Neutral Citation Number: [2025] UKIPTrib 11

Case Nos: **IPT/19/197/C**
& IPT/21/01/C

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 27 October 2025

Before :

LORD JUSTICE SINGH (PRESIDENT)
LORD BOYD OF DUNCANSBY (VICE-PRESIDENT)
ANNABEL DARLOW KC

- -

Between:

AL-HAWSAWI	**Complainant**
- v -	
(1) SECURITY SERVICE **(2) SECRET INTELLIGENCE SERVICE** **(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS** **(4) MINISTRY OF DEFENCE**	**Respondents**
AL-NASHIRI	**Complainant**
- v -	
(1) SECURITY SERVICE **(2) SECRET INTELLIGENCE SERVICE** **(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS** **(4) MINISTRY OF DEFENCE**	**Respondents**

- -

Edward Craven KC and Florence Iveson (instructed by **Redress**) appeared on behalf of the **First Complainant**
Hugh Southey KC and Robbie Stern (instructed by **Sternberg Reed**) appeared on behalf of the **Second Complainant**
David Blundell KC, Rory Phillips KC, Charlotte Ventham KC, Rosemary Davidson, Amelia Walker, Karl Laird and Thomas O'Donohoe (instructed by the **Treasury Solicitor**) appeared on behalf of the **Respondents**
Samantha Broadfoot KC and Matthew Fraser appeared as **Counsel to the Tribunal**

Hearing dates: **10-13 June 2025** (OPEN)

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Lord Justice Singh:

Introduction

1. This is the judgment of the Tribunal, to which all the members of the panel have contributed.

2. Both the Complainants have been in the detention of the United States ("US") for over 20 years, for much of that time at Guantanamo Bay. The period with which these complaints are concerned was between 2002 and 2006 (in the case of Mr Al-Nashiri) and between 2003 and 2006 (in the case of Mr Al-Hawsawi). In earlier judgments, this Tribunal granted the Complainants an extension of time to pursue these complaints despite the length of time that has passed since 2006: *Al-Hawsawi v Security Service & Ors* [2023] UKIPTrib 5; [2024] 1 All ER 671, and *Al-Nashiri v Security Service & Ors* [2023] UKIPTrib 9. This was principally because of the importance of the issues raised and the public interest in their investigation by an independent judicial body (this Tribunal).

3. It should also be emphasised that the Complainants were at no time within the "jurisdiction" of the United Kingdom ("UK") for the purposes of Article 1 of the European Convention on Human Rights ("ECHR"). They were never on the territory of the UK nor did the UK exercise any extra-territorial jurisdiction over them. It has never been suggested that Mr Al-Hawsawi fell within the jurisdiction of the UK. In the case of Mr Al-Nashiri this was suggested at an earlier stage of this case but that suggestion was rejected by the Tribunal: see [2023] UKIPTrib 6; [2024] 2 All ER 399. These are not cases, therefore, such as those which have been brought by these Complainants against other European States (Poland, Romania and Lithuania), which were held by the European Court of Human Rights to have permitted the US to detain them on their territory and to have violated their rights in the ECHR on the basis that they were complicit in their torture or other ill-treatment by US authorities: see *Al-Nashiri v Poland* (2015) 60 EHRR 16, *Al-Nashiri v Romania* (2019) 68 EHRR 3 and *Al-Hawsawi v Lithuania* (2025) 80 EHRR 12. Nor is there any suggestion in the present cases that the Respondents directly engaged in any ill-treatment of the Complainants. What is alleged is that the Respondents were complicit in their ill-treatment by US authorities and that this was unlawful as a matter of the public law of this country. Accordingly, what the Tribunal has before it are "complaints" in the strict sense, brought under section 65(2)(b) of the Regulation of Investigatory Powers Act 2000 ("RIPA"), and not "claims" brought under section 7(1)(a) of the Human Rights Act 1998 ("HRA"). Without intending any disrespect we will refer to the Complainants from hereon as "Al-Hawsawi" and "Al-Nashiri".

4. It is also important to stress that this Tribunal does not sit to conduct a public inquiry. There have been other such inquiries, including the Detainee Inquiry, chaired by Sir Peter Gibson, which was established in 2010 and issued an interim report in 2012 but did not proceed to a full report, and one conducted by the US Senate, which reported in 2014. The UK's Intelligence and Security Committee ("ISC") also examined some of the general issues which arise. The ISC published a report in 2018, which was the spur for these complaints to the Tribunal. But the focus of this Tribunal must be a more

limited one, important though it is: to investigate what happened in these two particular cases and to determine whether the Respondents' conduct in relation to them was unlawful, applying the principles of judicial review (i.e. principles of public law).

5. Furthermore, as will become apparent later, this Tribunal does not exercise a criminal jurisdiction. Accordingly, it cannot determine the criminal liability of any individual or corporate body if and in so far as it may be suggested that they have been guilty of criminal offences, for example by being complicit in torture.

6. The Respondents are all public authorities. The first three Respondents are the intelligence services of this country. The fourth is the Ministry of Defence ("MOD"). In accordance with their usual policy, the Respondents "neither confirm nor deny" the factual allegations made by the Complainants and addressed the facts only in CLOSED, although they make it clear that they do not thereby intend to minimise the gravity of the allegations.

7. The Respondents have accepted in OPEN that, during the relevant period, they "were too slow to appreciate" the risk of mistreatment to detainees in the detention of the Central Intelligence Agency ("CIA"), and that "more detailed guidance should have been in place prior to 2006 to cover their broader engagement with the US in this context." For the avoidance of doubt, the Respondents "reiterate that they do not participate in, solicit, encourage or condone the use of torture or CIDT [cruel, inhuman or degrading treatment]." (OPEN Skeleton Argument, para 2).

8. The principal complaint made against the Respondents is that they engaged in intelligence sharing with the US authorities during the relevant period, in particular by:

> "providing questions and/or information to US officials to be put to [the Complainant] during interrogations and/or by receiving information obtained from [the Complainant] during interrogations, while being aware/the circumstances were such that they ought to have been aware, that [the Complainant] was being subjected or was likely to be subjected to torture and/or ill-treatment."

9. The gravamen of the complaints is therefore that, while it is not alleged that the Respondents themselves engaged in the torture or other ill-treatment of the Complainants, they were "complicit" in that torture or ill-treatment.

10. We conducted an OPEN hearing over four days, at which the Complainants' representatives made extensive submissions of law, to which the Respondents responded.

11. We also conducted a CLOSED hearing at which we heard oral evidence from corporate witnesses and were also assisted by oral submissions from Counsel to the Tribunal ("CTT"), who made submissions in support of the Complainants' cases having had access to all the CLOSED material, and on behalf of the Respondents.

12. We express our gratitude to all counsel, including the OPEN representatives, for their written and oral submissions in these important cases.

The Complainants' cases in outline

13. What follows is a summary of the OPEN material relied on by the Complainants.

Al-Nashiri

14. Abd Al-Rahim Al-Nashiri, a Saudi Arabian national, was first arrested and detained by the United States in Dubai in the United Arab Emirates in mid-October 2002. In subsequent years, he was rendered to detention sites within different countries, including Thailand, Poland, Morocco, Romania, Lithuania and Afghanistan, in addition to being held in military detention at the United States Naval Base at Guantanamo Bay in Cuba. He is currently detained at Guantanamo Bay.

15. Al-Nashiri is suspected of being an Al-Qaida operational planner and their Chief of Operations in the UAE Gulf. He is suspected of having orchestrated the terrorist attacks on USS Cole in Yemen in October 2000 and MV Limburg, a French civilian oil tanker, in Yemen. He is further suspected of involvement in the bombings of US embassies in East Africa in 1989.

16. Following his capture, Al-Nashiri was rendered to Detention Site COBALT, in Afghanistan, on 10 November 2002. Shortly afterwards, on 15 November 2003, he was rendered to the Catseye Prison in Thailand.

17. Al-Nashiri was moved from Thailand to Stare Kiejkuty, also known as Detention Site BLUE, in Poland, between 4 and 5 December 2002. On 6 June 2003, he was rendered to Rabat in Morocco, before he was moved again to Guantanamo Bay, on 23 September 2003. He was rendered to Romania on 12 April 2004, to Lithuania on 5 October 2005 and to Afghanistan in March 2006. He was rendered to Guantanamo Bay in September 2006 where he remains until the present day.

Al-Hawsawi

18. Mustafa Adam Ahmed Al-Hawsawi, a Saudi Arabian national, was arrested and detained on 1 March 2003 in Rawalpindi, Pakistan and shortly afterwards, was transferred to the custody of US authorities. He is suspected of having been a financier of the 11 September 2001 attacks. He was detained at the same time as Khalid Sheikh Mohammed ("KSM") who was alleged to be a key planner of 9/11.

19. Al-Hawsawi was initially rendered to Detention Site COBALT in Afghanistan and ultimately transferred to Guantanamo Bay in September 2006, where he remains until the present day. In the intervening years, he was rendered to detention sites in

Afghanistan, either Morocco or Romania, and Lithuania, in addition to being held in detention in Guantanamo Bay for a period of time between 2003 and 2004.

20. The interrogation of Al-Hawsawi by the CIA commenced on about 10 March 2003. On 21 November 2003, Al-Hawsawi was rendered to Guantanamo Bay. Subsequently, in March or April 2004, he was rendered to either Morocco or Romania, before his rendition to Detention Site VIOLET in Lithuania in 2005. He was rendered to Detention Site BROWN in Afghanistan in March 2006.

The jurisdiction of the Tribunal

21. The jurisdiction of this Tribunal is statutory. It has only such jurisdiction as Parliament has conferred upon it, no more and no less. The Tribunal was established by section 65(1) of RIPA.

22. Section 65(2) of RIPA provides that the jurisdiction of the Tribunal shall be, among other things, (b) "to consider and determine any complaints made to them which, in accordance with subsection (4) … are complaints for which the Tribunal is the appropriate forum".

23. Section 65(4) provides that the Tribunal is "the appropriate forum" for "any complaint if it is a complaint by a person who is aggrieved by any conduct falling within subsection (5) which he believes (a) to have taken place in relation to him, … and (b) … to have been carried out by or on behalf of any of the intelligence services."

24. Section 65(5) provides that conduct falls within subsection (4) if (whenever it occurred) it is (a) "conduct by or on behalf of any of the intelligence services".

25. Section 67 of RIPA governs the exercise of the Tribunal's jurisdiction. Subsection (1) provides that, subject to subsections (4) and (5) – which are not material for present purposes – "it shall be the duty of the Tribunal – … (b) to consider and determine any complaint … made to them by virtue of section 65(2)(b) …"

26. Section 67(3) provides that, where the Tribunal consider a complaint made to them by virtue of section 65(2)(b), it shall the duty of the Tribunal "(a) to investigate whether the persons against whom any allegations are made in the complaint have engaged in relation to (i) the complainant, … in any conduct falling within section 65(5); (b) to investigate the authority (if any) for any conduct falling within section 65(5); and (c) in relation to the Tribunal's findings from their investigations, to determine the complaint by applying the same principles as would be applied by a court on an application for judicial review."

27. As this Tribunal has explained in its earlier judgments in these two cases, it has jurisdiction to consider two types of case. The first is a claim under section 7(1)(a) of the HRA in relation to any proceedings which fall within section 65(3) of RIPA: see section 65(2)(a). The second type of case is a "complaint" made under section 65(2)(b) of RIPA.

28. As we note above what is before the Tribunal are two "complaints" under section 65(2)(b) of RIPA. As this Tribunal explained in its earlier judgment in *Al-Hawsawi*, at paras 39-40, a complaint in this context is not "proceedings". In part at least the Tribunal has an investigatory role: see section 67(3)(a) and (b). As the Tribunal said at para 39: "This is why the Tribunal's procedure is not only a conventional adversarial one but includes an inquisitorial element." As the Tribunal continued at para 40, once it has conducted the "investigations" referred to in section 67(3)(a) and (b), it then has the duty "to determine the complaint by applying the same principles as would be applied by a court on an application for judicial review": see section 67(3)(c) of RIPA.

29. At the OPEN hearing before us, and even more in the Skeleton Arguments, there were extensive submissions about principles of criminal law, for example the law relating to aiding and abetting a criminal offence. In our judgment, these issues fall outside the jurisdiction of this Tribunal. The first point to note is that criminal charges are usually brought against an individual, although there can be criminal offences which are committed by a body corporate. The present complaints have been brought against institutions, not against any individual. More fundamentally, we have no jurisdiction to determine issues of criminal liability, or for that matter civil liability if by that is meant something different from public law (for example the law of tort). By statute this Tribunal must apply the same principles as would be applied by a court on an application for judicial review, in other words the principles of public law, no more and no less.

30. It follows from the above analysis that this Tribunal has no jurisdiction to determine questions of criminal liability or civil liability. In particular, as the Tribunal has already held in its earlier judgment in the case of *Al-Hawsawi*, it has no jurisdiction to decide questions of tortious liability. Nor does the Tribunal have jurisdiction to determine questions of *individual* liability: the complaints are made against the Respondents as institutions and not against any individual officer.

31. At this juncture we should say a word about the role of the Tribunal in making findings of fact. In *Lee v Security Service* [2024] UKIPTrib 7 the Tribunal (Singh LJ (President), Lord Boyd of Duncansby (Vice-President) and Judge Rupert Jones) explained that the Tribunal has only a limited role when it comes to questions of fact but this has to be understood in the context of the issues that were before the Tribunal in that case.

32. First, there will be claims which are brought under section 7(1)(a) of the HRA. *Lee* itself was such a claim. Although a number of public law arguments were raised in that case, and no pleading point was taken about this, there was in fact no "complaint" under section 65(2)(b) of RIPA in that case: see para 92. As we have already said, the present cases are not claims under the HRA. Where a claim does arise under the HRA, the approach which the Tribunal should take was summarised by the Tribunal in *Lee*, at para 168. Of particular relevance is what was said at para 168 (iv), in the context of a claim that there has been a violation of a qualified right such as the right to respect for private life in Article 8 of the ECHR: "when the Tribunal is conducting the fair balance exercise under the fourth part of the proportionality test, and weighs the interests of national security on one side of the balance, it cannot substitute its own findings of fact for those of the Respondent. Its role is to consider whether the factual basis on which

the Respondent acted had a rational basis." That proportionality exercise is not the exercise which the Tribunal has to perform in the present cases.

33. Secondly, there was a specific ground of challenge to the Interference Alert which was the subject of *Lee* that the Security Service had made a material error of fact: see paras 102-104. The Tribunal rejected that ground of challenge. It said, at para 103, that, because section 67(2) of RIPA requires it to apply the principles which would be applied by a court on an application for judicial review, the Tribunal could "see no reason to depart from the conventional principle that judicial review is not available where there is an alleged error of fact, so long as there was a rational basis for the Respondent's view of the facts." But it is important to place that statement of principle, which is undoubtedly correct, in its proper context. There the ground of challenge itself was that the Respondent had acted on the basis of a material error of fact.

34. But public law grounds are many and varied. Depending on the nature of the ground of challenge, a court or tribunal applying the principles of judicial review may have to make findings of fact for itself. To take just one example which does not arise in the present cases but illustrates the point of principle, a decision by a public authority may be challenged on the ground that it was reached after a process which was unfair, perhaps because it is alleged that the decision-maker was biased. The allegation may be that there was actual bias because the decision-maker accepted a bribe from an applicant for a licence. Or it may be alleged that there was apparent bias because the decision-maker was a close friend of the applicant and so a fair-minded observer who knows all the facts would think that there was a real possibility of bias. In that type of case, the court or tribunal will first have to make findings of fact ("what happened?") before it can then apply the relevant principles of judicial review, for example the tests for actual or apparent bias. When it makes such findings of fact it will apply the conventional standard of proof in civil cases, that is the balance of probabilities. In that sort of context, the Tribunal is not confined to asking only whether there was a rational basis for the Respondent's view of the facts but must decide for itself what the facts are.

35. This is reinforced in the particular context of this Tribunal by the express terms of RIPA. Section 67(3) expressly envisages the following stages in the process which the Tribunal must follow when considering a "complaint" made under section 65(2)(b). First, the Tribunal must "investigate" the matters set out in paragraph (a) of section 67(3). Secondly, it must make "findings from their investigations": see the first clause of paragraph (c) of section 67(3). Thirdly, "in relation to" those findings, the Tribunal must "determine the complaint by applying the same principles as would be applied by a court on an application for judicial review."

36. It follows that the Tribunal may, indeed must, make findings of fact for itself when it is necessary to do so in order to address the particular ground of challenge. This is not a departure from conventional judicial review principles; it is an application of those principles. In the present cases, one of the grounds of challenge is that the Respondents failed to have regard to an obviously material consideration, that is the risk of torture or other ill-treatment of the Complainants when they were in US detention. That is a conventional ground of challenge applying judicial review principles but, in order to

address it, the Tribunal may well have to make findings of fact that are relevant to that ground.

Parliamentary privilege

37. In these cases the Complainants have placed reliance on a report issued by the Intelligence and Security Committee ("ISC") of Parliament on 28 June 2018: 'Detainee Mistreatment and Rendition 2001-2010'. Since this potentially raised an issue of Parliamentary privilege, and the related issue of a possible breach of Article 9 of the Bill of Rights 1689, we invited written submissions on behalf of the Speaker of the House of Commons, which were helpful and for which we are grateful.

38. At the OPEN hearing before us, the submissions for the Complainants on this issue were made by Mr Edward Craven KC. His primary submission was that it is unnecessary for the Tribunal to rule on any issue of Parliamentary privilege because it would have access to all the underlying relevant CLOSED material that the ISC did. He made it clear that the only reason the Complainants have cited passages from the ISC report is that their OPEN representatives do not have access to the primary material and have used it as no more than a convenient OPEN summary of that material. In the alternative, Mr Craven made submissions to the effect that there would be no breach of Parliamentary privilege or Article 9 of the Bill of Rights in any event.

39. Having seen the relevant CLOSED material, and heard submissions about it from both CTT and the Respondents, we have reached the conclusion that Mr Craven's primary submission should be accepted. There is no need for this Tribunal to rule on any issue of Parliamentary privilege because we do not need to rely on anything said in the ISC report in order to adjudicate on these complaints. We can reach conclusions on these complaints by referring to the primary material, the relevant part of which has been drawn to our attention by CTT and counsel for the Respondents.

Material legislation

40. The Security Service (MI5) was placed on a statutory footing by the Security Service Act 1989 ("the 1989 Act").

41. Section 1(1) of the 1989 Act provides that there "shall continue to be a Security Service … under the authority of the Secretary of State." Section 1(2) provides that the "function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means." Section 1(4) provides that it "shall also be the function of the Service to act in support of the activities of police forces, the National Crime Agency and other law enforcement agencies in the prevention and detection of serious crime."

42. Section 2(1) of the 1989 Act provides that the "operations of the Service shall continue to be under the control of a Director-General appointed by the Secretary of State." Section 2(2) provides that the Director-General "shall be responsible for the efficiency of the Service" and "it shall be his duty to ensure", among other things, that (a) "there are arrangements in place for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of the prevention or detection of serious crime or for the purpose of any criminal proceedings".

43. The Secret Intelligence Service ("SIS" or "MI6") and the Government Communications Headquarters ("GCHQ") were put on a statutory footing by the Intelligence Services Act 1994 ("the 1994 Act").

44. Section 1(1) of the 1994 Act provides that there "shall continue to be a Secret Intelligence Service … under the authority of the Secretary of State" and that, subject to subsection (2), "its functions shall be – (a) to obtain and provide information relating to the actions or intentions of persons outside the British Islands; and (b) to perform other tasks relating to the actions or intentions of such persons." Section 1(2) provides that the functions of SIS "shall be exercisable only", among other things, (a) "in the interests of national security, with particular reference to the defence and foreign policies of [His] Majesty's Government in the United Kingdom"; and (c) "in support of the prevention or detection of serious crime."

45. Section 2(1) of the 1994 Act provides that the operations of SIS "shall continue to be under the control of a Chief of that Service appointed by the Secretary of State." Section 2(2) is in similar terms to those of section 2(2) of the 1989 Act and imposes similar duties on the Chief of SIS. In particular, that person must ensure that there are "arrangements" for securing that no information is obtained by SIS except so far as necessary for the proper discharge of its functions; and that no information is disclosed by it except so far as necessary (i) for that purpose, (ii) in the interests of national security, (iii) for the purpose of the prevention or detection of serious crime, or (iv) for the purpose of any criminal proceedings.

46. Sections 3 and 4 of the 1994 Act relate to GCHQ and its Director. As it has not been suggested that there is any material difference between those provisions and the ones that govern the functions of the Security Service and SIS, it is unnecessary to set them out here.

47. Section 7 of the 1994 Act should also be noted. Section 7(1) provides that: "If, apart from this section, a person would be liable in the United Kingdom for any act done outside the British Islands, he shall not be so liable if the act is one which is authorised to be done by virtue of an authorisation given by the Secretary of State under this section." Subsection (2) provides that "liable in the United Kingdom" in this context means "liable under the criminal or civil law of any part of the United Kingdom." Subsection (3) provides that the Secretary of State shall not give an authorisation under that section unless he is satisfied "(a) that any acts which may be done in reliance on the authorisation or, as the case may be, the operation in the course of which the acts may be done will be necessary for the proper discharge of a function of the Intelligence Service or GCHQ; …"

48. It has not been suggested before us that section 7 has any relevance to the issues that arise for this Tribunal in the present cases. By its terms section 7 is concerned with criminal or civil liability. It is not concerned with the principles of judicial review, which, as we have said above, are the principles which the Tribunal must apply in these cases.

The prohibition of torture in the common law and in international law

49. Both Mr Craven and Mr Hugh Southey KC emphasised before us that (i) the common law has long regarded the practice of torture with abhorrence and (ii) torture has in more recent times become a crime in international law, giving rise to universal jurisdiction, and the prohibition of it is now part of the *ius cogens*, that is a peremptory norm of international law which permits of no derogation, even in time of war or other public emergency. This is reflected in the terms of the 1984 UN Convention against Torture ("UNCAT") and in Article 3 of the ECHR. They submit that these fundamental principles are relevant to consideration of the public law grounds of challenge which arise in these two cases, for example what are the powers of the Respondents (the *vires* issue) and what are obviously material considerations which the Respondents were required as a matter of rationality to take into account?

50. Of particular importance in this context is the decision of the House of Lords in *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] 2 AC 221. Although it is accepted that the actual issue which fell for determination in that case is not directly in point, our attention has been drawn to very strong statements of principle in the opinions of the seven judges who sat in that case. We need refer only to some of those dicta for present purposes.

51. In *A (No 2)* the appellants had been certified and detained as suspected international terrorists under sections 23 and 25 of the Anti-terrorism, Crime and Security Act 2001, which was enacted in response to the atrocities of 11 September 2001 (commonly referred to as "9/11"). They appealed to the Special Immigration Appeals Commission ("SIAC"). The central question in that case was whether SIAC could "receive evidence which has or may have been procured by torture inflicted, in order to obtain evidence, by officials of a foreign state without the complicity of the British authorities": see para 1 (Lord Bingham of Cornhill). SIAC held that such evidence was not legally inadmissible. A majority of the Court of Appeal upheld that decision. The House of Lords allowed the appeal and remitted the cases to SIAC for reconsideration. Although the Appellate Committee was unanimous in its decision that evidence which was known to have been obtained by torture could not be admitted, it was divided on the issue whether it was admissible if there was a risk that it had been obtained by torture. The majority (Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Carswell and Lord Brown of Eaton-under-Heywood) held that SIAC should adopt the test of admissibility in Article 15 of UNCAT and consider whether it was established by such enquiry as was practicable to carry out, and on a balance of probabilities, that the evidence had been obtained by torture; if satisfied that it was so established, SIAC should decline to

admit the evidence but, if they were doubtful, they should admit it, bearing in mind their doubt when evaluating it.

52. At para 11, Lord Bingham noted that, "from its very earliest days, the common law of England set its face against the use of torture" and its rejection of it for a long time stood in contrast to the lawful use of torture in continental Europe. Lord Bingham said that: "In rejecting the use of torture … the common law was moved by the cruelty of the practice as applied to those not convicted of crime, by the inherent unreliability of confessions or evidence so procured and by the belief that it degraded all those who lent themselves to the practice." At para 13, he emphasised that the "condemnation" of torture by the common law should be categorised as "a constitutional principle".

53. At para 27, Lord Bingham said that, if and to the extent that development of the common law was called for, "such development should ordinarily be in harmony with the United Kingdom's international obligations". He then addressed the state of international law in detail and concluded, at para 33, that there "can be few issues on which international legal opinion is more clear than on the condemnation of torture." He noted that offenders have been recognised as the "common enemies of mankind".

54. The international crime of torture, which attracts universal jurisdiction, has been incorporated into domestic law by section 134 of the Criminal Justice Act 1988.

55. At para 112, Lord Hope said that: "The use of such evidence is excluded not on grounds of its unreliability – if that was the only objection to it, it would go to its weight, not to its admissibility – but on grounds of its barbarism, its illegality and its inhumanity. The law will not lend its support to the use of torture for any purpose whatever. It has no place in the defence of freedom and democracy, whose very existence depends on the denial of the use of such methods to the executive."

56. In similar vein, at para 150, Lord Carswell quoted the well known and powerful statement by the Supreme Court of Israel in *Public Committee against Torture v Israel* (1999) 7 BHRC 31, at para 39: "Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitute an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties."

57. It will be apparent that the actual issue in *A (No 2)* concerned the admissibility of evidence that has been obtained by torture before a *judicial* body. But the opinions of members of the Appellate Committee also touched on the question whether such evidence could be received and acted upon by the *executive*.

58. Lord Nicholls of Birkenhead addressed this issue at para 68-69. At para 68, he said that the "intuitive response" is that "if the use of such information might save lives it would be absurd to reject it. If the police were to learn of the whereabouts of a ticking bomb it would be ludicrous for them to disregard this information if it had been procured by torture." Similarly, he said, the information may properly be taken into account when considering whether to arrest someone. At para 69, he continued: "In both these instances the executive arm of the state is open to the charge that it is condoning the use of torture. So, in a sense, it is. The government is using information obtained by

torture. But in cases such as these the government cannot be expected to close its eyes to this information at the price of endangering the lives of its own citizens. Moral repugnance to torture does not require this."

59. At para 131, Lord Rodger said that the stance that such information should never be taken into account, even by the executive, had "the great virtue of coherence" but that "coherence is bought at too dear a price. It would mean that the Home Secretary might have to fail in one of the first duties of government, to protect people in this country from potential attack."

60. At para 93, Lord Hoffmann said that: "It is not the function of the courts to place limits upon the information available to the Secretary of State, particularly when he is concerned with national security. In his dealings with foreign governments, the type of information that he is willing to receive and the questions that he asks or refrains from asking are his own affair."

61. We have found particularly helpful what Lord Brown had to say about this topic at paras 160-161. At para 160, he said that unswerving logic might suggest that no use should ever be made of information which has been obtained by torture: "a revulsion against torture and an anxiety to discourage rather than condone it perhaps dictate that it should be ignored: the ticking bomb must be allowed to tick on." But, he continued, "there are powerful countervailing arguments too: torture cannot be undone and the greater public good thus lies in making some use at least of the information obtained, whether to avert public danger or to bring the guilty to justice." At para 161, Lord Brown noted that there are two types of information involved: first, the actual statement coerced from the detainee under torture and, secondly, the further information to which the coerced statement, if followed up, may lead ("the fruit of the poisonous tree" as it is sometimes called). He said that the executive may make use of both types of information. He said that not merely "is the executive entitled to make use of this information; to my mind it is bound to do so. It has a prime responsibility to safeguard the security of the state and would be failing in its duty if it ignores whatever it may learn or fails to follow it up." But he added this caveat: "Of course it must do nothing to promote torture. It must not enlist torturers to its aid (rendition being perhaps the most extreme example of this). But nor need it sever relations even with those states whose interrogation practices are of most concern."

62. Seeking to apply those considerations to the present context, we would accept the essence of the submission advanced by Mr Craven to this effect: (i) there is nothing unlawful in principle if the Respondents receive information which has been obtained by the torture of a detainee by the authorities of another state (what might be called merely passive receipt of the information); but (ii) they must not do anything actively to encourage the obtaining of information by torture, for example by providing questions to be asked by those authorities of the detainee in circumstances where the Respondents are aware, or ought reasonably to be aware, that torture is being used (this is not mere passive receipt but involves positive action by the Respondents).

63. On behalf of the Respondents Mr David Blundell KC sought to persuade us that there is no such principle of public law. He placed particular reliance on the majority judgments in *R (Elgizouli) v Secretary of State for the Home Department* [2020] UKSC

10; [2021] AC 937. That case concerned the possible imposition of the death penalty in the US on the appellant's son, who had once been a British citizen but who had been deprived of that citizenship. The US authorities were conducting investigations into the activities of certain terrorists, including the appellant's son. Two of the offences being investigated carried the death penalty. In response to a request for mutual legal assistance, the Secretary of State sought a written assurance that the US authorities would not seek to impose or carry out the death penalty. Although that assurance was refused, the Secretary of State nevertheless provided the mutual legal assistance, most of which consisted of providing personal data relating to the appellant's son.

64. The appellant sought judicial review of that decision on two grounds. The first was that it was in breach of a common law rule which would prevent the facilitation by the UK of the imposition of the death penalty in breach of fundamental principles of justice and the rule of law, including international law. The second ground was that it breached the restrictions on transferring personal data to third countries imposed by section 73 of the Data Protection Act 2018. The Divisional Court rejected both grounds. The Supreme Court allowed the appeal on the second ground, to do with the Data Protection Act, but the majority (Lord Kerr JSC dissenting) rejected the first ground. It is the majority judgments about that ground upon which Mr Blundell relies.

65. The main judgment for the majority was given by Lord Carnwath JSC. At para 190, Lord Carnwath set out certain "principles of law or policy" that were not in doubt. We will set out the most relevant here. The first is that it is the clear policy of the UK to oppose the death penalty in all circumstances, to seek to increase the number of abolitionist countries and to seek restrictions on the use of the death penalty in countries where it is still used. Secondly, in those countries which are subject to the ECHR, such as the UK, the Thirteenth Protocol has abolished the death penalty in all circumstances and this admits of no derogation. Thirdly, however, there is as yet "no settled rule of customary international law to like effect".

66. Furthermore, at para 191, Lord Carnwath said that: "there is as yet no established principle (under the common law, the European Convention or any other recognised system of law), which prohibits the sharing of information relevant to a criminal prosecution in a non-abolitionist country merely because it carries a risk of leading to the death penalty in that country." Against that background, Lord Carnwath said at para 192, the appellant's counsel "faced an uphill task in seeking to persuade the court that it should now fashion a common law rule to that effect."

67. It is also important to note that, at para 195, Lord Carnwath drew attention to the fact that Parliament had recently made express provision in respect of death penalty assurances in one context: see section 16 of the Crime (Overseas Production Orders) Act 2019, which amended section 52 of the Investigatory Powers Act 2016. The possible relevance of this was two-fold. First, it confirmed that "this is an area in which Parliament remains directly involved." Secondly, "where the statute applies, the Secretary of State is required to seek assurances, but there is no specific prohibition on the exchange of information where no such assurance is ultimately obtained."

68. It was also important, in Lord Carnwath's view, that Parliament had also recently legislated in this field, in the shape of the Data Protection Act, which provided "a

detailed and carefully calibrated regime for the transfer of such information to third countries": see para 205.

69. Of most direct relevance to the present context is Lord Carnwath's commentary on the decision of the House of Lords in *A (No 2)*, on which the appellant's counsel relied, at paras 193-194. Lord Carnwath noted that the common law had, from its very earliest days, set its face against torture. "By contrast … the death penalty has never as such attracted the attention of the common law. It is notable that the developments of the law have come relatively recently, from Parliament or the European Court of Human Rights, rather than the domestic courts."

70. The other main judgment for the majority was given by Lord Reed PSC (with whom Lady Black and Lord Lloyd-Jones JJSC agreed). Baroness Hale and Lord Hodge DPSC gave short concurring judgments, in which they agreed with both Lord Carnwath and Lord Reed. Lord Reed agreed with Lord Carnwath but gave some additional reasons for rejecting the common law ground. He stressed, at para 170, the "constraint" on judicial law-making, in contrast to the "pre-eminent constitutional role of Parliament in making new law". He said that the development of the common law "builds incrementally on existing principles."

71. Lord Reed also stressed that, although the common law could be said to recognise a "right to life", attracting "the most anxious scrutiny", it "might more aptly be described as a value to which the courts attach great significance when exercising their supervisory jurisdiction": see paras 175-176. He said that the authorities do not "vouch the existence of right in the sense in which that term is used in the law of obligations".

72. We consider that the issue and reasoning in *Elgizouli* are distinguishable from the present context. Although we would not wish in any way to diminish the high value which the common law attaches to human life, the death penalty was not unlawful at common law, as torture has been for centuries. Nor has the death penalty been abolished in international law until relatively recently and there is still no rule of customary international law to that effect. By way of example, the original text of the ECHR, which was agreed in 1950, included an exception to the right to life in Article 2 for the judicial imposition of the death penalty, which no doubt reflected what was the prevalent practice in the Council of Europe, including the UK, at that time. In more recent times, the death penalty has come to be abolished in Europe, initially in the Sixth Protocol, which still admitted of some exceptions, for example in time of war, and now in the Thirteenth Protocol, which admits of no exceptions at all. However, the position in international law more generally remains that there is no equivalent to UNCAT nor is there any rule of customary international law prohibiting the death penalty. A number of democratic countries, such as the US and India, retain the death penalty.

73. Furthermore, the reasoning of the Supreme Court in *Elgizouli* was influenced by the fact that Parliament had recently legislated in the field of the death penalty and assurances to be obtained from third countries with whom information was to be shared and had not imposed an absolute bar on the provision of such information even if assurances were not forthcoming. Against that background, it was very difficult, if not impossible, for the common law to be developed incrementally to achieve what Parliament had recently decided not to do.

74. Accordingly, we do not accept the analogy suggested by Mr Blundell in reliance on *Elgizouli*.

Other forms of cruel, inhuman or degrading treatment

75. We do not accept that the above principles apply with the same force to other forms of cruel, inhuman or degrading treatment ("CIDT"). For example, the absolute terms of the principle at common law was expressed in its abhorrence of torture, not other forms of ill-treatment. In international law, the prohibition of torture is part of the *ius cogens* and the crime of torture attracts universal jurisdiction but other forms of CIDT do not.

76. Nevertheless, we would accept that, as an aspect of the public law principle of rationality, if a respondent were to share information with a foreign intelligence service (for example by requesting that certain questions be put to a detainee or by making use of information obtained from interrogation of that person by the foreign liaison service) it would be unlawful for it to do so in circumstances where it either knew or ought reasonably to have known that the detainee was likely to be subjected to CIDT.

The decision in the "Third Direction" case

77. At the OPEN hearing we heard submissions about the potential relevance of the decision of the Court of Appeal in *Privacy International & Ors v Secretary of State for Foreign and Commonwealth Affairs & Ors* [2021] EWCA Civ 330; [2021] QB 1087 (the "Third Direction" case). It is important to be clear about what the Court did and did not hold in that case. The Court upheld the decision of the majority of this Tribunal (Singh LJ (President), Lord Boyd (Vice-President) and Sir Richard McLaughlin) that the Security Service had the *vires* to "authorise" agents to participate in potentially criminal activities.

78. We say "potentially" because, at the point where the "authorisation" was given, it did "not necessarily follow that the conduct of the agent, or instructing handler, actually *is* necessarily criminal": see para 60 (emphasis in original). This is because, as the Court continued at para 61, for example, "the necessary mental element for the postulated crime or attempted crime may well be lacking" or there may be a potential defence, such as the defence of another person or of property.

79. We also note in this context what was said in the majority judgment in the Tribunal: [2019] UKIPTrib IPT_17_186. At para 65, it was noted that "it is, generally speaking, not the function of the civil law to state in advance whether or not a criminal offence would be committed in a particular case: see the line of authority beginning with *Imperial Tobacco Ltd v Attorney General* [1981] AC 718 which was summarised in *R (Rusbridger & Anr) v Attorney General* [2003] UKHL 38; [2004] 1 AC 357 at paras 16-18 (Lord Steyn). All will depend on the precise facts of a particular case, usually to be judged after the event rather than before."

80. We also place "authorise" in quotation marks, as the Court of Appeal did for example at para 76, because the Court emphasised, as the majority of this Tribunal had done, that the legal effect of the so-called authorisation was not to confer any immunity, civil or criminal, at all. The only issue in the case was whether the Security Service had the *vires* to do what it had been doing since before the 1989 Act. The Court of Appeal held that it did have that *vires*, initially under the prerogative and continued by the 1989 Act as an implied statutory power. The Court described the distinction in law between a power and an immunity as being "critical" (para 75) and this "important differentiation" was again emphasised at para 99.

81. The Court also emphasised the fact that there was no general immunity under the 1989 Act at paras 77-78. The Court drew a contrast with other provisions such as section 7 of the 1994 Act, which does have the legal effect of conferring an immunity in the circumstances where it applies, in particular it only applies to "any act done outside the British Islands": see subsection (1).

82. More recently, Parliament has taken the decision to confer true legal immunities in a wider range of circumstances, including in principle for acts done in the UK: see the Covert Human Intelligence Sources (Criminal Conduct) Act 2021. But no one has suggested that that change in the law has any relevance to the facts of the present cases, which occurred during the period 2002-2006.

83. Returning to the present cases, no one has suggested that the Respondents had the *vires* to engage in torture or other ill-treatment, whether directly or by way of complicity in the actions of the US; or that anyone purported to authorise such "criminal activities". What the limits may be of the *vires* identified in the "Third Direction" case was not explored in that case because it did not need to be. What was in issue in that case was the initial question whether the Security Service had the *vires* to "authorise" any criminal conduct at all. The submission for the complainant in that case was that there was no such *vires* but the Tribunal (upheld by the Court of Appeal) held that in principle there was *vires* because, otherwise, even to authorise an agent to be a member of a proscribed organisation would be *ultra vires* since such membership is by definition a criminal offence. In our judgment, the "Third Direction" case therefore has no relevance to the issues which arise in the present case.

Other relevant principles of judicial review

84. Under Ground 2 it is submitted on behalf of the Complainants that, if there was *vires* to do something on the part of the Respondents, it cannot lawfully be exercised for a purpose which is improper or otherwise contrary to the policy and object of the legislation which confers the *vires*. This is often referred to as the *Padfield* principle: see *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. For example, a respondent could not provide questions to a foreign liaison service to be put to a detainee for some private purpose or because they wanted the detainee to be tortured or subjected to CIDT. We have no hesitation in accepting that the *Padfield* principle applies in the present context.

85. Under Grounds 3 and 4, Mr Craven and Mr Southey submit that the Respondents were required as a matter of public law to have regard to the risk of torture or CIDT as a mandatory relevant consideration in the exercise of their discretion to engage in information sharing with US authorities; to comply with the "*Tameside*" duty of inquiry (see *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, at 1065 (Lord Diplock)); and to act rationally. The overarching theme of each of these arguments is that the Respondents had to act in a way which was rational, having regard to the absolute nature of the prohibition of torture.

86. In *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673; [2019] 1 WLR 4647, at para 70, the Court of Appeal approved the summary of the six relevant principles governing the *Tameside* duty by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin); [2015] 3 All ER 261, at paras 99-100. For present purposes, it will suffice to mention two of those principles. The third principle is that the court should not intervene merely because it considers that further enquiries "would have been sensible or desirable"; it should intervene "only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision." The fourth principle was that "the court should establish what information was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient."

87. It is also well established in public law that there will be some considerations that are "so obviously material" that no reasonable decision-maker could have failed to consider them: see the line of authority summarised by Lord Hodge DPSC and Lord Sales JSC in *R (Friends of the Earth) v Heathrow Airport Ltd* [2020] UKSC 52; [2021] 2 All ER 967, at paras 116-121.

88. In both lines of authority the governing principle is rationality but, as was emphasised on behalf of the Complainants, the concept of rationality (or "reasonableness", as it is put in some of the authorities) is applied in a flexible way in modern public law and has careful regard to the context: see e.g. *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591, at para 96 (Lord Mance JSC), para 109 (Lord Sumption JSC), and para 114 (Lord Reed JSC). Here we must bear in mind that the context is the absolute and fundamental prohibition of torture.

[REDACTED]

The grounds of complaint

89. The grounds in each of the two cases before us were not formulated in identical terms in each case: in *Al-Hawsawi* see para 5 of the Amended Complaint, para 5 of the Agreed List of OPEN Issues, and para 104 of the Skeleton Argument; in *Al-Nashiri* see para 2.2 of the Amended Complaint, para 5 of the Agreed List of OPEN issues, and para 5 of the Skeleton Argument. To some extent the issues were clarified during the course of the OPEN hearing before us.

90. In substance, however, the grounds are essentially the same and, insofar as the Respondents engaged in any relevant conduct, those grounds appear to us to raise the following issues of public law:

(1) Did the Respondents have the *vires* (legal power) to do as they did?

(2) Assuming that they had the power to do as they did, did the Respondents use that power for an improper purpose, contrary to the principle in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997?

(3) In exercising such power, did the Respondents fail to take account of relevant considerations which they were required as a matter of law to take into account? Related to this is the issue of whether the Respondents failed to make reasonable inquiries as required by the principle in *Tameside*.

(4) Did the Respondents exercise such power irrationally, in other words in such a way that no reasonable authority could have done?

91. There were some suggestions in the case of *Al-Nashiri* that there was an additional ground of complaint. That ground was not formulated in identical terms in the various documents to which we have referred. For example, in para 5(iv) of the Agreed List of OPEN issues, it was put as follows:

> "[the alleged conduct] constituted a breach by the Respondents of a common law duty not to aid, abet, encourage or facilitate, or conspire knowingly in the commission of any treatment by the US against the Complainant which constituted torture and/or cruel, inhuman or degrading treatment."

92. In the Skeleton Argument, at para 5(iv), it was formulated slightly differently:

> "[the acts of the UK Agencies were] in breach of a common law duty not to acquiesce in treatment constituting torture or cruel, inhuman or degrading treatment".

93. As we have said above, the Tribunal does not have jurisdiction to pronounce on issues of criminal or civil liability. This last suggested ground of complaint, however formulated, is redolent of the language of criminal law (and perhaps the law of tort) but this Tribunal cannot decide issues of criminal or tortious liability. This Tribunal is required by statute to apply the principles that would be applied by a court on an application for judicial review, in other words principles of public law. If and in so far as this last suggested ground of complaint raises issues of public law, in our view, it can be subsumed within the earlier four issues which we have set out above. By the conclusion of the OPEN hearing we did not understand Mr Southey to urge any other course upon us but, even if he had, we would not have taken it.

94. In CLOSED there was an additional issue that was raised by CTT.

[REDACTED]

The Complaints in more detail

When the acts complained of took place

95. Both Complainants are currently detained in conditions which impose restrictions upon their ability to communicate with their legal representatives and preclude each from providing instructions on specific factual matters to their legal representatives in the United Kingdom. The factual basis of the claim of each Complainant is therefore drawn exclusively from open-source material.

96. The Complainants have placed reliance upon a number of open-source reports, memoranda, judgments and other documents, including:

    i) The '*Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*' ("the US Senate Committee Report") published in December 2014.

    ii) A CIA document entitled '*Disposition Memorandum, CIA Release Doc CO6541723*'.

    iii) Judgments of the Strasbourg Court, including *Abu Zubaydah v Poland* (Application No. 7511/13, judgment of 24 July 2014); *Abu Zubaydah v Lithuania* (Application No. 46454/11, judgment of 31 May 2018); *Al-Nashiri v Poland* (2015) EHRR 16; *Al-Nashiri v Romania* (2019) 68 EHRR 3; *Al-Hawsawi v Lithuania* (2025) 80 EHRR 12.

    iv) The report entitled '*Detainee Mistreatment and Rendition 2001-2010*' which was published by the Intelligence and Security Committee of Parliament on 28 June 2018.

Al-Nashiri

97. On behalf of Al-Nashiri, it is stated that between October 2002 and early September 2006, he was held incommunicado and subjected to various authorised and unauthorised forms of brutal interrogation. Following his detention, he was held by the Emirati authorities for approximately four weeks, during which time he was interrogated. He was then transferred to CIA custody and taken on 10 November 2002 to a detention facility in Afghanistan, where he was subject to enhanced interrogation techniques ("EIT") and unauthorised prolonged stress positions, which included having his hands shackled above his head and being kept naked.

98. When transferred to the site in Thailand known as 'Catseye' on 15 November 2002, he was kept naked, shackled and threatened with rape and with the arrest and rape of his family. CIA records indicate that from 27 November 2002, he was subjected to waterboarding.

99. In December 2002, when transferred to a CIA detention site in Poland, he was subjected to EIT on at least four occasions, including a mock execution. He was threatened with a drill whilst naked, shackled and hooded, and forced to adopt painful stress positions. He was scrubbed with a stiff brush on his naked skin and caused severe pain by his interrogators, who stood on his shackles. He was subjected to sleep deprivation, including being placed naked in a standing sleep deprivation position with his arms affixed over his head for several days. His interrogators stood on his shackles, causing him severe pain.

100. Al-Nashiri's Complaint Form alleges that he was transferred to Morocco on 6 June 2003, where he may have been tortured, albeit there is little information in the public domain as to his treatment whilst detained in Morocco. On 23 September 2003, he was transferred to Guantanamo Bay, where the Complaint Form states he was held in secret and in isolation.

101. The Complaint Form alleges that, when transferred to a detention facility in Romania in April 2004, he was subjected to forced rectal feeding with no evidence of medical necessity, and may have been subject to other mistreatment, including sleep deprivation, conditions of confinement and sensory deprivation.

102. In October 2005, when transferred from Romania to Lithuania, the Complaint Form states that Al-Nashiri may have been subject to mistreatment, albeit there is limited available information as to his treatment whilst within that jurisdiction.

Al-Hawsawi

103. On behalf of Al-Hawsawi, there are no specific allegations of mistreatment during his initial detention in Pakistan following his capture by Pakistani forces. It is alleged that, when transferred to the custody of the US authorities, he was thereafter detained by the CIA under the High Value Detainee Programme. He was rendered to Afghanistan and detained at Detention site COBALT, where he was subject to ill-treatment and torture. His first interrogation by the CIA was on 10 March 2003, when Al-Hawsawi was subject to 'water dousing', a facial slap, and stress positions.

104. The Complaint Form alleges that on 5 and 6 April 2003, Al-Hawsawi was subjected to water dousing, walling, attention grasps, facial holds, cramped confinement, psychological pressures and possibly, rectal feeding without medical necessity. This information has been drawn in part from the redacted US Senate Committee Report. The water dousing technique used on Al-Hawsawi was later deemed by some sources to approximate to waterboarding. He was subjected to rectal examinations conducted with excessive force, which resulted in serious health consequences.

105. Between 7 and 12 May 2003, he was subjected to 'bathing' and standing sleep deprivation.

106. When transferred to Guantanamo Bay on or around 21 November 2003, it is stated that he was subjected to EIT, including sleep deprivation, and was held incommunicado in inhuman conditions.

107. In around late March or early April 2004, the Claim Form alleges that Al-Hawsawi was forcibly rendered from Guantanamo Bay to a CIA black site within an unknown country, likely to be Morocco or Romania.

108. In either February or October of 2005, it is stated that Al-Hawsawi was subject to rendition to a CIA black site in Lithuania, Detention Site VIOLET, where he suffered from medical conditions requiring urgent medical treatment. He was there subjected to a virtually complete sensory isolation from the outside world and a regime which included blindfolding or hooding, solitary confinement, continuous noise of high and varying intensity, continuous light and the use of leg shackles.

109. In respect of his detention in Afghanistan, following rendition in March 2006, Al-Hawsawi makes no specific allegations of mistreatment. In September 2006, he was rendered back to Guantanamo Bay.

[REDACTED]

The nature and timing of information entering the public domain

110. From early 2002, reports entered the public domain, both in the form of articles published by the media and within statements and reports issued by international organisations and public bodies, which raised concerns as to the alleged mistreatment of detainees held in US custody. Examples of such reporting are set out below.

111. On 16 January 2002, the United Nations High Commissioner for Human Rights issued a statement that recent reports of the arrival of Al-Qaida and Taliban prisoners at Guantanamo Bay had included allegations about the manner in which the prisoners were transported and the conditions in which they were held. The High Commissioner affirmed the principle that all detainees must at all times be treated humanely, consistent with the International Covenant on Civil and Political Rights and the Geneva Conventions of 1949.

112. In January and February of 2002, questions were asked on a number of different occasions in Parliament as to issues concerning detainees and Guantanamo Bay.

113. Early reporting of rendition, which at the time was a little-known practice, was published in *The Guardian* newspaper on 12 March 2002. The journalist Duncan Campbell reported that the US had been sending prisoners suspected of Al-Qaida connections to countries in which torture during interrogation was legal and recorded a US diplomat as stating: '*It allows us to get information from terrorists in a way we can't do on US soil.*'

114. Following the arrest of Abu Zubaydah in March 2002, the *Independent* newspaper published a news article on 3 April 2002, which reported the comments of a former CIA Head that the interrogation of '*Abu Zubeida*' (sic) *might include techniques considered by some to be torture*'.

115. In a lengthy article published in *The Washington Post* on 26 December 2002, journalists reported that Al-Qaida and Taliban operatives detained at the Bagram airbase in Afghanistan were, in the event of non-cooperation, subjected to '*stress and duress*' techniques, including being held in awkward, painful positions and being sleep-deprived over a 24-hour period. Detainees were said to be kept standing or kneeling for hours, in black hoods or spray-painted goggles. The authors of the article contrasted the US government's public denouncement of the use of terror with the words of current national security officials, who defended the use of violence against captives. Cofer Black, then Head of the CIA Counterterrorist Centre, was quoted as having said on 26 September, at a joint hearing of the House and Senate intelligence committees, '*After 9/11 the gloves come off.*'

116. The *Washington Post* article was quoted in a subsequent piece in *The Guardian*, published on 27 December 2002. *The Guardian* reported on the rendition of suspects to countries such as Morocco, which were known for their brutality, and cited contrasting claims by US officials, some of whom indicated that the main motive for such renditions was the belief that a suspect would open up if questioned in their own language or on familiar terrain, and others who indicated that the purpose of rendition was effectively to ensure that the use of violence against detainees was by a country other than the US itself. A similar piece appeared on the same day in *The Independent* newspaper.

117. A second piece, alleging that the US was condoning the torture and illegal interrogation of Al-Qaida prisoners, appeared in *The Guardian* on 25 September 2003. The article identified two forms of torture being used by America and its partners; firstly, the use of '*torture lite*' such as sleep deprivation and the shining of harsh lights at detainees held at Guantanamo Bay and secondly, the rendition of prisoners to third party countries where '*full-blown*' torture techniques were used. The article repeated a quotation, originally published in *The Washington Post*, from an official said to be involved in the supervision of the capture and transfer of prisoners; '*If you don't violate someone's human rights some of the time, you probably aren't doing your job*'.

118. The treatment of Khalid Sheikh Mohammed was reported in various UK newspapers, including *The Sunday Telegraph*, which published an article on 9 March 2003 suggesting that testimonies from other prisoners indicated that the likely treatment of KSM would include the use of stress positions, deafeningly loud sounds and bright lights for 24-hour periods.

119. An article published online by *The Washington Post* on 8 June 2004 discussed a memo from August 2002, in which the Justice Department apparently advised the White House that torturing Al-Qaida terrorists held in detention abroad may be justified. The view of the Justice Department, as expressed in a document signed by the Assistant Attorney General, was stated to be that the infliction of moderate or fleeting pain did not necessarily constitute torture. According to the memo, torture '*must be equivalent*

in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.'

120. The Parliamentary Assembly of the Council of Europe Resolution on the rights of persons held in the custody of the US in Afghanistan or Guantanamo Bay, of 26 June 2003, expressed the Assembly's deep concern as to the conditions of detention of those held in custody and their belief that because the status of those persons was undefined, their detention was unlawful. The Resolution noted the detainees' lack of access to the International Committee of the Red Cross.

121. The International Committee of the Red Cross published its report on the '*Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Convention in Iraq during Arrest, Internment and Interrogation*' in February 2004. This report voiced substantial concerns as to the US treatment of prisoners at Abu Ghraib.

122. Additionally, in June 2004, Human Rights Watch published a report entitled '*The Road to Abu Ghraib'*. The report referred to the torture and mistreatment of detainees by US military personnel at Abu Ghraib prison in Iraq, which had come to light in April 2004, and suggested that, far from being an isolated incident, abuse similar to that perpetrated at Abu Ghraib was replicated against detainees in US custody. The report further cited *The New York Times* which had reported in the previous month that Khalid Sheikh Mohammed had been subjected to water-boarding, and the same techniques had been authorised by a set of secret rules for the interrogation of twelve to twenty high-level Al-Qaida prisoners, that were endorsed by the Justice Department and the CIA.

123. The Senate Committee Report states that, in July 2003, the CIA suspended its use of EIT, pending a review of its interrogation programme. By mid-September 2003, the agency re-certified its interrogation programme. The use of EIT was suspended once again in late May 2004, together with the use of standard interrogation techniques, pending a legal review. Thereafter, one-off authorisations were granted on a case-by-case basis. On 23 December 2005, the CIA suspended its interrogation programme and in February 2006, the CIA informed the National Security Council that it would not seek continued use of all the EIT.

Al-Nashiri

124. Widespread national and international media reporting of the arrest of Al-Nashiri began in about 22 November 2002, initially indicating only that he had been detained in an undisclosed country and was being held in US custody.

125. In October 2004, Al-Nashiri was included in a Human Rights Watch Report listing 'ghost detainees' held by the US at undisclosed locations. A Report issued by the Intelligence and Security Committee in March 2005, entitled '*The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq,'* noted that the US had confirmed that Al-Nashiri was amongst a small number of '*ghost*

prisoners' who were held at undisclosed locations and under unknown conditions, without access to the Red Cross. The report noted comments by SIS and MI5 that they were aware that the US was holding some Al-Qaida prisoners in detention other than Guantanamo Bay but did not know the location or terms of their detention and did not have access to the prisoners.

126. The use of black sites to detain HVDs was accepted by the US Director of National Security in April 2006 and in September 2006, President Bush publicly acknowledged the use of secret prisons.

[REDACTED: CLOSED SECTION]

[REDACTED]

Consideration of each ground by reference to the facts

127. Having set out our findings of fact in CLOSED, we can address each of the grounds of challenge relatively briefly.

Ground 1: vires

128. We have set out the relevant legislation above. When addressing Ground 1, it is crucial to appreciate what exactly the Respondents are alleged to have done. For example, if the suggestion were that they engaged in torture of a detainee, or that they were complicit in such torture, the Respondents would clearly have no *vires* to do that, nor has it been suggested on behalf of the Respondents that they did.

129. With the assistance of Counsel to the Tribunal, the parties agreed a list of OPEN issues which proceeded on the assumed basis that the Respondents engaged in intelligence sharing with the US in relation to the Complainants.

130. The first three Respondents clearly had the vires to engage in intelligence sharing with the US. This is an implied power in the relevant legislation: the 1989 and 1994 Acts. Liaison with foreign intelligence services and other authorities of a foreign state are obvious and important functions of those Respondents. Liaison includes sharing information with those authorities; putting questions to them which are relevant to the discharge of the Respondents' functions; and the receipt of information from those authorities.

131. There can be no doubt, in our judgement, that the first three Respondents had the vires to engage in that assumed conduct. We have considered the position of the Fourth Respondent in the CLOSED Judgment. We therefore reject ground 1. The real question is whether the exercise of that power (if it was, in fact, exercised) was lawful, in

accordance with the principles of judicial review. It is necessary therefore to consider the other grounds of challenge.

Ground 2: Padfield

132. We have set out the *Padfield* principle above. As we have said, there is no dispute that the *Padfield* principle applies to the present context. If, for example, a respondent had put some questions to be asked of a detainee by the US out of spite or for some private reason, which had nothing to do with the legitimate exercise of the respondent's own functions, that would be unlawful. The Respondents accept that.

133. On the facts, which we have considered in detail in CLOSED, there is no evidence to support the suggestion that the Respondents acted unlawfully contrary to the *Padfield* principle. CTT, who (unlike the OPEN representatives) had the advantage of seeing all the CLOSED material, did not submit that they did. We therefore reject ground 2.

Grounds 3 and 4: taking account of relevant considerations, Tameside and irrationality

134. As we have indicated above, grounds 3 and 4 can be taken together, because each of the complaints in substance leads to the proposition that the Respondents could not rationally have engaged in intelligence-sharing without having regard to the fundamental norms concerned, in particular the prohibition of torture.

135. We will not repeat what we have said above about the relevant principles of law. Suffice to say here that the Respondents would not dispute that whether a detainee is at risk of being tortured or subjected to CIDT by a foreign liaison service is obviously relevant to the exercise of their power to liaise with them. It would be irrational to say otherwise. The Respondents would also accept that they had a duty to act rationally in making enquiries of the foreign state concerned and, if necessary, seek assurances that a detainee would not be subject to such ill-treatment. It also follows that the Respondents would accept that they could not rationally engage in such liaison if they either knew or reasonably ought to have known that a detainee was at risk of being subjected to such ill-treatment. Even if the Respondents did dispute any of that, we would hold that they were subject to those duties as a matter of public law.

136. With the assistance of Counsel to the Tribunal, we have investigated whether any relevant conduct occurred and, if it did, whether the Respondents acted irrationally in the senses indicated above.

137. For reasons given in our CLOSED Judgment, we have reached the conclusion that grounds 3 and 4 must also be rejected.

Additional CLOSED ground

138. CTT have raised an additional CLOSED ground of challenge, which it was not possible for the OPEN representatives to raise because they do not have access to the CLOSED material. For the reasons given in our CLOSED Judgment, we have rejected this additional ground of challenge.

Conclusion

139. For the reasons we have given in OPEN and in CLOSED the Tribunal makes no determination in favour of either Complainant in relation to any of the Respondents.

140. Pursuant to section 67A of RIPA there is a right to apply for leave to appeal this decision. The Tribunal specifies that the relevant appellate court for the purposes of an appeal under section 67A(2) RIPA is the Court of Appeal of England and Wales.