actions brought by a Member State, an institution or a natural or legal person, (ii) give preliminary rulings at the request of a court or tribunal of a Member States on the interpretation of EU law or the validity of an act adopted by an EU institution and (iii) rule in other cases provided for in the Treaties.

30. The first paragraph of Article 263 TFEU provides that the Court of Justice has jurisdiction to review legislative acts and other acts of European institutions and acts of bodies, offices or agencies of the Union, in either case where the relevant act is "intended to produce legal effects *vis-à-vis* third parties". The fourth paragraph of Article 263 confers on natural and legal persons the right to bring proceedings against the relevant institution, body, office or agency in respect of such an act "addressed to that person or which is of direct and individual concern to them" where the proceedings are brought "on grounds of lack of competence, infringement of an

essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application or misuse of powers".

31. Articles 274 TFEU provides:

> "Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States."

In other words, the Court of Justice has exclusive jurisdiction to hear disputes involving the EU as a party where jurisdiction is conferred on it by the Treaties. Where that is not the case, the jurisdiction of national courts is not excluded.

32. The final sentence of Article 24(1) TEU provides:

> "The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions [namely, the CFSP provisions], with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union."

33. Article 275 TFEU provides:

> "The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.
>
> However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union."

34. In other words, the Court of Justice does not have jurisdiction with respect to "these [CFSP] provisions" nor with respect to "provisions relating to" the CFSP nor with respect to "acts adopted" on the basis of the CFSP provisions of the Treaties. There are two exceptions to this exclusion of jurisdiction, namely:

i) where the Court of Justice has jurisdiction to monitor compliance with Article 40 TEU, which concerns the application of procedures and extent of powers of EU institutions exercising EU competences under Articles 3 to 6 TFEU; and

ii) where a natural or legal person (referred to in the fourth paragraph of Article 263) seeks to challenge "restrictive measures" that have been adopted by the

> Council under the CFSP provisions of the TEU. Restrictive measures are sanctions adopted under Article 215 TFEU for foreign policy reasons.

35. The key issues raised by this application are whether the jurisdiction of the Court of Justice is excluded in relation to this claim as a result of these provisions and, if so, whether the English court can and, if so, should exercise jurisdiction.

36. In relation to these issues, the claimants rely on the second sentence of Article 19(1) TEU, which provides:

> "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

37. The CFSP is a field covered by Union law. I have already referred to Chapter 2 of Title V of the TEU. In addition, Article 2(4) TFEU provides:

> "The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy."

38. Although Mr Khan did not positively advance it on behalf of the defendants, he drew my attention to the argument that had been raised by EULEX in its skeleton argument (which I had received and reviewed before I became aware that the claimants were discontinuing their claim against EULEX) that any jurisdiction a national court might have as a matter of EU law under Article 19(1) TEU in relation to a CFSP matter cannot, as a matter of domestic law, be exercised by the English courts by virtue of the exclusion of the provisions of the CFSP from the definition of "the Treaties" in section 1(2) of the European Communities Act 1972 and, in particular, sub-clauses (k) and (s). The intention to exclude the CFSP is reinforced at the end of section 1(2) by the words "any other treaty entered into by the EU (except so far as it relates to, or could be applied in relation to, the Common Foreign and Security Policy)".

39. The claimants seek to establish non-contractual liability of the defendants for breaches of their human rights and to claim damages. The second paragraph of Article 340 TFEU provides:

> "In the case of non-contractual liability, the Union shall in accordance with the general principles common to the laws of Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."

Article 268 TFEU confers jurisdiction on the Court of Justice in disputes relating to compensation for damage arising from its actions giving rise to non-contractual liability, cross-referencing the second paragraph of Article 340 TFEU.

40. The key human rights provisions of the Treaties and the Charter relevant to this claim are as follows:

i) Article 6(1) TEU provides that the Charter has the same legal value as the Treaties.

ii) Article 6(2) TEU provides that the EU shall accede to the ECHR, and that such accession shall not affect the EU's competences as defined in the Treaties. The EU has not, however, yet acceded to the ECHR.

iii) Article 6(3) TEU provides:

> "Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States shall constitute general principles of the Union's law."

iv) Article 47 of the Charter, which is headed "Right to an effective remedy and to a fair trial", includes as its first paragraph the following:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."

v) The second and third paragraphs of Article 47 set out basic procedural protections, namely, the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal, with the right to be advised, defended and represented and with legal aid to be made available to those who lack sufficient resources.

41. In relation to Article 6(2) TEU, on 18 December 2014 the CJEU issued Opinion 2/13 of the Court (Full Court) EU:C:2014:2454 on the proposed agreement under which the EU would have acceded to the ECHR ("the ECHR Accession Opinion"), concluding that the agreement was not compatible with Article 6(2) of the TEU or with Protocol (No 8) to the Treaties relating to Article 6(2). Advocate General Kokott in her View delivered on 13 June 2014 (EU:C:2014:2475), prepared to assist the CJEU in respect of the ECHR Accession Opinion, had concluded that the draft accession agreement was compatible with the Treaties, subject to certain conditions. In her View AG Kokott dealt in some detail with issues relating to legal protection in the context of CFSP at paragraphs 82 to 103, reaching conclusions that lend support to the views of the claimants in this case. Her View was, of course, only advisory. I will return to AG Kokott's View in due course.

Jurisdiction in relation to the second and third defendants

42. I deal first with the issue of jurisdiction in relation to each of the second defendant and the third defendant.

43. The second defendant is an institution of the EU, a body created by agreement between the UK and the other member states of the EU. A body created by treaty between the UK and other sovereign states does not have legal personality under English law simply by virtue of the UK's having entered into the treaty. This follows from the principle that a treaty is not part of English law unless and until it has been

incorporated into English law by legislation: *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (HL), 476H-477A (Lord Templeman).

44. The TEU and the TFEU are incorporated into English law by the European Communities Act 1972, however the ECA confers legal personality only on the EU itself, by virtue of Article 47 of the TEU. It is silent on the question of legal personality in relation to the EU institutions, including the second defendant.

45. There are other routes by which a body created by a treaty between sovereign states may be recognised as having legal personality under English law, but none of them apply in this case. Section 1 of the International Organisations Act 1968 provides that Her Majesty may confer on an international organisation the capacities of a body corporate by Order in Council, however no such Order in Council has been made in relation to the second defendant. Another route by which a body created by a treaty entered into by sovereign states is where the body has been created, pursuant to the relevant treaty, as a body with legal personality under the domestic law of one or more members of the relevant treaty: *Arab Monetary Fund v Hashim* [1991] 2 AC 114 (HL), 161B, 162F, 164A, 167E (Lord Templeman). There is no suggestion, however, that that applies in relation to the second defendant. There may be other routes by which a body created by treaty could be recognised as having legal personality in England, but no other such route applies in this case.

46. The third defendant is a Vice President of the Commission, with specific responsibilities and powers under the EU Treaties in relation to the EU's external action and, in particular, in relation to the CFSP. The third defendant leads and is supported in her work by the European External Action Service ("the EEAS"). The Commission is an EU institution. There is no Order in Council conferring legal personality on the third defendant or on the Commission, and no suggestion that either the third defendant or the Commission has been created as a body with legal personality under the domestic law of an EU member state.

47. Mr Bedford, for the claimants, drew my attention to Article 335 of the TFEU, which provides that in each member state the EU "shall enjoy the most extensive legal capacity accorded to legal persons under their laws" and shall be "represented by the Commission" or by one of the EU institutions in matters relating to its respective operation. Article 335, however, confirms the position that it is only the EU that enjoys legal capacity in legal proceedings in a member state. The Commission or other relevant EU institution participates in such proceedings as representative of the EU. The fact that English law recognises an international body as existing as a matter of fact and even contemplates its acting in a representative capacity does not mean that the body must enjoy legal capacity under English law to sue or be sued.

48. As neither the second defendant nor the third defendant has legal personality under English law, the English court has no jurisdiction to hear a claim brought against the second defendant or the third defendant. I will therefore make a declaration to that effect and set aside the claim forms that were purportedly served on each of them.

49. The fact that the second defendant and the third defendant have no legal personality under English law does not, of course, prevent this court from recognising the fact of their existence as EU institutions. Any non-contractual liability that would attach to

an act or omission of the second defendant or the third defendant would be properly ascribable to the first defendant. That, in my view, is in accord with the intention of Article 47 TEU, which ascribes legal personality only to the EU in relation to proceedings before a national court.

Jurisdiction in relation to the first defendant

50. In relation to the EU, Article 335 of the TFEU makes it clear that the EU shall enjoy the most extensive legal capacity accorded to legal persons under the laws of each member state. Article 335 also makes clear that the Commission shall normally represent the EU in legal proceedings before the courts of a member state, unless the matter relates to the operation of one of the other institutions of the EU.

51. Mr Khan, for the defendants, based their application contesting jurisdiction on the following propositions:

    i) the declaration sought by the claimants' either lies within the exclusive jurisdiction of the Court of Justice or, otherwise, cannot be made by this court against the EU; and

    ii) the claim for damages lies within the exclusive jurisdiction of the Court of Justice.

    He further submitted that, in any event, the application cannot be dismissed without first making a reference to the Court of Justice for a preliminary ruling pursuant to Article 267 of the TFEU.

52. As to the declaratory relief sought, Mr Khan submitted that if the claimants are not seeking a declaration under Article 265 of the TFEU, such relief is unavailable. He submitted that this court had already rejected the proposition that a national court may grant relief of a type unavailable before the Court of Justice, citing *Conex Banninger v European Commission* [2010] EWHC 1978 (Ch) [16]. To the extent that a declaration is sought as a prelude to damages, it is redundant, as the finding of liability for damages under Article 340 of the TFEU against the EU inherently involves a finding of liability by reference to illegal conduct (in this case, by EULEX).

53. As for the claim for damages, Mr Khan submitted that Articles 268 and 340 of the TFEU clearly grant exclusive jurisdiction to the Court of Justice. Case C-377/09 *Hanssens-Ensch v European Community* EU:C:2010:459 confirms that these provisions exclude the jurisdiction of national courts to grant damages against the EU. He also noted that the claimants state in their prayer for relief that they are seeking "aggravated and exemplary damages", despite such damages being unknown in the jurisprudence relating to Article 340 of the TFEU.

54. Mr Khan referred to Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* EU:C:1987:452 at paras 15-17 and 20 as support for his submission that national courts do not have the power to declare acts of EU institutions invalid. This is based on the need for EU law to be applied uniformly by national courts. Divergence between national courts on the validity of EU acts would jeopardise the unity of the EU's legal order and detract from the fundamental requirement for legal certainty. It

would also undermine the necessary coherence of the system for judicial protection established by the TEU and the TFEU.

55. Although *Foto-Frost* did not concern acts arising under the CFSP, Mr Khan submitted that these principles from *Foto-Frost* have been consistently relied on by the Court of Justice in all circumstances, including in cases relating to the CFSP. He cited Case C-72/15 *R (PJSC Rosneft Oil Co) v HM Treasury* EU:C:2017:236, [2018] QB 1, in which the Grand Chamber of the CJEU considered questions referred to it by the Divisional Court under Article 267 of the TFEU regarding the validity of various EU acts imposing restrictive measures in response to Russia's actions in the Ukraine (*R (OJSC Rosneft Oil Company) v HM Treasury* [2015] EWHC 248 (Admin)), as an example of the principles being applied in the context of the CFSP. Any other approach would be inconsistent with the emphasis given by the Court of Justice to the "necessary coherence" of the EU system of judicial protection, as that term is used in paragraph 78 of the *Rosneft* decision:

> "78. The necessary coherence of the system of judicial protection requires, in accordance with settled case law, that when the validity of acts of the European Union institutions is raised before a national court or tribunal, the power to declare such acts invalid should be reserved to the Court under Article 267 TFEU (see, to that effect, judgments of 22 October 1987, *Foto-Frost*, 314/85, EU:C:1987:452, paragraph 17, and of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 62). The same conclusion is imperative with respect to decisions in the field of CFSP where the Treaties confer on the Court jurisdiction to review their legality."

56. It did not follow from the final sentence of that paragraph, according to Mr Khan, that the *Foto-Frost* principle was inapplicable to CFSP matters outside the scope of the exceptions set out in the second paragraph of Article 275 of the TFEU.

57. Mr Khan further submitted that it is a fallacy to conclude that if the Court of Justice does not have jurisdiction over a CFSP matter, it follows from the second sentence of Article 19(1) of the TEU that a national court must have jurisdiction. That would lead to national courts having unlimited jurisdiction over CFSP matters, such that a national court could even annul the EULEX Joint Action. That would clearly be an absurd result and demonstrates why the jurisdiction of the national courts must necessarily be limited. He submitted that the jurisdiction of the national courts in relation to actions against the EU is intended to allow for actions against the EU in relation to, for example, commercial contracts entered into by EU institutions, bodies or agencies with suppliers or service providers.

58. As to the exclusion of the Court of Justice's jurisdiction provided for in Article 24(1) of the TEU and Article 275, Mr Khan accepted that the claim in this case does not fall within either of the exceptions to which I have referred at [34] above. It is necessary, however, to consider what is meant by "these provisions" in Article 24(1) in relation to the CFSP. It does not follow that every act taken pursuant to measures adopted within the CFSP is intended to be excluded. He submitted that it is only sovereign policy choices about actions under the CFSP that are intended to be excluded.

59. In Case C-439/13 P *Elitaliana SpA v EULEX Kosovo* EU:C:2015:753, the CJEU emphasised at paragraph 42 that Article 24(1) of the TEU and Article 275 of the TFEU:

> "introduce a derogation from the rule of the general jurisdiction which Article 19 TEU confers on the Court of Justice to ensure that in the interpretation and application of the Treaties the law is observed, and they must, therefore, be interpreted narrowly … ."

60. *Elitaliana* was an appeal to the CJEU from the GCEU concerning a procurement dispute relating to helicopters for EULEX. At paragraph 49 the CJEU concluded:

> "Having regard to the specific circumstances of the present case, the scope of the limitation, by way of derogation, on the Court's jurisdiction, which is provided for in the final sentence of the second subparagraph of Article 24(1) TEU and in Article 275 TFEU, cannot be considered to be so extensive as to exclude the Court's jurisdiction to interpret and apply the provisions of the Financial Regulation with regard to public procurement."

61. In other words, not all disputes arising in the context of the CFSP and falling outside the specific exclusions are necessarily outside the jurisdiction of the Court of Justice. In the case of *H*, to which I referred at [26] above, which was an appeal to the CJEU from the GCEU in a dispute arising in the context of the CFSP, the CJEU confirmed at paragraph 43 that the mere fact that a dispute arises in the context of the CFSP does not mean that the jurisdiction of the Court of Justice is excluded. In that case, the CJEU ultimately concluded that the Court of Justice had jurisdiction to review acts of staff management relating to staff members seconded by Member States in order to meet the needs of an EU mission at theatre level. The case of *H* concerned the European Union Police Mission in Bosnia and Herzegovina.

62. In Case T-286/15 *KF v The European Union Satellite Centre* EU:T:2018:718 the GCEU found that it had jurisdiction to determine a dispute arising in the context of the CFSP, where a former employee of the European Union Satellite Centre (SatCen) sought to challenge the process by which she was disciplined, suspended and ultimately dismissed. SatCen was established by a Joint Action of the Council under the CFSP provisions of the Treaties. The GCEU ruled at paragraph 99 of its decision that it had jurisdiction under Article 263 TFEU as regards the review of the legality of the contested decisions and under Article 268 TFEU, read in conjunction with the second paragraph of Article 340 TFEU, in relation to claims for non-contractual liability, taking into account Article 19(1) TEU and Article 47 of the Charter. In support of its conclusion, it referred to the decision of the CJEU in *H*.

63. The trend of this jurisprudence, submitted Mr Khan, is that the Court of Justice would find that it had jurisdiction over this claim. If that is the case, then the jurisdiction of this court is excluded.

64. Mr Khan also referred to the Protocol (No 7) to the Treaties on the Privileges and Immunities of the European Union as reinforcing the conclusion that only the Court

of Justice has jurisdiction to entertain an action for damages for non—contractual liability against the EU.

65. In opposition to the application, Mr Bedford submitted that this claim is clearly excluded from the jurisdiction of the Court of Justice by virtue of Article 24(1) TEU and Article 275 TFEU. The defendants have not argued, and cannot argue, that this claim falls within one of the exceptions in the second paragraph of Article 275 TFEU. This case can clearly be distinguished from the cases of *Elitaliana*, *H* and *KF*, two of which were concerned with staff management issues and one with procurement, albeit in each case in a CFSP context. The allegations in this case go to the heart of the EU's CFSP stated mission and policy objectives in Kosovo. This is apparently an unprecedented case. There is no relevant authority dealing with the issue of the jurisdiction of the Court of Justice in respect of alleged human rights violations in the context of the CFSP. Nothing in *Elitaliana*, *H* or *KF* casts doubt on the exclusion of this claim from the jurisdiction of the Court of Justice.

66. Mr Bedford further noted that in Case T-328/14 *Jannatian v Council* EU:T:2016:86, a case involving restrictive measures brought against an Iranian citizen as part of the sanctions intended to pressure the Islamic Republic of Iran into ending its development of nuclear weapons capability, the GCEU confirmed at paragraph 31 of its decision that the Court of Justice does not have the jurisdiction to award compensation for damages suffered as a result of the adoption of an act relating to the CFSP.

67. Mr Bedford noted that these conclusions are consistent with the submissions made by the second defendant in its Observations dated 2 February 2017 in opposition to the first claimant's application to the GCEU for legal aid in Case T-840/16 AJ. In particular, the second defendant, relying on *Jannatian*, submitted that the first claimant's claim for damages for non-contractual liability in that case did not fall within the jurisdiction of the Court of Justice by virtue of its relating to the CFSP. The second defendant submitted, however, at paragraph 13 of its Observations:

> "The Council would add that this does not in any way mean that the applicant would not have any remedy. First, the Council specifically established the HRRP, as part of the legal framework applicable to EULEX Kosovo, to review alleged human rights violations by EULEX Kosovo in the conduct of its executive mandate, as an independent and impartial external accountability body. If the Panel decides that a complaint is admissible, it reviews the complaint and renders a finding as to whether EULEX has violated human rights law applicable in Kosovo. Second, in any event, nothing prevents an applicant from bringing an action for damages before the Court of a Member State, in accordance with Article 19(1), second subparagraph TEU and Article 274 TFEU. Pursuant to the latter provision, '[s]ave where jurisdiction is conferred on the court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.' *The Union would not enjoy immunity from jurisdiction in such cases.*" (emphasis added)

68. Mr Bedford echoed these observations of the EU Council, submitting that, as the jurisdiction of the Court of Justice is excluded in relation to this claim, it follows from Article 274 TFEU that the jurisdiction of national courts is not excluded. Moreover, the second sentence of Article 19(1) requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. It is not in dispute that the CFSP is a field covered by Union law.

69. Mr Bedford submitted that the first sentence of Article 47 of the Charter, which has the same legal value as a provision of the Treaties, requires that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal, subject to basic procedural rights and protections set out in the remainder of Article 47. The findings of the HRRP demonstrate clearly that the rights and freedoms of the claimants have been violated. The exclusion of these claims from the jurisdiction of the Court of Justice means that the rights of the claimants under Article 47 can only be vindicated in a national court. A national court therefore must be able to exercise jurisdiction in relation to this claim, to make a finding of non-contractual liability and to award damages.

70. Mr Bedford submitted that this court must exercise jurisdiction in order to ensure that the defendants' acts conform with the basic constitutional character of the EU, especially with regard to fundamental rights. In this regard, he referred me to the Joined Cases C-402/05 P and C-412/05 P *Kadi v Council* EU:C:2008:461 at paragraphs 281-284.

71. Mr Bedford noted that there is strong support for the position of the claimants in the View of AG Kokott in respect of the ECHR Accession Opinion at paragraphs 82 to 103. She states, for example, her view at paragraphs 100 to 101 that the *Foto-Frost* principle cannot be applied to the CFSP, given that the CFSP is excluded from the jurisdiction of the Court of Justice. She says at paragraph 101:

> "There is no doubt that it is highly regrettable from the aspect of integration policy that , in matters relating to the CFSP, the Court of Justice has no jurisdiction to give preliminary rulings or a monopoly on ruling on validity as in *Foto-Frost*, because, as a result, the uniform interpretation and application of EU law in the context of the CFSP cannot be ensured. That is, however, a logical consequence of the decision by the Treaty legislature to continue to configure the CFSP essentially along intergovernmental lines, and to restrict the supranational element inherent in the jurisdiction of the Court of Justice to narrowly circumscribed exceptions which are exhaustively enumerated in the second paragraph of Article 275 TFEU."

72. AG Wahl in his opinion in the case of *H* disagrees with this proposition, opining at paragraph 102 that the *Foto-Frost* principle must apply even with regard to a claim relating to the CFSP, in spite of the fact that there is no EU court that can exercise jurisdiction in relation to the claim. He relies, however, on Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* and *Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* EU:C:1991:65 for the proposition that in appropriate circumstances a national court before which an EU act

is challenged may, where certain conditions are satisfied, suspend the applicability of an EU act to the applicant "and, where appropriate, award him damages".

73. Mr Bedford referred me to various pieces of academic commentary supporting these propositions. Mr Bedford submitted that the position of the claimants is also supported by the decision of the GCEU in the first claimant's case T-840/16 *Tomanović v Council*, in which, as I have already noted, the GCEU found that the Court of Justice lacked jurisdiction to hear the claim. In its judgment at paragraph 13, the GCEU distinguished the cases of *H* and *Elitaliana* from the first claimant's claim.

74. The *Foto-Frost* principle on which the defendants heavily rely, Mr Bedford submitted, does not apply to CFSP claims for the reason that the Member States have chosen to exclude those claims from the jurisdiction of the Court of Justice, as noted by AG Kokott in her View on the ECHR Accession Opinion. In any event, the *Foto-Frost* principle, however important, cannot trump the fundamental right of the claimants to have an effective remedy for proven human rights violations before a tribunal that complies with the conditions laid down in Article 47 of the Charter.

75. As to Mr Khan's reliance on Protocol (No 7) to the Treaties on the Privileges and Immunities of the European Union, Mr Bedford submitted that that is relevant only to the question of the enforcement of any award of damages against the defendants. It does not confer an immunity from jurisdiction on any of the defendants. I agree with Mr Bedford that the Protocol does not confer immunity from jurisdiction.

76. In my opinion, the difficulty at the heart of this case is the conflict between the *Foto-Frost* principle and the fundamental right of the claimants to have an effective remedy before an Article 47 compliant tribunal. This difficulty is created by the political decision of the Member States to exclude the CFSP provisions of the Treaties from the jurisdiction of the Court of Justice. It is clear from the cases of *Elitaliana*, *H*, *KF* and *Rosneft* that the exclusion of the jurisdiction of the Court of Justice is to be narrowly construed. There is, nonetheless, a considerable margin of uncertainty. The claimants are of the view that this is an unprecedented case, being a case concerned with human rights violations in the context of the CFSP that does not concern restrictive measures. I have seen nothing that suggests otherwise.

77. As a matter of principle, the claimants should have access to an effective tribunal that is capable of hearing their claim and, if finding in their favour, capable of giving an effective remedy in the form of compensatory damages.

78. I see a number of difficulties, however, with this court's attempting to fill the gap left by the exclusion of CFSP claims from the jurisdiction of the Court of Justice by asserting jurisdiction over this claim. The first is the technical issue of the exclusion of the CFSP provisions of the Treaties from the European Communities Act 1972. That, in my view, is an insurmountable hurdle. It is intrinsic to this claim that it arises out of the EU's implementation of the EULEX Joint Action, which is a CFSP measure. This is a human rights claim arising under EU law in relation to a CFSP measure. This Court would only be able to assert jurisdiction by virtue of its nature as a CFSP-related claim. The human rights aspect and the CFSP aspect of the claim are inextricably linked. But we have not implemented the CFSP provisions of the Treaties in our law.

79. If I am wrong about that, there are other difficulties. Because this is the first case of its kind, there is doubt as to whether this claim is, in fact, excluded from the jurisdiction of the Court of Justice. I found considerable force in Mr Khan's submission that the references to "these provisions" in Article 24(1) and to "provisions relating to [the CFSP]" and "acts adopted on the basis of those provisions" in Article 275 TFEU are intended to refer to the sovereign policy choices involved in the CFSP. The cases of *Elitaliana*, *H*, *KF* and *Rosneft* all demonstrate that the exclusion of the jurisdiction of the Court of Justice is to be narrowly construed and the mere fact that an issue arises in an CFSP context does not mean it is excluded from the jurisdiction of the Court of Justice.

80. It seems to me that there is a strong argument that a claim based on a violation by an EU institution, body, office or agency of human rights guaranteed by EU law falls outside the scope of the reference to CFSP provisions in Articles 24(1) TEU and 275 TFEU, provided that the claim, while arising in a CFSP context does not seek to annul or declare invalid the sovereign policy choice that gives rise to that context.

81. In this case, the claimants are not seeking to annul the EULEX Joint Action. They are seeking redress for failures in the carrying out of that sovereign policy choice that have led, if one accepts the findings of the HRRP, to the violation of their human rights. The CFSP is the context, but, as the cases of *Elitaliana*, *H* and *KF* demonstrate, that is not a sufficient basis for excluding jurisdiction where the nature of the claim is not itself concerned with a sovereign policy choice made by the Member States.

82. These arguments are reinforced, it seems to me, by Article 6 TEU, Article 19(1) TEU and Article 47 of the Charter and by the observations of the CJEU in the case of *Kadi*, to which I referred at [71] above.

83. I note that the first claimant made arguments along these lines and a number of related arguments, in considerably more detail and, if I may say so, with considerable force and eloquence, at paragraphs 26 to 36 and paragraphs 101 to 116 of her pleadings in Case T-840/16 AJ. The latter paragraphs, which deal with the applicability of the Charter to the activities of EULEX in Kosovo, are worth setting out in full here:

> "111. As the EU is bound to protect fundamental human rights in its CSDP activities, including those in the context of EULEX Kosovo, it is bound by the Charter pursuant to Article 6 TEU.
>
> 112. This conclusion follows the wording of Article 6 TEU, which is broad and does not exclude any activities from the scope of application of fundamental human rights.
>
> 113. The application of the Charter in CSDP activities is also borne out by the case-law of the European Court of Justice ('the Court of Justice' or 'the Court'). In Case C-105/03 *Pupino* ECLI:EU:C:2005:386, the Court ruled on an EU measure adopted under Police and Judicial Co-operation in Criminal Matters (a set of rules which predated the Lisbon Treaty and which was characterized by legal features similar to those of CFSP). It held as follows:

> '58. … in accordance with Article 6(2) EU, the Union must respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms … and as they result from the constitutional traditions common to the Member States, as general principles of law.'

114. Similarly, in Case C-354/04 *Gestoras v Council* ECLI:EU:C:2007:115 (an action concerning a CFSP and Police and Judicial Co-operation in Criminal Matters measure), the Court held:

> '51. … As is clear from Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights as general principles of Community law. It follows that the institutions are subject to review of the Conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union.'

115. The applicability of the fundamental human rights under EU law is also borne out by the judgment of the Grand Chamber of the Court of Justice in Case 130/10 *Parliament v Council* (ECLI:EU:C:2012:472). This was rendered in the context of restrictive measures that the EU had imposed on individuals following a CFSP act. The Court held that 'the duty to respect fundamental rights is imposed, in accordance with Article 51(1) of the Charter of Fundamental Rights of the European Union, on all the institutions and bodes of the Union' (para. 83). This statement is unqualified and does not exclude CFSP (and, therefore, also CSDP) activities. In the same judgment, the Court also held that 'the duty to respect fundamental rights bears also on Union measures giving effect to resolutions of the Security Council' (para. 84). This extract also suggests that respect for fundamental human rights is a requirement that governs the EU's conduct in the context of CFSP and CSDP activities[.]

116. It follows from the above that the Charter is binding on the EU in the context of its EULEX Kosovo activities."

84. As I have already noted, the GCEU did not accept those arguments. However, I also note that in that case the first claimant sought relief in the form of a wide range of orders addressed to the EU Council, the Commission and the EEAS to do various things, for example:

i) provide EULEX with a budget of EUR 29,100,000 to enable it to fulfil effectively its executive mandate;

ii) order the Head of Mission of EULEX to take measures to allow an effective investigation of the first claimant's husband's case "and all other cases of person who were killed or went missing after 12 June 1999"; and

iii) order the Council to require the UK and other Member States to cooperate with the EULEX investigation.

In fact, these are just three of the nine orders sought, as enumerated in paragraph 2 of the GCEU judgment. The GCEU found no proper basis in the Treaties for ordering any of this relief. In contrast to this claim, the first claimant did not appear to be seeking an order that the EU, in respect of its non-contractual liability, make good any damage caused by "its institutions or its servants" in the performance of their duties in relation to the alleged failures of EULEX to investigate properly or at all the disappearance or deaths of the claimants' relatives.

85. The GCEU said at paragraph 15 of its judgment:

> "In the third, and last, place, even if the application could be construed, on the basis of the citation of Articles 268 and 340 TFEU, as referring to the non-contractual liability of the European Union, the fact remains, as is clear from the fifth and sixth heads of claim (see paragraph 2, fifth and sixth indents above) and from paragraph 138 of the application, that *those provisions are relied on for the sole purpose of forming the basis of a request that the bodies referred to therein be ordered to cooperate to set up a mechanism for making good any damage caused by the international institutions acting in Kosovo*. However, such a request cannot be construed as referring to a way of making good damage, in accordance with Articles 268 and 340 TFEU, resulting from an infringement, by an institution or body of the Union, of the rules conferring rights on individuals." (emphasis added)

86. Accordingly, the GCEU did not have the opportunity to consider the arguments made by the first claimant in relation to a direct claim for damages for non-contractual liability under Articles 268 and the second paragraph of Article 340 as is sought by the claimants in this action.

87. As the Full Court of the CJEU noted in the ECHR Accession Opinion at paragraph 251:

> "[T]he Court has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions."

Although *Elitaliana*, *H*, *Rosneft* and *KF* all post-date the ECHR Accession Opinion, it appears still to be the case that the CJEU has not had the opportunity to consider the extent of its jurisdiction in relation to human rights violations in a CFSP context.

88. In my view, the argument that the Court of Justice should have jurisdiction over these claims is strengthened by the *Foto-Frost* principle. The policy underlying the *Foto-*

Frost decision must also apply in a CFSP context, as recognised by AG Wahl in his Opinion in the case of *H*. As neither his view on this question nor the contrary view of AG Kokott in her View on the ECHR Accession Opinion are binding upon this court, I will simply note that the Court of Justice does not appear to have ruled on this point. In the absence of authority to the contrary, I prefer AG Wahl's view, with all due respect to the view of AG Kokott and the academic commentaries to which I was referred.

89. Since a finding by a national court of non-contractual liability of the EU giving rise to damages would breach the *Foto-Frost* principle, there is no good reason, in my view, to depart from the view that the Court of Justice has exclusive jurisdiction in relation to a claim for damages under Article 268 TFEU and the second paragraph of Article 340 TFEU.

90. In light of the foregoing, I am of the view that the Court of Justice has exclusive jurisdiction over the matters raised by this claim. I acknowledge, however, that the position is uncertain and can only be resolved by a reference to the Court of Justice under Article 267(2) TFEU for a preliminary ruling.

91. I have concluded, however, that it would not be proper to seek a preliminary ruling from the Court of Justice for a number of reasons. In relation to the declaratory relief sought, it would not be a proper exercise of the Court's discretion to assert jurisdiction in circumstances where the legal basis for the declaratory relief sought is unclear. Even if that were satisfactorily clarified, the claimants already have the benefit of the findings of the HRRP to which therefore, even if the claimants were wholly successful, declarations by this court would add little or nothing. In relation to the damages sought, even if the claimants were wholly successful, damages awarded by this court could not be enforced against the EU or any of its institutions, bodies, offices or agencies in light of Protocol (No 7) on Privileges and Immunities.

92. It is also relevant that if jurisdiction were asserted, the nature of the case is such that the use of the Court's resources would be considerable, in circumstances where the claimants have not articulated a basis for asserting that this court is a *forum conveniens*. The claimants are bringing an action against the FCO, but that is not, in my view, sufficient to establish that this court is the most appropriate or convenient national court within the EU to try this case.

93. Moreover, on the question of whether to make a reference to the Court of Justice and on the question of whether it would be appropriate or even possible to exercise jurisdiction following a preliminary ruling permitting that exercise, I am entitled to weigh in the balance that there is a strong possibility that the UK will no longer be a Member State of the EU by the time the request for a preliminary ruling is resolved by the Court of Justice.

94. In summary, my primary view is that this court does not have jurisdiction to consider this claim by virtue of the exclusion of the provisions of the CFSP from the definition of "the Treaties" in section 1(2) of the European Communities Act 1972. If I am wrong about that, I am of the view that the Court of Justice has exclusive jurisdiction to hear this claim and to grant the damages sought. That, however, is not certain given the current state of the authorities and cannot be resolved without a reference to the Court of Justice for a preliminary ruling. It would be futile to seek such a ruling,

however, as this court would not be able to grant effective relief beyond what the claimants have already obtained by virtue of the findings of the HRRP. Furthermore, there would be other serious reasons to doubt whether it would be appropriate for this court to exercise jurisdiction even if a preliminary ruling from the Court of Justice confirmed that it did not have jurisdiction over this claim.

Conclusion

95. I will grant the application made by the Commission on behalf of the defendants and make the order sought, as set out in the first paragraph of this judgment.