Casebook 3

CONFRONTING TORTURE: LANDMARK UK LITIGATION

2026

REDRESS
Ending torture, seeking justice for survivors

PREFACE

REDRESS has a long track record of using strategic litigation against torture to deliver justice and reparation for survivors, adopting a holistic approach that supports and accompanies the torture survivors through the process. We also promote this concept and technique to partner NGOs through litigation workshops and publications.

The Torture Litigation Casebook series aims to showcase emblematic case studies of strategic litigation against torture to illustrate best practice and to help strengthen the capacity of human rights lawyers worldwide. Other Casebooks in the series cover Leading Cases Against Torture and Strategic Litigation Challenging Torture and Defending Dissent.

The Casebooks cover all regions, include cases brought before national, regional, and international jurisdictions, and seek to highlight different techniques of strategic litigation against torture, including national and international advocacy, collaborative partnerships, and effective media campaigns. They also highlight the impact achieved through litigation, including novel legal precedents, reparations awarded and implemented, legal and policy reforms, and increased attention to public interest matters.

The majority are cases brought by private parties or applicants, invoking human rights norms enshrined in national legislation or constitutions, or resorting to regional or international human rights bodies where national remedies prove ineffective. Some are criminal or inter-state actions. The Casebooks are published alongside our Practice Notes. They provide practical examples demonstrating strategies that lawyers have pursued to challenge torture, and the impact of strategic litigation.

The main criteria for deciding which cases to include in the series were their strategic features and impact. Rather than seeking to compile a legal casebook of the leading cases relating to the law of torture, the intention was to demonstrate the range of different ways in which strategic litigation can be deployed to challenge torture. In many instances, this has involved the use of multiple approaches and strategies on the part of civil society, including advocacy, activism, and use of the media. The Casebooks present a range of innovative legal claims or remedies, and efforts to bring about effective implementation.

The impetus for this series was a recognition that such a focus on strategic features of litigation is often not readily available to lawyers or activists preparing for litigation. At the same time, assessing the precise impact of strategic litigation is not always straightforward.

The aims of the Casebook series are to serve as a reference for practitioners and for workshops that REDRESS delivers to other NGOs conducting strategic litigation relating to torture; to illustrate the main approaches or strategies that have proven most effective in the conduct of strategic litigation; and to create connections between the communities of lawyers engaged in this work.

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LIST OF ABBREVIATIONS

ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
FCO	Foreign and Commonwealth Office of the UK Government (replaced by Foreign, Commonwealth & Development Office)
HRA	The Human Rights Act 1998
MOD	Ministry of Defence of the UK Government
NGO	Non-Governmental Organisation
UNCATH	UN Convention against the Taking of Hostages
UNCAT	UN Convention against Torture

INTRODUCTION

Strategic litigation provides a powerful tool to address both individual acts of torture and the broader policies and practices that enable such abuse. In the United Kingdom (UK) context, legal practitioners have pursued cases that not only seek justice and reparation for survivors, but also contribute to legal reform, influence public policy, challenge the UK's role in contexts where torture occurs, and reinforce institutional safeguards against future violations.

This Casebook presents significant legal challenges brought before UK courts and the European Court of Human Rights (ECtHR) involving the UK. It does not attempt to provide an exhaustive overview of all UK cases concerning torture or other ill-treatment. It highlights a curated selection of cases that demonstrate how litigation has shaped the interpretation and application of the UK's obligations under both domestic and international law, and how it has contributed to the development of legal standards aimed at preventing and responding to torture and other ill-treatment.

These cases were selected for their demonstrable legal, policy, social or other impact. Many of the decisions included in this Casebook are regularly cited in litigation, advocacy, and academic analysis, and continue to inform efforts to strengthen protections against and accountability for torture in the UK and beyond. The subject matter of these anti-torture cases is diverse, ranging from extradition and diplomatic assurances to police or State accountability, immigration, prisoners' rights, military operations overseas, and historical abuses.

Unlike other Casebooks in the REDRESS series, which examine strategic litigation features and techniques, this volume focuses on the substantive content and outcomes of the cases themselves. Each entry provides a concise summary of the facts, legal arguments, findings, and the case's broader impacts. The Casebook aims to offer a practical and accessible resource for those working in the UK and internationally to support litigation, policy reform, and strengthen protections against torture. This Casebook is provided for general information purposes.

This publication was prepared by a team at REDRESS, including **Renata Politi**, Senior Legal Advisor, **Alejandra Vicente**, Head of Law, **Blánaid Ní Chearnaigh**, former Legal Officer, **Chris Esdaile**, Senior Legal Advisor, **Dianne Magbanua**, Communications Officer, **Rupert Skilbeck**, Director, and **Eva Sanchis**, Head of Communications. We would like to also thank external experts and practitioners for their contributions to preparing this Casebook, including Fiona McKay, Jed Pennington, Mala Savjani, Malcolm Evans, Rev Nicholas Mercer, Phillippa Kaufmann KC, and Sapna Malik.

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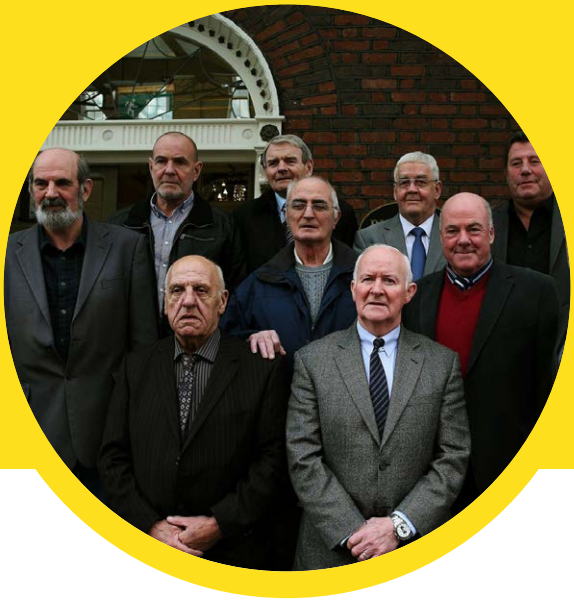
DEFINITION OF TORTURE AND ILL-TREATMENT

IRELAND V. UNITED KINGDOM (1978)

Link to the judgment

European Court of Human Rights (Plenary)

POLICE MISTREATMENT • THRESHOLD FOR TORTURE • INTERROGATION TECHNIQUES • SEVERITY • DETENTION POWERS • STATE OF EMERGENCY • STATE RESPONSIBILITY



CASE SUMMARY

Also known as the 'Five Techniques Case' or the 'Hooded Men Case', this case marked the first inter-state case decided by the ECtHR, brought by the Republic of Ireland against the UK. Ireland alleged that the UK's treatment of detainees in Northern Ireland during 'The Troubles', particularly the use of the 'five interrogation techniques', violated the ECHR.

While the Court ultimately held that the techniques constituted inhuman and degrading treatment, it controversially stopped short of classifying them as torture, a conclusion that fuelled significant legal and academic debate. This judgment had profound implications for the distinction between torture and inhuman or degrading treatment under Article 3 ECHR, setting a precedent that continues to influence global jurisprudence and interrogation standards.

THE FACTS AND PROCEDURAL HISTORY

The case arose against the backdrop of 'The Troubles', a period of sectarian conflict and paramilitary violence in Northern Ireland between the Irish Republican Army (IRA), loyalist groups, and the British authorities. In 1971, the UK Government introduced internment without trial under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922, leading to widespread arrests. Allegations emerged that British security forces had used the following interrogation methods, collectively known as the 'five techniques':

- Wall-standing: forcing detainees to remain in a stress position against a wall for extended periods.
- Hooding: placing a hood over detainees' heads, except during interrogation.
- Subjection to noise: exposing detainees to continuous loud hissing or static noise (to cause mental strain).

- Sleep deprivation: preventing detainees from sleeping for extended periods.
- Deprivation of food and drink: denying detainees adequate sustenance.

On 16 December 1971, Ireland lodged an application with the European Commission of Human Rights under former Article 24 ECHR, alleging violations of the prohibition of torture, and inhuman or degrading treatment or punishment (Article 3), the right to liberty and security (Article 5), and the right to a fair trial (Article 6). In its 1976 report, the European Commission unanimously concluded that the combined use of the five techniques constituted torture.

The case was referred to the ECtHR. In its judgment of 18 January 1978, the ECtHR found that, while the techniques constituted inhuman and degrading treatment, they did not reach the threshold of torture under Article 3.

Ireland's 2014 Revision Request

In 2014, Ireland sought a revision of the 1978 judgment after the release of declassified documents revealed that the UK Government had been aware of the severe and long-term effects of the five techniques, contrary to its earlier claims of minor and short-term harm. Ireland argued that this evidence would have decisively altered the Court's findings in 1978. However, in 2018, the ECtHR rejected the revision request, emphasising the importance of legal certainty and finality (*see Ireland v. UK* (2018)). The Court held that even though new evidence demonstrated that certain UK officials minimised the severity of the techniques in the case (i.e. which in the 1978 judgment were held to amount to inhuman treatment, but not torture), this did not constitute previously unknown facts and would not have altered the 1978 judgment.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision on 18 January 1978, the ECtHR found by 13 votes to four that the UK Government had violated Article 3 ECHR, on the basis that the treatment was inhuman and degrading, although it did not constitute torture. It also held that the UK had not violated the right to liberty and security (Article 5) taken together with non-discrimination (Article 14), nor did it breach the right to a fair trial (Article 6).

The Five Techniques Did Not Constitute Torture under Article 3 of ECHR

The Court found that the techniques caused severe physical and psychological suffering amounting to inhuman and degrading treatment but lacked the intensity and cruelty necessary to meet the threshold of torture under Article 3. In doing so, the Court departed from the previous jurisprudence of the European Commission, including in the same case and in 'The Greek Case', where the Commission had considered that the defining element distinguishing torture from other forms of ill-treatment was the purpose of the treatment (see 'The Greek Case', (1969), Yearbook: European Convention on Human Rights No. 12, p. 186).

Instead, the Court ruled that the distinction between torture and inhuman or degrading treatment derives from the intensity of the suffering inflicted, noting that torture involves "deliberate inhuman treatment causing very serious and cruel suffering" [167]. The majority concluded that the five techniques, although amounting to

inhuman and degrading treatment, "did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood" [167]. To illustrate, the Court found that numerous detainees were subjected to systematic violence by members of the Royal Ulster Constabulary, causing intense suffering and at times, significant physical injury. While this amounted to inhuman treatment, the Court held that it did not meet the severity threshold of torture under Article 3.

The Court also reaffirmed the absolute and non-derogable nature of the prohibition of torture and other ill-treatment, including during states of emergency under Article 15 ECHR (derogation in time of emergency). It rejected the UK's attempt to invoke Article 15 as a defence, underscoring that no circumstance, including the victim's conduct, can justify violations of Article 3.

Justified Differences in the Use of Detention Powers

Addressing the use of detention powers, the Court upheld its established approach requiring an "objective and reasonable justification" for any difference in treatment [226]. While acknowledging the profound differences between Republican and Loyalist terrorism at the time, the Court also considered that in the period prior to February 1973 (i) most violence came from Republican groups; (ii) the IRA was a more structured organisation and posed a greater threat compared to the Loyalist factions, which were less organised and could be dealt with more effectively through ordinary criminal processes; and (iii) Loyalist suspects were more often brought to Court, while IRA suspects were harder to prosecute.

Accordingly, the Court found that targeting the most significant threat first (i.e. the IRA) was legitimate and the measures taken were not disproportionate [230]. Following February 1973, despite the expansion of detention laws to encompass terrorism more broadly, significant differences persisted in how these powers were enforced against Republican and Loyalist groups because a majority of the terrorist acts were still committed by the IRA; and Loyalist suspects could often be prosecuted successfully, particularly for crimes such as sectarian murders. Accordingly, the Court noted the evolving and complex nature of the crisis and found that there was no evidence of deliberate or unjustifiable discrimination in how emergency powers were applied [231].

Derogations Consistent with a State of Emergency Under Article 15 ECHR

The Court found that while the practices of Northern Ireland relating to extrajudicial deprivation of liberty would, in principle, have breached Article 5 ECHR, it noted that the situation at the time constituted a public emergency threatening the life of the nation within the meaning of Article 15. In assessing the necessity of such measures, the Court concluded that the derogations from Article 5 resulting from this state of emergency were not beyond the extent strictly required by the exigencies of the situation [224].

As to the right to a fair trial, the Court noted that the measures challenged were essentially the same as those examined under Article 5. Because the derogation from procedural safeguards under Article 5 necessarily affected fair trial rights, the Court reached the same conclusion. It found that the derogations from Article 6 were likewise justified and consistent with Article 15, given the established emergency situation in Northern Ireland [235].

IMPACT OF THE CASE

A High Threshold for Torture

The judgment has been criticised for setting a high threshold for torture, which some argue limited accountability for severe mistreatment. Subsequent rulings, such as *Selmouni v. France* (1999), have demonstrated that Courts are willing to consider both the purpose and severity of the treatment in question [98, in Selmouni]. Additionally, Gäfgen v. Germany (2010) expanded Article 3 protections to include threats of torture [91].

Despite the Court's rejection of Ireland's 2014 revision request, many scholars and human rights advocates contend that, if the same facts were presented today, the five techniques would likely be classified as torture. This view is reinforced by the fact that the five techniques are now explicitly recognised as methods of torture under the Istanbul Protocol on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), which despite not being a binding legal instrument, provides comprehensive guidance on torture documentation, a framework that did not exist at the time of the original judgment.

Influence on the Interpretation of Torture and Other Ill-treatment

The judgment has had an influence on how the prohibition of torture and other ill-treatment is interpreted and applied internationally and by other jurisdictions. It influenced, for example, discourse and commentary around the definition of torture under UNCAT, as well as subsequent European and other international caselaw. In individual States, notably, the reasoning from the 1978 judgment was controversially cited in the United States (US) Department of Justice's 2002 'Torture Memos' to justify the claim that certain interrogation techniques used by the US did not meet the legal threshold for torture.

Missed Opportunity for Clarification

The ECtHR's decision to reject Ireland's 2014 revision request has been criticised as a missed opportunity to provide greater clarity on the distinction between torture and other ill-treatment. In her dissenting opinion, Judge Síofra O'Leary strongly condemned the majority's reasoning for adopting an overly formalistic approach that prioritised legal certainty over the public interest in addressing grave human rights violations. She emphasised the broader implications of the judgment, particularly its misuse to justify US "enhanced interrogation techniques" in the post-9/11 era. Judge O'Leary's dissent underscored how a restrictive interpretation of torture risks undermining its absolute prohibition (a *jus cogens* norm of international law) and eroding protections enshrined in human rights frameworks.

Wider Attention and Reforms

The case attracted significant international attention and debate on State interrogation techniques and the treatment of detainees. It played a pivotal role in shaping public discourse on human rights, governmental accountability, and the need for clear legal definitions and robust safeguards against abuse, bolstering global human rights advocacy efforts.

It also prompted reform in the UK. In a 1977 hearing before the ECtHR, the UK Attorney General assured the Court that the five techniques would no longer be used [102] and, in response to the ruling, the UK formally discontinued

the use of such techniques, expressing commitment to higher standards for the treatment of detainees. Despite these policy commitments, the UK has had ongoing torture controversies, for example, regarding interrogation techniques in Iraq and Afghanistan explored in other cases included in this Casebook.

The Legal Representatives were D. Costello S.C., Attorney General, A.J. Hederman S.C., R.J. O'Hanlon S.C., A. Browne S.C., and J. Murray for the Applicant Government; S. Silkin KC, MP, Attorney General, J. Hutton KC, A. Lester KC, and N. Bratza for the Respondent Government; and G. Sperduti, C. Nørgaard, and T. Opsahl for the European Commission of Human Rights.

ADDITIONAL RESOURCES

- Amnesty International, 'UK/Ireland: Landmark 'hooded men' torture case should be re-opened' (24 November 2014).
- Association for the Prevention of Torture and the Center for Justice and International Law, 'Torture in International Law A guide to jurisprudence' (APT and CJIL joint paper, 2008).
- David Bonner, 'Of Outrage and Misunderstanding: Ireland v United Kingdom – Governmental Perspectives on an Inter-State Application under the European Convention on Human Rights' (2014) 34(1) Legal Studies 47–75.
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- Elaine Webster 'A Positive take on the Legacy of the 1978 Judgment in Ireland v. United Kingdom' (EJIL: Talk!, 7 February 2019).
- Fiona de Londras, 'Revisiting the Five Techniques in the European Court of Human Rights' (EJIL: Talk!, 12 December 2014).
- Fionnuala Ní Aoláin, 'Revisiting Torture: Implications of Overturning Ireland v. United Kingdom' (Just Security, 5 December 2014).
- Iulia Padeanu, 'Why the ECHR Decided not to Revise its Judgment in the Ireland v. The United Kingdom Case' (EJIL: Talk!, 5 April 2018).
- Registrar of the Court, 'ECHR rejects Irish request to find torture in 1978 judgment against UK' (ECtHR Press Release, 20 March 2018).

A V. UNITED KINGDOM (1998)

Link to the judgment

European Court of Human Rights

CORPORAL PUNISHMENT • ASSAULT OF CHILD • TORTURE OR INHUMAN OR DEGRADING TREATMENT • REASONABLE CHASTISEMENT DEFENCE • STATE FAILURE TO PROTECT

CASE SUMMARY

This case put the spotlight on the limits of 'reasonable chastisement' by parents (and/or others in *loco parentis*) and the State's duty to protect children. The ECtHR found that the UK had violated Article 3 ECHR by failing to protect a child from known physical abuse – specifically, beatings inflicted by a stepfather on a nine-year-old boy using a cane and, on several occasions with considerable force.

The case not only underscores that assault occasioning actual bodily harm on children is severe enough to attract an Article 3 violation, but also that States can be held accountable where they lack a robust protective framework to prevent such abuse. The judgment triggered legislative reform in this area.

THE FACTS AND PROCEDURAL HISTORY

The applicant child, A, suffered "known physical abuse" by his stepfather when he was nine years old, including beatings with a garden cane and "considerable force" on several occasions, as verified by a paediatrician. After the allegations were reported to the local Social Services department in February 1993, A's stepfather was charged with assault occasioning actual body harm in contravention of Section 47 of the Offences against the Person Act 1861, as amended. Actual bodily harm includes any "hurt or injury calculated to interfere with the health or comfort of the victim; the hurt or injury need not be permanent but must be more than transitory or trifling" [12].

In February 1994, A's stepfather was acquitted of this offence by the jury, who found that the stepfather's actions fell within the defence of 'reasonable chastisement'. Under English common law, parents (and/or others *in loco parentis*) are protected if they administer punishment which is "moderate and reasonable in the circumstances" [14].

In July 1994, A applied to the European Commission of Human Rights, alleging that the UK had failed to protect him from ill-treatment by his stepfather, in violation of the prohibition of torture, and other inhuman or degrading treatment or punishment (Article 3) and/or the right to respect for private and family life (Article 8). The Commission unanimously found a violation of Article 3. Whilst the Government accepted the decision, it asked the ECtHR to consider only the facts of the case and to refrain from making general determinations on the corporal punishment of children. The applicant asked the ECtHR to find violations of Articles 3 and 8 ECHR and to confirm that national law should not "condone directly or by implication any level of deliberate violence to children" [18].

THE DECISION AND ITS SIGNIFICANCE

Violation of Article 3 ECHR for Failing to Afford Adequate Protection

In its judgment issued on 23 September 1998, the ECtHR unanimously found the UK had violated Article 3 ECHR for failing to provide adequate protection to A against his stepfather's treatment which was contrary to Article 3.

First, the Court considered whether the physical abuse suffered by A met the severity threshold of Article 3, emphasising that this assessment is relative and depends on all the circumstances of the case, including the nature and context of the treatment, its duration, its physical and mental effects, and in some instances, the victim's sex, age, and state of health [20]. In A's case, the Court concluded that such treatment was severe enough to attract a violation of Article 3. It relied on the victim's age (nine) and the findings made by the consultant paediatrician, who concluded that A had been caned with considerable force on more than one occasion in a manner that exceeded the threshold under Article 3 [21].

The ECtHR then held that the UK had breached Article 3 by failing to afford adequate protection to A from the ill-treatment and punishment inflicted by his stepfather. It noted that Article 1 ECHR, read in conjunction with Article 3, obliges States to take "measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment", even where such treatment is inflicted by private individuals [22]. However, given that A was a child, and that the UK's domestic law at the time permitted the acquittal of A's stepfather on the basis that his actions constituted 'reasonable chastisement', the Court concluded that the Government failed to afford A sufficient protection against inhuman or degrading treatment [23]. It noted the Government's acknowledgement that the law did not provide adequate protection to children and should be amended.

Given a violation of Article 3 was found, the Court found it unnecessary to examine the potential breach of Article 8.

IMPACT OF THE CASE

Level of Severity to Engage Article 3 ECHR

While this was a not a contentious point of the case, the judgment highlighted that battery or ill-treatment resulting in actual bodily harm on children meets the threshold of Article 3 and cannot be justified on the grounds of 'reasonable chastisement' and punishment under UK law. The Court also clarified that the treatment must attain "a minimum level of severity" to engage Article 3, which is dependent on all of the circumstances of

the case, including various factors such as the nature, duration, and context of the treatment, its physical and mental effects and, in some instances, the victim's sex, age, and state of health [20].

State Responsibility to Protect Children from Treatment Contrary to Article 3 ECHR

The most important contribution of this judgment was the Court's ruling that a violation of Article 3 occurs when States fail to afford children adequate protection against treatment contrary to Article 3. The Court recalled that 'reasonable chastisement' is an acceptable defence to a charge of assault on a child under English law and that the prosecution bears the burden to prove that specific treatment exceeds such limits [23]. As A's treatment was severe enough to attract Article 3, and his stepfather was acquitted, the Court found that the UK law did not afford adequate protection to A [24]. However, the Court did not address the general application of 'reasonable chastisement' in the UK.

Legislative and Policy Impacts

While *A v. UK* did not lead to a ban on corporal punishment, it shed light on the need for law reform. As acknowledged by the UK Government in the case, the law allowing for the 'reasonable chastisement' defence did not provide adequate protection to children and should be amended.

Scotland and Wales have since introduced a prohibition of corporal punishment in all forms and settings, abolishing the 'reasonable chastisement' defence in 2020. However, no equivalent prohibition exists in England and Northern Ireland, and the defence invoked by A's stepfather remains available under English law.

Nonetheless, although the 'reasonable chastisement' defence still exists in England and Northern Ireland, Section 58 of the Children Act 2004 reformed the law by preventing the defence from being used in cases involving actual bodily harm, wounding, grievous bodily harm or child cruelty. Accordingly, under this new law, A's stepfather would not have been able to rely on this defence or secure an acquittal from his assault on A occasioning actual bodily harm. However, the defence remains available in cases involving common assault, leaving children without full legal protection from all forms of physical punishment in these jurisdictions.

There have been increasing calls for the prohibition of 'reasonable chastisement', including from the UN Committee against Torture, which has repeatedly recommended the prohibition of all forms of corporal punishment and a ban on "the use of any technique of restraint designed to inflict pain on children". Some might argue that such language might be nonetheless still limiting: for instance, in the UK juvenile detention context, an Independent Inquiry on Sexual Abuse recommended the prohibition of all 'pain compliance' techniques, but this recommendation was rejected by the Government. Also, organisations in the UK such as the Royal College of Paediatrics and Child Health have persistently advocated for the complete removal of the 'reasonable chastisement' defence, citing the vagueness of current law and safeguarding concerns caused by the lack of clarity around disciplining children.

Following the judgment in *A v. UK*, the Government also launched public awareness initiatives, including a booklet titled 'Being a Parent in the Real World', "intended for parents, explaining the law on smacking and actively discouraging the practice".

The Legal Representatives were A. Levy KC and T. Eicke for the Applicant; and D. Pannick KC and M. Shaw for the Respondent Government.

ADDITIONAL RESOURCES

- Andrew Roland, Felicity Gerry QC and Marcia Stanton, "Physical Punishment of Children: Time to End the Defence of Reasonable Chastisement in the UK, USA and Australia" (The International Journal of Children's Rights, 20 June 2017).
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- Royal College of Paediatrics and Child Health, 'Equal Protection from assault in England and Northern Ireland: Prohibiting physical punishment of all children' (RCPCH Resource, April 2024).
- Royal College of Paediatrics and Child Health, 'Equal Protection from assault in England and Northern Ireland: The health, education and legal case for legislative change to remove the "reasonable punishment" defence and to prohibit all physical punishment of children' (RCPCH Policy Report, April 2024).
- UK Government, 'Review of Section 58 of the Children Act 2004' (Department for Children, October 2007).

R (ADAM, LIMBUELA AND TESEMA) V. SECRETARY OF STATE FOR THE HOME DEPARTMENT (2005)

Link to the judgment

House of Lords

ASYLUM SEEKERS • DESTITUTION • SEVERE HUNGER • HOMELESSNESS • INHUMAN OR DEGRADING TREATMENT • STATE OBLIGATIONS

CASE SUMMARY

Three asylum seekers were denied basic housing and subsistence support in the UK for failing to apply for asylum "as soon as reasonably practicable" after their arrival – a requirement under the Nationality, Immigration and Asylum Act 2002 (2002 Act). They argued that the denial of support left them destitute, amounting to inhuman or degrading treatment.

The House of Lords held that leaving the individuals in a state of severe deprivation breached their rights under Article 3 ECHR, rejecting the argument that hardship and suffering exist on a 'spectrum'. It affirmed that destitution – such as homelessness, hunger, and lack of hygiene – itself reaches the required threshold of Article 3. The judgment reinforced the duty of the UK Government to provide support when serious harm is likely by clarifying that States must be proactive and act before suffering becomes extreme.

THE FACTS AND PROCEDURAL HISTORY

The case arose from the UK's policy aimed at deterring fraudulent or late asylum claims by requiring prompt applications and seeking the early identification of genuine refugees in need of protection – all of which were aimed at reducing the burden on public finances and ensuring that funds were used responsibly for the appropriate recipients.

The claimants were asylum-seekers who were legally prohibited from undertaking paid work while their asylum applications were pending and who were refused accommodation and the barest necessities of life due to the lateness of their asylum applications. They argued that their resulting destitution breached Article 3. The three asylum seekers were:

a. Limbuela: a 25-year-old (at the time of the House of Lords decision) Angolan national who arrived in the UK and sought asylum on the same day (6 May 2003) but after initially being granted emergency accommodation by the National Asylum Support Service (NASS), was denied further support under Section 55 of the 2002 Act. He spent two nights sleeping rough without access to food, shelter, or hygiene facilities before obtaining assistance.
b. Tesema: a 28-year-old (at the time of the House of Lords decision) Ethiopian national of Oromo ethnicity who applied for asylum on 14 August 2003, a day after his arrival. When support was withdrawn, he was on the verge of homelessness and medical evidence suggested that he had mental health issues including depression, anxiety, and trauma. Interim relief was granted to prevent him from sleeping on the streets without food or shelter.
c. Adam: a 29-year-old (at the time of the House of Lords decision) Sudanese national who, as determined by the Home Secretary, claimed asylum late on 16 October 2003 — a day after his arrival in the UK — and faced extreme deprivation without NASS support. His destitution resulted in immediate homelessness, although he received some limited support from the Refugee Council. His destitution was significant enough for the Courts to intervene.

Each of the claimants applied for asylum either on their day of arrival in the UK or the day after, but the Home Secretary was not satisfied that any of them had made their claim as soon as practicable for purposes of providing support under Section 55(5)(a) of the 2002 Act.

Following the decision to refuse support, each of the three asylum seekers applied for judicial review, arguing that the Secretary of State was obliged by Section 55(5)(a) of the 2002 Act to provide support as to avoid breaching the ECHR. In each case, the Administrative Court granted the judicial review applications, finding that the dire conditions faced by the individuals breached or threatened Article 3 ECHR.

The Secretary of State was granted permission to appeal by the Administrative Court. On 21 May 2004, following a joint hearing off all three appeals, by a majority, the Court of Appeal (Carnwath LJ and Jacob LJ) upheld the decisions of the Administrative Court and dismissed all three appeals. Laws LJ dissented, *inter alia*, employing a spectrum analysis to determine the circumstances when Article 3 may be engaged (*R (Adam, Limbuela and Tesema) v. Home Secretary* (2004)).

The main question before the House of Lords was whether the conditions caused by the denial of support — destitution, homelessness, and extreme deprivation — amounted to inhuman or degrading treatment under Article 3, thus engaging the Secretary of State's duty to provide support under Section 55(5)(a) of the 2002 Act.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision on 3 November 2005, the House of Lords unanimously dismissed the appeals from the Secretary of State, finding that there had been a violation of Article 3 ECHR (inhuman or degrading treatment but not torture or punishment).

Prohibition on Work and Deprivation of Benefits Violated Article 3 ECHR

The House of Lords concluded that the case concerned inhuman and degrading treatment but not torture or punishment [6]. The prohibition on work, coupled with the removal of any entitlement to benefits based on a late application, created an imminent risk of suffering exacerbated by destitution, homelessness, and starvation which fell within the scope of Article 3.

The House of Lords held that Article 3 may be violated where there is clear and persuasive evidence of imminent destitution, severe hunger, and serious suffering specifically, where asylum seekers were, "by the deliberate action of the State, denied shelter, food or the most basic necessities of life" [7]. Given the absolute nature of Article 3, policy objectives such as reducing expenditure or deterring late applications could not justify such ill-treatment. The majority also stressed that the State must be sufficiently involved in the destitution, in order to distinguish it from a mere failure to provide welfare support.

IMPACT OF THE CASE

Destitution as Treatment Contrary to Article 3 ECHR

The House of Lords decided that the State's denial of support, resulting in destitution, could amount to treatment prohibited by Article 3. By knowingly creating or permitting conditions of destitution and homelessness, the State was directly responsible and could not attribute the hardship solely to the asylum seekers' conduct.

The House of Lords drew on the ECHTR's jurisprudence to determine the threshold of severity required for treatment to amount to inhuman or degrading treatment. It referred, among other cases, to *Pretty v UK (2002)*, where the ECtHR held that "where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading" [7, 54].

Accordingly, the Court concluded that extreme destitution — homelessness, hunger, lack of hygiene, and basic deprivation caused by State policy — can reach the threshold of Article 3. It highlighted a "continuum" of severity: while not every refusal of support breaches Article 3, as hardship worsened the risk of a breach increased. By finding that State action resulting in destitution can amount to an Article 3 violation, the decision in effect provides some, if limited, protection against destitution, especially where it results from State action or inaction. The Court also emphasised that the State's duty to protect against Article 3 violations does not depend on intent to harm; it is enough that State policy foreseeably creates the conditions severe enough to breach the Article 3 prohibition.

State Responsibility for Acts and Omissions

The House of Lords was clear that State responsibility in respect of Article 3 can arise from positive State action (e.g. detention or physical abuse) and/or omissions where the State has a duty to act. What matters is whether the State is directly responsible for the inhuman or degrading treatment or punishment [53]. When such treatment is a result of State action or omission, "there is no escape from the negative obligation on

states to refrain from such conduct" [53]. By concluding this, the Court rejected Laws LJ's 'spectrum analysis' that proposed the State would only be responsible for breaches of Article 3 which consist in violence by State actors, and not breaches which consist in acts or omissions by the State which expose the individual to suffering by circumstance or third party [77]. It concluded that, in this case, the Secretary of State's refusal to provide support via NASS had resulted in conditions contrary to Article 3.

Judicial and Academic Reception

Adam has since been applied in other cases. In *R (MS) v. Home Secretary* (2017), the Court held that it would be a breach of Article 3 for the Secretary of State to release the claimant from detention without providing him with accommodation as he "would be obliged to sleep in the street for an indefinite period with difficulties in eating, sleeping and keeping clean" [82]. In *R (GS) v. London Borough of Camden* (2016), the Court emphasised that lack of accommodation alone does not amount to an Article 3 violation [75]. However, the claimant's "potential social isolation, physical disabilities, pain, mental health condition and the physical difficulties she encountered" were such that making her homeless would constitute a breach of Article 3. In *R (EM (Eritrea)) v. Home Secretary* (2014), the Supreme Court considered *Adam* to note that the positive obligation under Article 3 included "the duty to protect asylum seekers from deliberate harm by being exposed to living conditions (for which the State bears responsibility) which cause ill-treatment" [62]. However, in *R v. Altham* (2006), the Court of Appeal distinguished *Adam*, stating that in *Altham* the State had not done anything to exacerbate the applicant's condition [*Altham*, 19].

This is a significant decision, marking the first time the House of Lords applied Article 3 ECtHR caselaw to hold that the State must not act in ways that expose individuals to degrading living conditions. It represents a logical extension of Article 3's positive obligations, recognising their intersection with certain economic, social, and cultural rights. By characterising the circumstances of certain asylum seekers as one of "extreme deprivation", the Court identified a State duty to protect that might traditionally be regarded as falling within the welfare sphere, beyond civil and political rights. Academic commentary on *Adam* focuses on the conditions that can engage Article 3 and the role of State action or omission. The decision left open the question whether protections extend to cases of extreme destitution affecting non-asylum seekers.

Legislative and Policy Impact

Although the Court of Appeal's judgment in *Adam* instigated a debate in the House of Lords on repealing Section 55 of the Nationality, Immigration and Asylum Act 2002, the House of Lords' judgment ultimately resulted in a change of Government policy rather than legislative repeal. The UK Visas and Immigration Office replaced 'Policy Bulletin 75' with 'Section 55 Guidance', which sets out the threshold for refusing assistance to asylum seekers who apply late. The new guidance adopts the threshold test established in *Adam*, confirming that the UK Visas and Immigration Office "no longer refuses support under Section 55 to anyone who does not have some alternative source of support available, including overnight shelter, adequate food and basic amenities" [11]. Quarterly Home Office statistics in 2006 substantiated the impact of *Adam*, showing a "considerable reduction in the number of asylum seekers who were refused support under Section 55". Nevertheless, the policy approach remained cautious: support is still refused in subsistence-only cases, which the Government maintains are "less likely" to breach ECHR rights – suggesting a narrow interpretation of *Adam*. In 2006, the relevant Government Minister confirmed that Section 55 continued to be applied in such "subsistence-only cases", with 895 people

refused support that year [91]. The Joint Committee on Human Rights argued that this policy contravenes *Adam* and breaches Article 3 ECHR, ultimately recommending that Section 55 be repealed [92].

The Legal Representatives were Nigel Giffin KC, John-Paul Waite, and Kate Grange for the Appellant (the Home Secretary); and Nicholas Blake KC and Christopher Jacobs for the Respondents in the Appeal (Adam, Limbuela, and Tesema).

ADDITIONAL RESOURCES

- Colm O'Cinneide 'A modest proposal: destitution, state responsibility and the European convention on human rights' (SSRN Electronic Journal 2008(5)).
- International Network for Economic, Social and Cultural Rights, 'R. (Adam and Limbuela) v. Secretary of State for the Home Department' (ESCR-net publication, 6 June 2012).
- Joint Committee on Human Rights, 'The Treatment of Asylum Seekers: Tenth Report of Session 2006-07' (UK Government, 30 March 2007).
- Katie Bales, 'Hostile and inept: the government's approach to asylum support' (Journal of Social Welfare and Family Law, 25 April 2023).
- Liam Thornton, 'Law, Dignity & Socio-Economic Rights: The Case of Asylum Seekers in Europe' (15 January 2016).
- Lucy Mayblin, 'Asylum and refugee support in the UK: civil society filling the gaps' (Journal of Ethnic and Migration Studies, 27 April 2018).
- Niroshan Ramachandran, 'The Enforced Destitution of Asylum Seekers in the UK' (Journal of Human Rights and Social Work, 6 March 2024).
- Peter Billings and Richard A Edwards, 'R. (Adam, Limbuela and Tesema) v. Secretary of State for the Home Department: A Case of 'Mountainish Inhumanity'?' (Journal of Social Security Law, 1 May 2009).
- Sheona York, 'The Law of Common Humanity: revisiting Limbuela in the 'Hostile Environment'' (Journal of Immigration, Asylum and Nationality Law, September 2017).
- UK Visas and Immigration, 'Section 55 Guidance' (UK Government, undated).

A V. SECRETARY OF STATE FOR THE HOME DEPARTMENT (2005)

Link to the judgment

House of Lords

COUNTER-TERRORISM • TORTURE-TAINTED EVIDENCE • EXCLUSIONARY RULE • STANDARD OF PROOF • ACTS COMMITTED ABROAD • RIGHT TO A FAIR TRIAL • *NON-REFOULEMENT*

CASE SUMMARY

Ten non-British citizens challenged their designation as reasonably suspected terrorists and their consequent detention under the UK's counter-terrorism legal regime. The House of Lords was asked to determine whether evidence obtained by torture without the involvement of British authorities could be admitted in British proceedings. Relying on common law principles and interpretation of the ECHR, the Lords unanimously rejected the admission of the evidence, as its admission would constitute a grave breach of international and human rights law and degrade the administration of justice.

This case also explored the standard of proof required to establish that evidence was obtained through torture, which would then result in its exclusion. By a majority, the Lords held that if the Special Immigration Appeals Commission (SIAC) concludes, on the balance of probabilities, that the evidence was obtained through torture, then it must be excluded from legal proceedings. They emphasised the exceptional circumstances in which such a decision arises, and the fundamental importance of upholding international law.

THE FACTS AND PROCEDURAL HISTORY

In response to 9/11, the UK introduced the Anti-Terrorism, Crime and Security Act 2001 (2001 Act), which created a new legal regime for non-British citizens whom the Secretary of State for the Home Department (Home Secretary) reasonably suspected of being terrorists but could not deport due to the risk of torture or inhuman or degrading treatment in their home countries (Part 4 of the 2001 Act). The 2001 Act ultimately gave the Home Secretary the power to indefinitely detain those individuals.

The appellants were ten such detainees who had been certified by the Home Secretary as reasonably suspected terrorists. Between May and July 2003, the appellants had appealed to the SIAC against their certification as suspected terrorists under Section 25 of the 2001 Act.

On 29 October 2003, the SIAC dismissed all the appeals, with the Court of Appeal upholding their decision on 11 August 2004. One question raised in the proceedings was whether evidence procured through torture inflicted by foreign officials without the complicity of the British authorities was inadmissible. Both the SIAC and the Court of Appeal held that the evidence was legally admissible, finding that, whilst procurement of evidence by torture might affect the weight that it should be given, it did not affect its admissibility in legal proceedings.

The appeal to the House of Lords challenged this finding, on the basis that the common law forbids the admission of evidence obtained through torture. It was argued that if a confession or other evidence may have been procured by torture, the Court should exercise its discretion to exclude such evidence to uphold the integrity of the judicial process.

THE DECISION AND ITS SIGNIFICANCE

Evidence Obtained by Torture Inadmissible

In a judgment issued on 8 December 2005, the House of Lords unanimously allowed the appeals and overturned the decisions of the SIAC and the Court of Appeal. The House of Lords held that, according to common law principles, evidence obtained through torture carried out by foreign officials without the complicity of British authorities was inadmissible in legal proceedings. The Court affirmed the unequivocal condemnation of torture as both "a distinguishing feature of the common law" and a "constitutional principle" [11]. It also held that since the SIAC was exercising judicial functions, it could not admit evidence obtained by torture.

The House of Lords also highlighted that this exclusionary rule is reinforced by ECHR and the ECtHR's incorporation of public international law in its considerations. This includes the international consensus achieved in UNCAT [28] that any statement established to have been made as a result of torture is inadmissible as evidence in any proceedings (Article 15 UNCAT – exclusionary rule) [36].

Burden of Proof for Allegations of Torture-Tainted Evidence

Whilst the Lords unanimously agreed about the inadmissibility of third-party torture evidence, there was disagreement on the standard of proof applicable to SIAC proceedings – especially given the uncertainty as to whether such proceedings should be considered civil or criminal in nature [25]. It was agreed that the standard approach to the burden of proof would be inappropriate in this context, given the inherent difficulties detainees would face in proving that the evidence was obtained through torture [55]. Instead, the Court highlighted that the appellant should raise the issue that the evidence used against him may have been obtained through torture and, once the allegation is made, the burden shifts to the SIAC to investigate it [56].

However, the Law Lords were divided on the appropriate test to be adopted by the SIAC when determining whether the evidence is admissible. A minority contended that the evidence should be inadmissible if there was

suspicion, or a real risk, that it had been obtained through torture. However, despite its efforts to address the difficulty of proving torture, this test was rejected because it would lead to the exclusion of evidence whenever the SIAC was uncertain about whether torture had occurred, rather than permitting its admission in cases of doubt [118].

Ultimately, by a majority of 4-3, the Court adopted the test propounded by Lord Hope: the SIAC should not admit evidence if it concludes, on the balance of probability, that it was obtained by torture [121]. This test was preferred as it aligns with the language of Article 15 UNCAT, requiring that a statement be "established" as having been obtained through torture [157].

IMPACT OF THE CASE

Legal Developments

This case was a contemporary of *A (FC) and others (FC) v. Home Secretary* (2004), which found that the detention of the appellants was incompatible with the right to liberty and security of the person (Article 5 ECHR) and the prohibition of discrimination (Article 14 ECHR), as it discriminated between foreign and British nationals. As a result, the Law Lords held that the UK's derogation from Article 5(3) (implemented to allow for detention without charge or trial when there was a public emergency) was not lawful and a declaration of incompatibility was made regarding Section 23 of the 2001 Act and Articles 5 and 14 ECHR. Following both cases, Part 4 of the 2001 Act was repealed by the UK Government on 14 March 2005 and replaced by the Prevention of Terrorism Act 2005, which applied to individuals regardless of their nationality. *A (FC) and others (FC)* was later taken to the ECtHR, which found that the detention of the appellants by UK authorities violated their rights to liberty and security, to have lawfulness of detention decided speedily by a court, and to compensation for unlawful detention under Article 5(1)(4)(5) ECHR. However, the ECtHR found no breach of Article 3 ECHR (prohibition of torture and other inhuman or degrading treatment or punishment).

Other Political Responses

While the Lords had firmly condemned the practice of torture in the UK, Lord Hope's assertion that "condemnatory words are not always matched by conduct" highlighted a broader concern, particularly considering governmental actions at the time [67]. In 2005, efforts were made by the UK Government to circumvent its legal obligation not to deport individuals to countries where they risk being tortured (the *non-refoulement* principle). During this time, the UK entered into several Memoranda of Understanding (MOUs) with countries such as Jordan and Libya, where torture of detainees was widespread. These MOUs contained diplomatic assurances that those deported would not be tortured in the receiving country, which UK authorities argued would be sufficient not to breach the *non-refoulement* principle.

In this context of *non-refoulement* in counter-terrorism cases, the case of *Othman (Abu Qatada) v. UK* (2012) was brought to the ECtHR. In *Othman*, the ECtHR held that the use of evidence obtained by torture would breach Article 6 ECHR, and that the UK could not lawfully deport Abu Qatada, a terrorist suspect, to Jordan, given the risk that torture-tainted evidence would be used against him in legal proceedings.

Strengthening the Prohibition of Torture

By affirming that evidence obtained through torture is inadmissible in all legal proceedings, including those related to counter-terrorism, the decision reinforced the absolute and universal prohibition of torture. In the post-9/11 context, where human rights discourse risked being subordinated to national security concerns, the Court's robust defence of the prohibition of torture assumed an even greater significance. This judgment also contributed to the understanding that States must go further than simply abstaining from the practice of torture. The position of the Law Lords in this case indicates that States must also take positive steps to implement legislative, administrative, judicial, or other measures to prevent and punish torture and ensure that its use is not tacitly condoned.

Giving Effect to UNCAT

The Court also placed significant emphasis on the international exclusionary rule under Article 15 UNCAT. Even though this provision had not been incorporated into domestic law by statute, the Court applied it by interpreting the common law, the ECHR, and international law in conjunction with one another. The Court firstly affirmed that the use of torture-tainted evidence in legal proceedings would violate Article 6 ECHR, in breach of the right to a fair trial. Reasoning that the ECHR, as incorporated through HRA, was engaged, Lord Bingham held that the Convention could be interpreted as "taking account" of principles of public international law, including Article 15 UNCAT [28].

This innovative legal reasoning, using unincorporated international treaties and general international law to interpret ECHR rights, has been hailed by academics for importing public international norms into English law and encouraging "trans-national judicial dialogue".

The Legal Representatives were Ben Emmerson KC, Philippe Sands KC, Raza Husain, and Danny Friedman for the Appellants; and Ian Burnett KC, Philip Sales, Robin Tam, and Jonathan Swift for the Respondents. Interveners: The Commonwealth Lawyers Association and two other Interveners; and Amnesty International and 13 other Interveners.

ADDITIONAL RESOURCES

- Adam Wagner, 'Fruit of the Poisoned Tree: Evidence Obtained Under Torture in the UK' (UK Human Rights Blog, 7 October 2010).
- Alexandra Chirinos, 'Finding the Balance Between Liberty and Security: The Lords' Decision on Britain's Anti-Terrorism Act' (2005) 18 Harvard Human Rights Journal 155.
- Human Rights Watch, 'Highest Court Rules Out Use of Torture Evidence' (Human Rights Watch, 7 December 2005).
- Nathan Rasiah, 'A v. Secretary of State for the Home Department (No 2): Occupying the Moral High Ground?' (2006) 69(6) Modern Law Review 995.
- REDRESS, 'Landmark House of Lords Decision in Torture Evidence Case' (REDRESS, 12 August 2006).
- REDRESS and Fair Trials, 'Tainted by Torture: Examining the Use of Torture Evidence' (REDRESS, May 2018).

DUTY TO INVESTIGATE AND THE RIGHTS OF VICTIMS

R (AM AND OTHERS) V. SECRETARY OF STATE FOR THE HOME DEPARTMENT AND KALYX LIMITED (2009)

Link to the judgment

Court of Appeal (Civil Division)

VICTIMS' RIGHTS • FAMILY PARTICIPATION • DUTY TO INVESTIGATE • MINIMUM STANDARDS OF INQUIRY • DETENTION • PRISON CONDITIONS

CASE SUMMARY

Several individuals held at Harmondsworth Immigration Detention Centre (Harmondsworth) raised allegations of inhuman and degrading treatment and of systemic management failures during disturbances in November 2006. While an investigation was opened and carried out by a former civil servant of the Home Department (Home Office), the appellants in this case argued that the investigation lacked independence, and that the allegations required an independent public inquiry to satisfy the procedural requirements of Article 3 ECHR. This case is relevant as the Court of Appeal clarified the UK's procedural obligations under Article 3 to investigate allegations of inhuman and degrading treatment.

THE FACTS AND PROCEDURAL HISTORY

Harmondsworth is managed by Kalyx Limited on behalf of the Home Office and both were respondents in the appeal. Prior to the disturbances in question, Harmondsworth was already under scrutiny following a critical report by the Chief Inspector of Prisons which had documented a culture of oppression, bullying, and neglect.

On 28 and 29 November 2006, as a consequence of the disturbances which broke out in Harmondsworth, detainees who were uninvolved were subjected to conditions described as inhuman, including confinement in smoke-filled, flooded cells without adequate food, water, or ventilation and exposure to freezing outdoor temperatures while drenched from sprinklers [7]. Additionally, there were allegations of physical assaults by detention officers and rapid response personnel [7].

In February 2007, the Secretary of State commissioned Robert Whalley CB, a retired Home Office civil servant, to conduct an internal investigation into the disturbances (Whalley Investigation). However, his remit was limited

to addressing management issues, rather than allegations of ill-treatment, human rights violations, or broader systemic failures [23]. This investigation was later criticised for lacking independence and failing to meet other procedural requirements under Article 3 ECHR (prohibition of torture and inhuman or degrading treatment or punishment).

In May 2007, the appellants formally requested a full public inquiry, arguing that the Whalley Investigation fell short of Article 3's procedural obligations, particularly given the systemic nature of the allegations and the institutional ties of the investigator. In 2008, the High Court dismissed the appellants' claim, holding that while an investigation was necessary, a full public inquiry was not warranted due to the time elapsed between the request for a public inquiry and the disturbances. The High Court concluded that the Whalley Investigation, despite its limitations, was sufficient under the circumstances.

The appellants subsequently appealed to the Court of Appeal, challenging the adequacy of the Whalley Investigation and the High Court's decision. The central issues on appeal included whether Article 3's procedural obligations had been engaged and, if so, whether they had been met in the Whalley Investigation. It also addressed whether the passage of time precluded an effective remedy.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its judgment issued on 17 March 2009, the Court of Appeal found that the UK Home Secretary had failed to meet the State's procedural obligations under Article 3 ECHR in failing to institute an effective official investigation into the allegations of ill-treatment during the Harmondsworth disturbances.

Triggering of the State's Investigative Duty

The Court emphasised that the alleged ill-treatment, combined with pre-existing systemic management failures documented in the Chief Inspector of Prisons' report, met the threshold of severity required to trigger procedural obligations under Article 3. Once such obligations are engaged, the State is required to conduct an independent and effective investigation capable of uncovering the facts, identifying responsible parties, and ensuring accountability.

Investigations and Proceedings Failed to Satisfy Article 3 Obligations

The Court found the Whalley Investigation to be inadequate on multiple grounds. First, it lacked the requisite independence, as Whalley's long-standing career within the Home Office created an appearance of institutional bias [22-25, 69]. Second, the investigation's scope was too narrow, focusing on operational lessons rather than specific allegations of ill-treatment or systemic failures [67]. Consequently, it failed to satisfy procedural standards required by Article 3, which demand transparency, impartiality, and the capacity to address both individual allegations and systemic concerns [69]. The Court also agreed with the High Court's view that neither a contested civil claim not preliminary investigations made by police into potential offences committed by detainees during the disturbances satisfied the State's investigative obligations under Article 3 [67-68].

Court Declined to Order a Public Inquiry but Found a Violation

Despite recognising the State's failure to meet its procedural obligations, the Court declined to order a full public inquiry. It cited practical constraints, including the significant time that had elapsed since the disturbances, which would undermine the effectiveness of a retrospective investigation [69]. Instead, the Court issued a declaration of non-compliance with Article 3's procedural requirements while refraining from prescribing resource-intensive judicial remedies [69].

IMPACT OF THE CASE

Contribution to Existing Jurisprudence

This judgment built on the foundational case of *R (Amin) v. Secretary of State for the Home Department* (2003), which emphasised the importance of thorough, independent, and public investigations in relation to a State's investigative duty under Article 2 ECHR (right to life). In *Amin*, the House of Lords held that the State's refusal to conduct an independent public inquiry into the fatal attack of an inmate by his cellmate breached the State's procedural duties under Article 2. The case affirmed that Article 2 includes a robust procedural obligation, which extends to systemic negligence resulting in loss of life (not only killings by State agents). The Court of Appeal in *AM* confirmed that the minimum requirements set for investigations in *Amin* were equally applicable in the context of Article 3 [60]. However, the Court of Appeal in *AM* distinguished the case from *Banks v. UK* (2007) where the ECtHR clarified the limits of Article 3's procedural reach and held that civil and criminal remedies might suffice in cases of isolated breaches [36-50].

Strengthened Procedural Standards under Article 3 ECHR

The case reinforced the critical importance of conducting independent, impartial, effective, and transparent investigations into allegations of inhuman and degrading treatment. By finding the Whalley Investigation inadequate, the Court set clear benchmarks for the procedural requirements under Article 3, emphasising impartiality, transparency, and comprehensive scope to address both systemic and individual violations.

Accountability in Detention Practices to Prevent Future Violations

The judgment underscored the State's duty to ensure that custodial conditions adhere to human rights standards, even during crises. It highlighted the severity of systemic failures, such as the oppressive management practices documented at Harmondsworth, and the need to investigate such failures alongside individual allegations of ill-treatment to prevent future violations.

Public Inquiries and the Role of Independent Oversight Bodies

The Court demonstrated a cautious approach toward ordering public inquiries, suggesting that they only be used where other mechanisms are demonstrably inadequate, due to their resource-intensive nature and potential limitations when time has elapsed since the events in question. Therefore, the ruling highlighted the potential for independent oversight bodies, such as the Prisons and Probation Ombudsman, to fulfil Article 3 procedural

obligations, which could mitigate the need for judicially mandated inquiries, streamlining responses to allegations of systemic and individual ill-treatment.

The Legal Representatives were (i) Jessica Simor and Samantha Knights for the Appellants; (ii) James Eadie KC and Kate Gallafent for the First Respondent (the Secretary of State for the Home Department); and (iii) Jim Sturman KC and Jamas Hodivala for the Second Respondent (Kaylx Limited). Intervener: The Bail for Immigration Detainees.

ADDITIONAL RESOURCES

- Human Rights Law Centre, State Obligation to Conduct Public Investigations into Potential Violations of the Right to Life and Prohibition against Ill-Treatment (HRLC case summary, undated).

COMMISSIONER OF POLICE OF METROPOLIS V. DSD & ANOTHER (2018)

Link to the judgment

Supreme Court

INHUMAN OR DEGRADING TREATMENT • DUTY TO INVESTIGATE • PRIVATE ACTORS • VICTIMS' RIGHTS • SYSTEMIC FAILINGS • WOMEN'S RIGHTS

CASE SUMMARY

Two victims of sexual assaults by a London taxi driver, sued the police for failing to effectively investigate their cases, leading to prolonged delays in identifying the assailant. Both victims claimed that this failure violated their rights and the State's procedural obligations under Article 3 ECHR. The core issue concerned the scope of the duty to investigate acts of serious violence committed by private individuals under Article 3 and whether operational failings (as well as systemic shortcomings) could give rise to a breach.

The Supreme Court held by a majority that there is a positive obligation under Article 3 for the State to conduct an effective criminal investigation, regardless of whether the conduct was perpetrated by State or private actors, and that this obligation can be breached by sufficiently egregious systemic and operational failings. This case clarified that investigative failures can trigger liability under HRA, even in the absence of a traditional tortious duty of care.

THE FACTS AND PROCEDURAL HISTORY

Between 2003 and 2008, John Worboys, the driver of a black cab in London, committed sexual offences against numerous women. Two of his victims, DSD and NBV, reported their assaults to the police shortly after they took place. DSD reported her attack in 2003, but Worboys was not identified by the police; following NBV's attack in 2007, although Worboys was arrested as a suspect, he was later released without charge. Following a review by the police in February 2008, Worboys was eventually convicted of 19 counts of sexual assault.

The respondents brought proceedings against the police, alleging that their failure to conduct effective investigations into Worboys' crimes constituted a breach of the State's investigative duties under Article 3 ECHR (prohibition of torture and inhuman and degrading treatment or punishment). The proceedings were brought

under Sections 7 and 8 of HRA, which enable persons who claim that a public authority has acted in a way incompatible with ECHR rights to bring proceedings against the authority and be awarded damages.

In 2014, the High Court found in favour of the respondents, holding that there had been a violation of their rights under Article 3 and awarding them compensation. In 2015, the Court of Appeal rejected an appeal by the police against this decision, after which the police appealed to the Supreme Court.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its judgment issued on 21 February 2018, the Supreme Court found that the police's failure to investigate violated the State's procedural obligations under Article 3 ECHR, which included an operational duty to conduct a proper inquiry into behaviour amounting to a violation of the prohibition of torture and inhuman or degrading treatment or punishment. The Court was clear that Article 3 requires an effective investigation into crimes involving serious violence to persons, whether the crimes were carried out by State agents or private individuals [61].

Scope of Investigative Duty under Article 3 ECHR

While the judges agreed that the police investigation into Worboys' crimes breached Article 3 ECHR [54-58], the Court was divided as to the scope of the investigative duty, whether it was limited to systemic rather than operational failures.

Lord Kerr, with whom Lady Hale and Lord Neuberger agreed on this issue, held that the duty to conduct a proper investigation into behaviour contrary to Article 3 could be breached by both systemic and operational failings provided they were not merely simple errors or isolated omissions, but egregious and significant [55-58, 85].

Lord Hughes disagreed, finding that the investigative duty does not extend beyond a duty to put in place the necessary structures and systems for the investigation of the crime and cannot therefore be breached by operational failings however serious [139]. Lord Hughes found that there were structural failings in the investigations and therefore agreed that there had been a violation of Article 3 in any case [140].

IMPACT OF THE CASE

Domestic Recognition of Investigative Duty under Article 3 ECHR

This was the first time the Supreme Court considered the scope of the positive duty to investigate arising under Article 3 ECHR. It authoritatively confirmed that such duty can arise in respect of conduct perpetrated by private individuals [61]. Individuals are now entitled to bring a claim for compensation under HRA for a breach of

the investigative duty in respect of alleged ill-treatment committed by private individuals. The ruling is also particularly significant because, in domestic law, investigative failings are not actionable in negligence; the decision therefore provides an essential route for accountability where police investigative failures amount to a breach of Article 3.

Significance for Women's Rights

While the decision is applicable to both men and women who have been victims of ill-treatment under Article 3 ECHR, given the female victims involved in the case and the broader disproportionate impact of sexual assault on women, the decision has been hailed as a victory for women's rights in the UK. Following the decision, four women's rights groups (the End Violence Against Women Coalition; Rape Crisis England & Wales; the NIA Project and Southall Black Sisters) who intervened in the case released a joint statement welcoming the ruling and emphasising the decision's relevance for protecting women's human rights (in particular through positive duties) and encouraging the police to change their daily policy and practice.

The Legal Representatives were (i) Phillippa Kaufmann KC and Ruth Brander for the Respondents; (ii) Lord Pannick KC and Jeremy Johnson KC for the Appellant.

ADDITIONAL RESOURCES

- End Violence Against Women, NIA, Rape Crisis England & Wales and Southall Black Sisters, 'Supreme Court rules police failing in Worboys breached women's human rights' (End Violence Against Women joint statement, 21 February 2018).
- Human Rights Law Centre, 'UK Supreme Court Rules that Police Violated Victims' Rights by Failing to Properly Investigate Sexual Assaults' (HRLC case summary, undated).
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NON-REFOULEMENT AND DIPLOMATIC ASSURANCES

SOERING V. UNITED KINGDOM (1989)

Link to the judgment

European Court of Human Rights

EXTRADITION • DEATH PENALTY • *NON-REFOULEMENT* • "DEATH ROW PHENOMENON" • ARTICLE 3 ECHR SCOPE • EXTRADITION • DEATH ROW

CASE SUMMARY

Jens Soering, a German national, faced extradition from the UK to the US to stand trial for capital murder in Virginia, a crime punishable by death. He argued that his extradition would violate Article 3 ECHR because of the psychological suffering caused by the "death row phenomenon". The ECtHR ruled that his extradition would breach Article 3, finding that the conditions associated with death row would amount to degrading treatment or punishment. The judgment considered the principle of *non-refoulement*, i.e. that States must avoid exposing individuals to a real risk of torture, inhuman or degrading treatment or punishment in third countries, and it reaffirmed the extraterritorial applicability of the ECHR.

THE FACTS AND PROCEDURAL HISTORY

In March 1985, Soering and his girlfriend, Haysom, were accused of murdering Haysom's parents in Bedford County, Virginia, US. The couple fled Virginia in October 1985 but were arrested in England in April 1986 in connection with cheque fraud.

Between 5 and 8 June 1986, Soering admitted to the killings during interviews with the Sheriff's Department of Bedford County. He was indicted on 13 June 1986 by a grand jury of the Circuit Court of Bedford County. On 11 August 1986, the US requested Soering's extradition under the 1972 US-UK Extradition Treaty. The Federal Republic of Germany also filed a request for his extradition, which was ultimately denied because the evidence it relied upon was inadmissible under English law.

On 29 October 1986, the UK requested assurances from Virginia authorities that the death penalty would not be imposed or carried out. The Attorney General of Virginia indicated he would make such representations to

the trial judge but would not provide a binding assurance. Soering challenged his extradition through judicial review and *habeas corpus* petitions, both of which were dismissed by the UK courts on the basis that they were premature, as the Secretary of State had not yet reached a final decision regarding the extradition.

On 3 August 1988, the UK Home Secretary signed a warrant for Soering's extradition to the US. Soering subsequently appealed to the ECtHR, asserting that his extradition would violate, amongst other rights, the prohibition of torture and inhuman and degrading treatment or punishment under Article 3 due to the likelihood of prolonged psychological suffering from the "death row phenomenon". He also alleged violation of Article 6 (right to a fair trial) and Article 13 (right to an effective remedy).

The Commission issued interim measures requesting the UK to postpone extradition while the case was pending. The case was referred to the ECtHR in January 1989, and oral hearings were held in April 1989.

The central question for the Court was whether Soering's extradition would breach Article 3 ECHR. Amnesty International intervened, arguing that evolving European norms rendered the death penalty itself incompatible with Article 3.

THE DECISION AND ITS SIGNIFICANCE

Violations

The Court unanimously ruled that although the death penalty itself did not constitute a violation, extraditing Soering would violate his rights under Article 3 ECHR (prohibition on torture, inhuman or degrading treatment or punishment). The Court found no violation of Article 6 ECHR (right to a fair trial), or Article 13 ECHR (right to effective remedy), holding that due process in Virginia was not inadequate and that judicial remedies in the UK were not unduly limited.

The Court noted the existence of the "death row phenomenon", i.e. extreme psychological suffering arising from prolonged delays between sentencing and execution, combined with harsh detention conditions and the constant anticipation of death [111]. If extradited to Virginia, Soering would likely face an average of six to eight years on death row, and potentially longer in the event of appeals [106-107]. During this time, he would be subjected to severe stress, tension and isolation, exceeding the threshold of inhuman or degrading treatment prohibited under Article 3.

The ECtHR paid specific attention to Soering's personal circumstances, particularly his age (18 at the time of the offence) and mental state. It found that death row conditions in Virginia would have a particularly severe impact on someone of his youth and vulnerability, and that the US authorities' assurances failed to adequately mitigate this [108]. The Court emphasised that such suffering could not be justified by the legitimate aim of bringing a fugitive to justice, noting that extraditing Soering to Germany (where there was no risk of the death penalty) could achieve the same objective without exposing him to such ill-treatment [110].

IMPACT OF THE CASE

Influence on Death Penalty Jurisprudence

The ruling identified the "death row phenomenon" as a form of inhuman or degrading treatment, influencing subsequent decisions such as *Earl Pratt and Ivan Morgan v. The Attorney General for Jamaica and The Superintendent of Prisons, Saint Catherine's, Jamaica* (1993). It also contributed to the gradual abolition of the death penalty in Europe (see, for example, *Öcalan v. Turkey* (2005)).

Non-Refoulement Principles and Diplomatic Impacts

Soering broadened the application of Article 3 ECHR to extradition scenarios, marking the first ECtHR judgment to find that Article 3 prohibits *refoulement* where the individual faces a real risk of torture, inhuman or degrading treatment or punishment in the receiving State, affirming that a State's human rights obligations may be engaged by the actions of a third State. While the principle of *non-refoulement* was already recognised in international law, particularly in refugee protection under the 1951 Convention Relating to the Status of Refugees, *Soering* reinforced and extended this principle within the ECHR framework.

Cases imposing extraterritorial human rights obligations on States upon expulsion have since become a common feature of ECtHR jurisprudence and have expanded beyond Article 3 to include issues such as the right to a fair trial (*Othman (Abu Qatada) v. UK* (2012), [189]). The judgment also encourages States to secure binding assurances from requesting States regarding human rights compliance, reshaping global extradition practices.

Third-Party Interventions by NGOs

This case marked the first time an NGO intervened before the ECtHR to present submissions grounded on human rights concerns. Amnesty International's intervention marked a significant development in the role of NGOs in ECtHR human rights litigation and helped establish third-party interventions as a key mechanism for influencing the Court's jurisprudence.

The Legal Representatives were Colin Nicholls KC for the Applicant; and Sir Patrick Mayhew KC and M. Baker for the Government of the United Kingdom.

ADDITIONAL RESOURCES

- Laura Vozzella, 'No parole for Jens Soering, German diplomat's son convicted in 1985 double murder in Virginia' (Washington Post, 31 March 2017).
- Nigel S. Rodley, 'The Contribution of British NGOs to the Development of International Law' (JUSTICE content upload, undated).
- Robert McCorquodale and Jean-Pierre Gauci (eds), 'British Influences on International Law, 1915-2015' British Institution of International and Comparative Law 2016 236-263, (2016).

CHAHAL V. UNITED KINGDOM (1996)

Link to the judgment

European Court of Human Rights

DEPORTATION • *NON-REFOULEMENT* • EFFECTIVE REMEDIES • NATIONAL SECURITY • DETENTION POWERS • INDEFINITE DETENTION

CASE SUMMARY

Karamjit Chahal, an Indian Sikh national, faced deportation from the UK due to alleged involvement in Sikh separatist activities, which the Government considered a threat to national security. Chahal contested the deportation, claiming he would face torture or inhuman treatment by Indian authorities, particularly the Punjab police, because of his political activism. He also argued that the deportation appeal process was unfair, as he was denied access to evidence against him and had no opportunity to challenge it. Instead, the deportation decision was subject to review by a non-statutory advisory panel, informally known as the 'Three Wise Men', which lacked transparency and legal authority. The ECtHR ruled in favour of Chahal, confirming that Article 3 provides absolute protection and cannot be overridden by national security considerations.

THE FACTS AND PROCEDURAL HISTORY

Chahal settled in the UK in 1971 and became a prominent activist advocating for the creation of Khalistan, an independent Sikh state. In 1990, concerned about his political activities and affiliations, the UK Government ordered his deportation on national security grounds.

Chahal applied for asylum, asserting that he had previously been tortured during a visit to India and would face persecution if returned. The Home Secretary rejected his asylum claim, and Chahal was detained pending deportation. He sought judicial review of the decision, but the UK courts upheld the deportation order, deferring to the executive's assessment of national security risks.

Having exhausted domestic remedies, Chahal petitioned the European Commission of Human Rights, which referred the case to the ECtHR for final determination. The central issues were whether his deportation would

violate his right to be free from torture and inhuman or degrading treatment or punishment (Article 3) and right to a family life (Article 8); whether his detention violated the right to liberty and security (Article 5), and whether he had been denied an effective remedy (Article 13).

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision issued on 15 November 1996, the ECtHR held that the UK had violated Article 3 (by 12 votes to seven), as well as Articles 5 and 13 (both unanimously). The Court found it unnecessary to examine separately the alleged violation of Article 8 ECHR.

The Absolute Nature of the Prohibition in Article 3

The Court reaffirmed its well-established principle that the prohibition in Article 3 is absolute and allows no exceptions or justifications [79]. It therefore rejected the UK Government's argument that the threat Chahal posed to national security should be balanced against the risk of ill-treatment, noting that Article 3 protection is wider than that afforded under Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees [80].

Given the absolute nature of Article 3, Chahal's deportation could not be justified if there were substantial grounds to believe he faced a real risk of treatment contrary to that provision. In assessing that risk, the Court examined both the general human rights situation in Punjab at the relevant time and Chahal's profile as a prominent Sikh activist, which placed him at heightened risk. It concluded that such risk existed [107], and considering the "recalcitrant and enduring problem" of abuses by security forces in Punjab and elsewhere in India, the Court was not persuaded that assurances provided by the Indian Government offered sufficient guarantees of protection [105]. Accordingly, the Court found that there was a violation of Article 3 ECHR.

Available Remedies under Judicial Review were Insufficient for Article 5 ECHR

Article 5(4) ECHR guarantees detainees the right to challenge the lawfulness of their detention before an independent court with authority to order release if the detention is unjustified. Chahal's detention was based on the Home Secretary's assessment that he posed a national security threat. The ECtHR found that judicial review at the time did not provide an effective way to challenge that assessment. The Home Secretary relied on undisclosed evidence that neither Chahal nor his lawyers could see, and the Courts themselves lacked access to the classified material. Judicial review was therefore limited to assessing whether the decision was irrational or unlawful, without scrutinising the lawfulness of the detention. The Court found a violation of Article 5(4).

Remedies to Protect Article 3 Rights Insufficient for Article 13 ECHR

The ECtHR found a violation of Article 13 ECHR, given the substantial grounds for believing that Chahal faced a real risk of ill-treatment if returned to India. The remedies available in the UK, mainly judicial review, were ineffective, as the Courts could not assess the risk fully or examine the undisclosed evidence relied upon by the Government. The advisory panel (the 'Three Wise Men') was similarly inadequate: it did not permit access

to evidence or legal representation. Because Chahal could not meaningfully challenge the allegations against him, there were no procedural safeguards capable of balancing national security concerns with his rights. This absence of an effective remedy breached Article 13.

IMPACT OF THE CASE

This ruling established that the prohibition of torture under Article 3 ECHR is absolute and overrides all other considerations, including national security concerns. It rejected the idea that such concerns should be balanced against the risk of torture and restated the fundamental principle that deportation cannot be justified where there are substantial grounds for believing that a person faces a real risk of treatment contrary to Article 3. It underscored the importance of fair procedures and judicial safeguards in immigration and national security cases, ensuring that individuals have an opportunity to challenge the evidence against them and defend their rights.

Creation of the Special Immigration Appeals Commission (SIAC)

The *Chahal* decision had far-reaching implications for the UK's counter-terrorism policies and immigration law. One immediate outcome was the establishment of the Special Immigration Appeals Commission (SIAC) in 1997, replacing the previous Home Office advisory panel. SIAC was intended to ensure greater procedural fairness in cases involving national security. However, the introduction of special advocates – lawyers authorised to handle classified evidence in closed hearings – continued to raise concerns about fairness, as they could not communicate fully with their clients after reviewing the evidence.

UK's Counter-Terrorism Response

Following the 9/11 attacks, the *Chahal* ruling helped to shape the UK's response to terrorism. Since Article 3 ECHR prohibits deportation to countries where individuals face a real risk of torture and ill-treatment, the Government introduced indefinite detention under the Anti-Terrorism, Crime and Security Act 2001 for suspects it could not deport. This approach was later declared unlawful by the House of Lords in *A (FC) and others (FC) v. Secretary of State for the Home Department* (2004), leading to the introduction of control orders under the Prevention of Terrorism Act 2005.

Diplomatic Assurances

To circumvent the *Chahal* decision, the UK Government began seeking diplomatic assurances from countries with poor human rights records, promising that deportees would not face torture. However, despite cases like *Agiza v. Sweden* (2003) demonstrating the unreliability of such assurances, and criticism that such assurances would be insufficient to uphold the prohibition of torture (not least because States known for violating international obligations could not be trusted to honour bilateral agreements), the subsequent case of *Othman (Abu Qatada) v. UK* (2012) decided that such assurances, if sufficiently robust and adequately monitored, could be enough to reduce the risk of torture below the necessary threshold.

Expansions in Deportation Powers

The *Chahal* ruling also contributed to the expansion of deportation powers under the Immigration, Asylum and Nationality Act 2006, which enabled the Home Secretary to revoke the citizenship of dual nationals, exposing them to the risk of deportation. Despite these measures, critics questioned whether deportation was an effective counter-terrorism strategy, highlighting the risk of exporting, rather than preventing, terrorism (noted in the Privy Counsellors' review of anti-terrorism legislation).

Subsequent Judicial Consideration – *Sufi and Elmi v. UK* (2011)

The *Chahal* judgment established crucial principles that shaped the ECtHR's decision in *Sufi and Elmi*, including the absolute nature of Article 3, the application of the "real risk" test, and the procedural rigour required in assessing expulsion decisions. In *Sufi and Elmi*, these principles were applied expansively to encompass not only harm from violence, but also inhuman conditions arising from a humanitarian crisis. This illustrates the broader, long-term influence of *Chahal* on Article 3 jurisprudence.

In *Sufi and Elmi*, two Somali nationals argued that their removal from the UK to Somalia would violate Article 3 due to the country's dire humanitarian conditions. The ECtHR reaffirmed the principle from *Chahal*, holding that the risk of inhuman or degrading treatment in Somalia could not be outweighed by public interest justifications, such as migration control. The Court concluded that the general living conditions in areas controlled by the militant group Al-Shabaab, combined with widespread violence and famine, posed a "real risk" of treatment contrary to Article 3.

In *Chahal*, the ECtHR focused on the risk of torture and ill-treatment inflicted by State actors (e.g. Indian authorities in Chahal's case). Building on *Chahal*, the Court's jurisprudence developed to also encompass harm arising from non-state actors or from general conditions in the receiving country, where the State cannot offer effective protection. In *Sufi and Elmi*, the Court ruled that Article 3 applied not only to violent harm caused by non-state actors (such as Al-Shabaab) but also to "inhuman or degrading treatment" resulting from humanitarian conditions (e.g. lack of food, water, and healthcare exacerbated by conflict).

Further, the Court in *Sufi and Elmi* maintained that the applicants' removal could not be justified – even considering their criminal convictions in the UK – if doing so would expose them to a violation of Article 3, reinforcing *Chahal's* core principle. While *Sufi and Elmi* did not directly involve SIAC, the Court reaffirmed that States must provide robust procedural mechanisms to assess risks, whether the concern arises from national security concerns (as in *Chahal*) or humanitarian conditions (as in *Sufi and Elmi*). Questions as to whether the *Sufi and Elmi* standards should apply have arisen in subsequent cases such as *MI (Palestine) v. Secretary of State for the Home Department* (2018).

The Legal Representatives were N. Blake KC for the Applicants; and Sir Nicholas Lyell KC and J. Eadie for the Respondent Government.

ADDITIONAL RESOURCES

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- Gezana Rai, 'The UK's Regression to its Commitment to Non-Refoulement' (Global Rights Defenders, 11 November 2024).
- Natasa Maronicola, 'Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context' (Human Rights Law Review, 2015).
- Rosannah Healy, 'Deportation to situations of generalised violence may breach human rights' (Human Rights Law Centre).
- Veronica Flegar, 'Vulnerability and the Principle of Non-Refoulement in the European Court of Human Rights: Towards an Increased Scope of Protection for Persons Fleeing from Extreme Poverty?' (Contemporary Readings in Law and Social Justice, 27 February 2016).

BATAYAV V. SECRETARY OF STATE FOR THE HOME DEPARTMENT (2003)

Link to the judgment

Court of Appeal (Civil Division)

PRISON CONDITIONS • INHUMAN OR DEGRADING TREATMENT • ASYLUM • DEPORTATION • STANDARD OF PROOF • *NON-REFOULEMENT*

CASE SUMMARY

Zorig Batayav, a Russian national, arrived in the UK in 2001 and claimed asylum, relying on Article 3 ECHR because of the risk of ill-treatment arising from prison conditions in Russia. He appealed a decision of the Immigration Appeal Tribunal dismissing his claim, arguing that the Tribunal had failed to consider the ECtHR's earlier judgment in *Kalashnikov v. Russia* (2002), which found that Russian prison conditions violated Article 3.

The Court of Appeal found that the Immigration Appeal Tribunal erred in failing to consider *Kalashnikov* and, emphasising that it was not the Court's role to make its own factual findings about the current state of Russian prisons, it remitted the case for reconsideration. On reconsideration, the Immigration Appeal Tribunal found – based on evidence before it as to how conditions had changed since *Kalashnikov* – that the severe overcrowding was no longer systemic, and that Batayav's return would not pose a real risk of violating Article 3. The Court of Appeal later upheld this conclusion.

THE FACTS AND PROCEDURAL HISTORY

Zorig Batayav was a Russian Federation national who arrived in the UK on 7 August 2001 and claimed asylum under the 1951 Convention Relating to the Status of Refugees. He alleged a risk of persecution due to his non-Russian ethnic origin and the likelihood of imprisonment in Russia for refusing to participate in military action in Chechnya and for selling medicines to Chechens. He also sought protection under the ECHR, arguing that prison conditions in Russia were inhuman and degrading, in breach of Article 3, irrespective of whether he was at risk of persecution.

The Secretary of State refused both claims, and Batayav's appeals to the Adjudicator and the Immigration Appeal Tribunal were dismissed. He was, however, granted permission to appeal to the Court of Appeal on his Article 3 ground.

THE DECISION AND ITS SIGNIFICANCE

Remittal to the Immigration Appeal Tribunal to Consider Russian Prison Conditions

In its judgment issued on 5 November 2003, the Court of Appeal held that because the ECtHR had found Russian prison conditions to violate Article 3 ECHR (prohibition of torture and inhuman or degrading treatment or punishment) in *Kalashnikov v. Russia* (2002), the appellant's case should be remitted to the Immigration Appeal Tribunal for reconsideration in light of that ruling [33].

The Court noted that although *Kalashnikov* predated the Immigration Appeal Tribunal's judgment, the Tribunal made no reference to it [19]. Instead, it relied on the earlier domestic case of *Krotov v. Secretary of State for the Home Department* (2002), in which the Immigration Appeal Tribunal had held that Russian prison conditions did not raise risks contrary to Article 3 [14]. The Court of Appeal considered that *Kalashnikov* established *prima facie* grounds that the appellant would face a real risk of degrading treatment if returned, and that removal would be precluded unless there was evidence of a change in circumstances [28].

The Secretary of State argued that Russian prison conditions had significantly improved since *Kalashnikov*, reducing any Article 3 risk to the appellant [28]. The Court of Appeal accepted that evidence of improvements might be relevant, but held that, as an appellate court rather than a fact-finding tribunal, it was not appropriate to determine those factual issues [32]. That assessment was for the Immigration Appeal Tribunal on remittal [33].

Reconsideration by the Immigration Appeal Tribunal

On reconsideration, the Immigration Appeal Tribunal held that evidence showed that the severe overcrowding identified in *Kalashnikov* was no longer systemic in Russian prisons. It noted that counsel for the appellant had conceded that overcrowding was no longer a major problem, although other health-related concerns persisted. Batayav appealed again to the Court of Appeal (*Batayav v. Secretary of State* (2005)), challenging whether such a concession had been made and, if so, whether it could be withdrawn. The Court of Appeal dismissed the appeal, holding that the Immigration Appeal Tribunal was entitled to rely on the concession and had not erred in its reasoning [19].

IMPACT OF THE CASE

Recognition of ECtHR Jurisprudence on Article 3 ECHR

The case confirmed that English Courts and Tribunals must consider the ECtHR's assessment of detention conditions in other States when determining Article 3 protection claims. The Court of Appeal made clear that

domestic courts are expected to consider relevant ECtHR jurisprudence, even where domestic precedents point in a different direction. It also confirmed the ECtHR's position that prison conditions can constitute a violation of the prohibition of inhuman and degrading treatment or punishment under Article 3 irrespective of any intention to ill-treat the detainee.

Standard of Proof

The judgment helped clarify the standard of proof in expulsion cases involving alleged Article 3 ECHR breaches arising from detention conditions in the receiving State. Some domestic cases had previously adopted a restrictive approach, suggesting that detention conditions upon return were of limited relevance, or insufficient on their own, to establish a prospective breach of Article 3. In *Hariri v. Secretary of State for the Home Department* (2003), the Court of Appeal had referred to the need to establish a "consistent pattern of gross and systematic violation" before an applicant's removal could be precluded based on a generalised risk.

Although the Court of Appeal in *Batayav* did not reject *Hariri*, Sedley LJ (with whom the other judges agreed) emphasised that suggestions that "frequent" or even "routine" ill-treatment in receiving detention facilities would not suffice must be treated with care [38]. The determinative question remains whether there is a "real risk" that the individual – either personally or as a member of a group – would face inhuman or degrading treatment. This "real risk" standard is now well-accepted in domestic courts.

Subsequent Judicial Consideration

It is now well-established that Article 3 ECHR can be invoked to resist removal to countries where prison conditions pose a real risk of inhuman or degrading treatment, including overcrowding. *Batayav* has been recognised as domestic authority aligning UK courts with the ECtHR's approach to assessing prison conditions under Article 3. *Batayav's* "real risk" test has been consistently applied in later *non-refoulement* detention cases. Litigants in other proceedings have also relied on *Kalashnikov* or *Batayav* to support further, more innovative arguments about imprisonment both in domestic and expulsion cases, but such arguments have not generally gained judicial traction.

Academic Reception

Academic commentary has noted *Batayav's* role in clarifying the "real risk" standard applicable to Article 3 *non-refoulement* claims, and its reliance on ECtHR jurisprudence such as *Kalashnikov* when assessing foreign prison conditions. It has been further suggested that by applying *Kalashnikov* in the expulsion context, *Batayav* implicitly rejected a relativist approach in which the acceptable standard of detention conditions varies by country. More broadly, by adopting the ECtHR's jurisprudence on a cumulative approach to prison conditions, *Batayav* demonstrated the opening of an avenue for Article 3 challenges based on prison conditions, which was otherwise largely unavailable before the commencement of HRA.

Policy Impact

The case reinforced judicial scrutiny of foreign prison conditions in UK removal decisions. The principle that harsh prison conditions can amount to inhuman treatment precluding expulsions (offering broader protection than that available under the 1951 Convention Relating to the Status of Refugees) is now reflected in the UK's guidance governing asylum procedures.

The Legal Representatives were Oluwole Afolabi Ogunbiyi for the Appellant; and Neil Garnham KC and Tim Eicke for the Respondent.

ADDITIONAL RESOURCES

- European Union Agency for Asylum, 'Evidence and credibility assessment in the context of the Common European Asylum System, Judicial Analysis' (IARMJ and EUAA, second edition, February 2023).
- Robert Thomas, 'Risk, Legitimacy and Asylum Adjudication' (2020) 58(1) Northern Ireland Legal Quarterly 317.
- Rosalind English, UK Human Rights Blog, 'Foreign nationals who pose a threat to national security may not be deported to Algeria because of human rights – Court of Appeal | Electronic Immigration Network' (Electronic Immigration Network guest blog, 2 February 2015).

BABAR AHMAD AND OTHERS V. UNITED KINGDOM (2012)

Link to the judgment

European Court of Human Rights

EXTRADITION ORDERS • PRISON CONDITIONS • SOLITARY CONFINEMENT • LIFE IMPRISONMENT • COUNTER-TERRORISM • *NON-REFOULEMENT*

CASE SUMMARY

Six men accused of terrorism-related offences in the US – four British nationals and two foreign nationals – challenged their extradition from the UK on the grounds that it would violate Article 3 ECHR. They argued that, if extradited, they would face ill-treatment due to the conditions at the US "supermax" facility ADX Florence, especially if subjected to "special administrative measures" such as solitary confinement, and because of the risk of excessively long or life sentences.

The ECtHR found no violation of Article 3. It considered the conditions at ADX Florence, where some of the applicants risked detention, and concluded that there was no evidence that the treatment there was inhuman or degrading. The Court also examined the risk of life imprisonment without parole, noting that "grossly disproportionate sentences" could violate Article 3 only in exceptional cases, which did not apply in the context of the serious terrorism-related offences at issue.

THE FACTS AND PROCEDURAL HISTORY

Babar Ahmad, a British national, was first arrested in London in December 2003 on suspicion of terrorism offences linked to an extremist website. He was released without charge under UK law but re-arrested in August 2004 following an extradition request from the US Government, on the basis that the website was hosted on US servers. By the time of the Court's ruling in 2012, Ahmad had spent eight years in UK custody, pending extradition, without having been charged with any criminal offence under UK law.

The other five applicants were likewise arrested in the UK on suspicion of terrorism offences in the US and each appealed to the High Court against the initial extradition orders. The High Court held that there was no risk of

an Article 3 (prohibition of torture and inhuman or degrading treatment or punishment) violation, and therefore their extradition to the US could proceed. It also refused leave to appeal to the House of Lords.

The American Civil Liberties Union, the National Litigation Project at Yale Law School, INTERIGHTS, and Reprieve intervened in the proceedings, focusing primarily on the gap between the protection available under the US Constitution and that afforded by Article 3 ECHR.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its judgment issued on 10 April 2012, the ECtHR unanimously held that the applicants' extradition, despite conditions at the supermax prison and the potential length of their sentences, would not violate the prohibition of torture and inhuman or degrading treatment or punishment under Article 3 ECHR.

The Absolute Nature of Article 3 ECHR in Extradition Cases

The Court addressed a tension in its previous caselaw (between *Soering* and *Chahal*) by reaffirming the absolute nature of Article 3 in extradition cases. It rejected the UK Government's argument that the risk of ill-treatment could be balanced against policy reasons for expulsion [172]. Specifically, it rejected the distinction drawn by the UK House of Lords in *R (Wellington) v. Secretary of State for the Home Department* (2008), which had accepted that while policy reasons could not justify extradition that would risk exposure to torture, they might be relevant to lesser forms of ill-treatment. The ECtHR emphasised that the ill-treatment severity threshold must be assessed independently of the reasons for removal [172].

However, referring to *Wellington*, the Court noted that the absolute nature of Article 3 does not mean that any form of ill-treatment, however minor, will bar extradition. The Convention does not intend to impose standards on non-contracting States, and the treatment must still reach the minimum level of severity required by Article 3 [177]. The Court emphasised that its focus on *refoulement* cases is on whether the risk (of either torture or ill-treatment) is a real one, and that since *Soering* it has never examined the proportionality of a proposed extradition [173].

The Court acknowledged the inherent difficulties in assessing the risk of ill-treatment in *non-refoulement* cases [170], its general reluctance to draw distinctions in this context [171], and its careful approach before finding an Article 3 violation [179]. It also noted that it would be hesitant to find such a violation where the applicant faced extradition to a State with a "long history of respect of democracy, human rights and the rule of law" [179].

IMPACT OF THE CASE

The Importance of Conditions of Detention and Length of Sentence Imposed by Receiving States

The Court considered whether the conditions the applicants would face at ADX Florence met the threshold for an Article 3 violation. In relation to solitary confinement, it observed that prolonged social isolation is "undesirable", but that whether it breaches Article 3 depends on the specific conditions and their impact on the individual [209]. The Court found no evidence that detention conditions at ADX Florence would violate Article 3, noting that "a great deal of in-cell stimulation is provided" [222].

The applicants had also argued that the sentences they faced in the US would be grossly disproportionate to the offences alleged. The Court noted that sentencing policy generally falls outside the scope of the Convention [236] but accepted that "a grossly disproportionate sentence could amount to ill-treatment contrary to Article 3" [237]. However, given the seriousness of the allegations against the applicants and the discretion of US sentencing judges, it concluded that the potential sentences would not be grossly disproportionate [243].

Three applicants further argued that their diagnosed mental health conditions would expose them to ill-treatment at ADX Florence. The Court found, however, that the psychiatric services available would be sufficient to treat such conditions [224].

Legal Reasoning in *Non-Refoulement* Cases

The case reinforced that the *non-refoulement* obligation is equally absolute where there are risks of ill-treatment contrary to Article 3 [169-171]. It also clarified that the question of a real risk of such treatment cannot depend on the legal basis for removal, meaning the distinction between extradition and other forms of removal is irrelevant to the risk assessment [168]. It also departed from the House of Lords' finding in *Wellington* that treatment amounting to inhuman or degrading treatment in the domestic context will not necessarily meet such threshold when the extradition factor is considered [68]. Instead, the Court held that the ill-treatment threshold assessment is entirely independent from the extradition or removal factor, and that the Court does not examine the proportionality of extradition [172]. What matters is whether there is a real risk of torture or ill-treatment. This provides a blueprint for the examination of other extradition cases by the courts.

Influence and Limitations for Future Caselaw

The ECtHR's findings on Article 3 violations related to life sentences has since evolved, both within and outside the *non-refoulement* context. While in *Ahmad* the Court held that an Article 3 violation would not arise at the moment when a life sentence is imposed (although it could arise later if both the continued imprisonment could no longer be justified and the sentence was irreducible) [241-242], in *Vinter and Others v. UK* (2013), the Grand Chamber held that the imposition of a life sentence would violate Article 3 in the absence of clear rules as to how such a sentence might be reviewed and reduced subsequently. Similarly, in *Trabelsi v. Belgium* (2015), the ECtHR ruled that extradition to the US, in circumstances "very similar" to those in *Ahmad*, violated Article 3, as the individual would have no real prospect of release due to the absence of a sufficiently clear review mechanism linked to rehabilitation.

Public and Policy Reactions to the Judgment

In the context of ongoing debate over UK-US counter-terrorism co-operation practices and extradition policy, the ECtHR's finding that neither potential life sentences nor detention in a US supermax prison were sufficient to bar extradition attracted significant attention. NGOs like Amnesty International and other commentators raised concerns about the compatibility of maximum-security facilities in the US with international human rights standards, as well as the fairness of US-UK extradition laws and practices.

The Legal Representatives were (i) G. Pierce and B. Cooper for the first, second, third, and fifth Applicants; (ii) M. Arani, B. Brandon, and A. Jones KC for the fourth Applicant; (iii) A. Raja and J. Jones for the sixth Applicant; and (iv) D. Walton (of the Foreign and Commonwealth Office) for the Government.

ADDITIONAL RESOURCES

- Amnesty International, 'USA must respect rights of individuals extradited from the UK' (8 October 2012).
- Isabel McArdle, 'Abu Hamza and Babar Ahmad can be extradited to USA, rules human rights court' (UK Human Rights Blog, 10 April 2012).
- Scott Poynting, 'Entitled to be a Radical? Counter-Terrorism and Travesty of Human Rights in the Case of Babar Ahmad' State Crime Journal, Vol. 5, No. 2 (Autumn 2016).
- The Guardian 'Babar Ahmad and the injustice of the US/UK extradition laws' (The Guardian online, 6 April 2012).

OTHMAN (ABU QATADA) V. UNITED KINGDOM (2012)

Link to the judgment

European Court of Human Rights

DEPORTATION • NATIONAL SECURITY • DIPLOMATIC ASSURANCES • DETENTION • *NON-REFOULEMENT* • FAIR TRIAL

CASE SUMMARY

The UK sought to deport Abu Qatada, a Jordanian national, on national security grounds. Following the House of Lords' decision in *RB and U (Algeria) v. Secretary of State for the Home Department and Secretary of State for the Home Department v. OO (Jordan)* (2009), the case was appealed to the ECtHR.

The ECtHR found that Abu Qatada's deportation to Jordan would not violate the prohibition of torture and inhuman and degrading treatment or punishment under Article 3 ECHR, nor the right to liberty and security under Article 5 ECHR, given diplomatic assurances that he would be protected from such violations. However, it held that deportation would violate the right to a fair trial under Article 6 ECHR, as there remained a risk that torture-tainted evidence would be admitted in his re-trial, rendering the proceedings flagrantly unfair. The case had significant implications for the use of diplomatic assurances and the permissibility of extradition to face trial in countries where torture is reportedly practiced.

THE FACTS AND PROCEDURAL HISTORY

Abu Qatada arrived in the UK in 1993 and was granted asylum and permission to remain for an initial period of four years. In 1999, a Court in Jordan convicted him *in absentia* of conspiracy to commit terrorist acts. He was subsequently held in custody in the UK pending deportation to Jordan. He was detained on 11 August 2005 following a deportation order issued on national security grounds. His appeal to the Special Immigration Appeals Commission (SIAC) was refused in 2007. In 2008, the Court of Appeal overturned SIAC's decision to deport him, finding that there was a real risk that the 1999 conviction was based on evidence obtained through torture.

In February 2009, the House of Lords considered Abu Qatada's appeal together with that of another appellant. The appeals addressed whether diplomatic assurances provided by receiving States with poor human-rights records (*RB and U (Algeria)* and *OO (Jordan)*) could be sufficient to prevent a breach of Article 3 ECHR (prohibition of torture and inhuman or degrading treatment or punishment). The House of Lords held that the assurances given by Algeria and Jordan were satisfactory to safeguard deportees from torture. As the Jordanian Government had reportedly offered binding undertakings that Abu Qatada would not be ill-treated upon return, his appeal was rejected.

Abu Qatada subsequently brought the case before the ECtHR.

Amnesty International, JUSTICE and Human Rights Watch were granted permission to intervene before the ECtHR. They argued that reliance on assurances was fundamentally flawed given the established records of both Algeria and Jordan in using torture during interrogation. They also submitted that Article 3 ECHR would be breached if courts relied on closed or secret proceedings to assess the risk of ill-treatment on return. Further, they criticised the use of torture-tainted evidence in trials.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision on 17 January 2012, the ECtHR unanimously held that the UK Government would violate Article 6 ECHR (right to a fair trial) by deporting Abu Qatada to Jordan, due to the real risk that his re-trial would rely on evidence obtained through torture.

Use of Torture-Tainted Evidence and the Risk of a Flagrantly Unfair Trial

The Court drew a distinction between minor or technical procedural flaws and violations so serious that they nullify the fairness of a trial. It confirmed that torture-tainted evidence, particularly where there is a clear record of coercive interrogation, renders any resulting conviction inherently unsafe. As Abu Qatada's *in absentia* convictions rested primarily on statements from co-defendants who had been subjected to '*falaka*' (beating of the soles of the feet), the ECtHR concluded that there was a real risk the same evidence would be used again at re-trial. Deporting him in these circumstances would therefore breach Article 6, as it would expose him to a flagrantly unfair trial.

IMPACT OF THE CASE

Role of Diplomatic Assurances

The Court accepted that, in this case, the UK could rely on diplomatic assurances from Jordan to deport Abu Qatada, despite torture remaining widespread there. It recognised that the general human rights situation in

Jordan was problematic, noting United Nations (UN) findings of credible allegations of routine torture and ill-treatment [107]. However, the UK had concluded a Memorandum of Understanding (MOU) with Jordan in 2005 that contained assurances that returned persons would not be mistreated. The Court found sufficient evidence that the diplomatic assurances provided by the Jordanian Government were sufficient to prevent ill-treatment, noting that Jordan had made "genuine efforts" to provide "detailed assurances to ensure that that the applicant will not be ill-treated upon return" [194].

The Court's ruling does not establish a general rule that a country with a documented record of systematic torture cannot offer valid diplomatic assurances. Instead, it adopted a case-specific approach, finding that in this specific case the assurances from Jordan were sufficiently reliable to remove the real risk of ill-treatment. The Court emphasised factors such as the strength of bilateral relations, the detailed nature and importance of the MOU, and Abu Qatada's high-profile status, which would likely subject his treatment to heightened scrutiny.

Inadmissibility of Torture-Tainted Evidence

The case brought into focus the issue of extraditing individuals to face trial in countries where there is a real risk that evidence obtained through torture or ill-treatment may be used in proceedings. It is the ECtHR's leading judgment on the finding that such a risk violates the individual's right to a fair trial under Article 6 ECHR. The Court explicitly held that the admission of evidence obtained by torture constitutes a "flagrant denial of justice", emphasising that such trials are not simply procedurally flawed but fundamentally unreliable and unjust [263].

In *Soering*, the ECtHR had recognised that there could be circumstances in which a State is prohibited from deporting an individual because they would face a trial that does not meet the standards required by Article 6. *Othman (Abu Qatada)* marked the first time the ECtHR found those conditions were actually met, such that deportation would violate Article 6.

The Legal Representatives were E. Fitzgerald KC and D. Friedman for the Applicant; and M. Beloff KC, R. Tam KC, and T. Eicke for the Respondent Government.

ADDITIONAL RESOURCES

- Amnesty International, 'UK: European Court Ruling Sends Mixed Message on Torture', (18 January 2012).
- Rosalind English, Suspected terrorist may not be deported to Jordan - Strasbourg rules (UK Human Rights Blog, 17 January 2012).
- Conor McCarthy, 'Diplomatic Assurances, Torture and Extradition: The Case of Othman (Abu Qatada) v. the United Kingdom', (EJIL:Talk! Blog of the European Journal of International Law, 18 January 2012).
- Adam Tomkins, 'No deportation for Abu Qatada, but where are we now on torture evidence?' (UK Human Rights Blog, 19 January 2012).

LORD ADVOCATE V. DEAN (2017)

Link to the judgment

Supreme Court

PRISON CONDITIONS • NON-STATE VIOLENCE • DIPLOMATIC ASSURANCES • *NON-REFOULEMENT* • EXTRADITION • SOLITARY CONFINEMENT • PENAL REFORM

CASE SUMMARY

A British national facing extradition from Scotland to Taiwan challenged his extradition on the basis that it would violate his rights under the ECHR, due to a real risk of ill-treatment in Taipei prison, both from other prisoners and because of the likely detention conditions. He had initially succeeded in halting extradition in the Scottish Courts, but the UK Supreme Court later allowed the extradition, finding that assurances provided by Taiwan were sufficient to meet the standards required by Article 3 ECHR.

The decision highlights the role of diplomatic assurances in extradition cases and clarifies the Supreme Court's approach to State responsibility under Article 3 in protecting individuals from mistreatment by non-state actors, adopting a distinct standard of protection from State-inflicted harm. While concerns may persist about the reliability of assurances from States not formally recognised by the UK, the case has subsequently been followed in UK jurisprudence.

THE FACTS AND PROCEDURAL HISTORY

Zain Taj Dean was convicted in Taiwan in March 2010 of driving under the influence of alcohol, negligent manslaughter, and leaving the scene of an accident. He was sentenced to imprisonment. While on bail pending appeal, he fled to Scotland using a friend's passport. His appeal was subsequently heard *in absentia*, and the conviction was upheld.

Taiwan requested his extradition under an *ad hoc* Memorandum of Understanding (MOU) between the UK Government and the Government of the Republic of China in Taiwan, as no formal extradition treaty existed. Following various challenges in the Scottish Courts, an extradition order was made on 1 August 2014. Dean

challenged his extradition on, among other grounds, the UK's *non-refoulement* obligation under Article 3 ECHR (prohibition of torture and inhuman and degrading treatment or punishment). He argued that the conditions in Taiwanese prisons and the risk of violence from other prisoners exacerbated by his formerly prominent status in Taiwan created a real risk of ill-treatment. Although the Taiwanese authorities had given assurances that Dean could be protected, including by allowing him to remain in his cell and exercise alone, he argued that these measures themselves would amount to treatment contrary to Article 3 ECHR.

The extradition order was overturned by the High Court of Justiciary (Scottish Appeal Court) on 23 September 2016 by a two-thirds majority, on the basis that Dean's Article 3 rights would be violated. Applying the test from *Saadi v. Italy* (2008), which did not distinguish between harm inflicted by State or non-state actors when addressing an Article 3 violation, the Scottish Appeal Court held that in this case there was real risk of treatment contrary to Article 3.

The Lord Advocate appealed to the Supreme Court arguing, among other things, that the Scottish Appeal Court had applied the incorrect legal test when assessing the risk of ill-treatment and that extradition should proceed. Dean also raised additional claims under Article 5 (right to liberty and security) and Article 8 (right to private and family life) ECHR.

THE DECISION AND ITS SIGNIFICANCE

No ECHR Violation

In its decision on 28 June 2017, the UK Supreme Court overturned the Scottish Appeal Court's decision and unanimously held that Dean's extradition would not violate the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 ECHR), the right to liberty and security (Article 5), or the right to private and family life (Article 8).

Article 3 Risk Assessment: Prison Conditions and Diplomatic Assurances

In relation to Article 3, the Court accepted that some risk existed from other prisoners but found no evidence that the Taiwanese authorities would fail to protect Dean from ill-treatment [39]. Nor did it consider the proposed prison conditions, including the protective measures available to him, to amount to ill-treatment [48]. The assurances provided by the Taiwanese Government were given significant weight and were treated as credible and made in good faith [36, 38].

In assessing the level of protection required under Article 3, the Supreme Court clarified that a distinction must be made between risks arising from State and non-state actors. While *Saadi* confirms a high threshold where harm is State-inflicted, in cases involving non-state actors (such as other prisoners) it is sufficient that the State takes reasonable steps to protect the individual [24, 25-27]. The assurances that Dean could "remain in his cell and exercise outdoors by himself" if necessary were considered adequate protective measures [39].

In examining whether the likely prison conditions would breach Article 3, the Court, drawing on ECtHR jurisprudence, distinguished Dean's situation from solitary confinement involving complete sensory and social isolation. His prospective conditions would involve relative isolation, with access to limited social contact,

visits, newspapers, radio and television [40-42]. The Court also noted that prison conditions in Taiwan generally complied with standards advocated by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [34]. The length of sentence was also considered relevant [43]. The Taiwanese authorities undertook to credit Dean for time spent in custody in Scotland, meaning he was expected to serve less than 13 months, and he would not be required to isolate; it was merely an option [42].

The Supreme Court accepted that a holistic assessment of detention conditions was required [44] but did not consider Dean's additional arguments – concerning medical staffing ratios, UK consular involvement and other factors – to materially affect the Article 3 analysis [45-47].

Decision on Other Grounds and Remittal

The Court rejected Dean's Article 5 and Article 8 arguments [50-51]. However, it remitted a residual ground of appeal under Section 108 of the Extradition Act 2003 [52], concerning whether the "speciality arrangements" required by section 95 had been met, for reconsideration by the Scottish Appeal Court. The subsequent proceedings in the Scottish Court of Appeal again resulted in Dean's extradition being prevented (see *Zain Taj Dean v. Lord Advocate and Scottish Ministers* (2019)).

IMPACT OF THE CASE

State Obligations in Respect of Conditions of Detention

The Supreme Court applied ECtHR jurisprudence and clarified the State's obligations to prevent violations of Article 3 ECHR in respect of conditions of detention, as well as the criteria for assessing that risk. It considered several factors relevant to detention conditions, including the physical state of the facility, access to visitors and to healthcare. The Court also examined the protective measures that authorities could offer detainees against harm from non-state actors. It held that assurances from public authorities related to protective measures and conditions of detention were to be given weight and could be accepted as having been made in good faith.

Distinction Between State and Non-State Harm for Article 3 ECHR

Drawing on domestic authority and earlier ECtHR jurisprudence, the Supreme Court held that the level of protection required to prevent a violation of Article 3 depends on the source of the risk. Harm arising from State agents can trigger such a violation, whereas harm posed by non-state actors, such as other prisoners, does not automatically engage State responsibility under Article 3. Where the threat originates from State agents, a higher level of scrutiny applies; for threats from non-state actors, the State's duty is to offer reasonable protection to mitigate the risk of torture or ill-treatment. The assurances provided by the Taiwanese Government were considered sufficient to satisfy the Court that reasonable protective measures would be in place.

Approach to Protective Measures and Diplomatic Assurances

Some academic commentary has been critical of *Dean*, suggesting that, in departing from the *Saadi* approach, the Supreme Court relied on jurisprudence "qualitatively different from prison cases" and that the level of

control exercised by prison authorities "should be enough to cast doubt on the reliability of the State agent/ non-state actor divide in prison cases". On this view, the *Saadi* test – which arguably requires a more thorough examination of whether protective measures are compatible with Article 3 ECHR – remains the more appropriate standard.

Nevertheless, UK courts appear to have adopted the more restrictive approach taken in *Dean*. In *Giese v. Government of the United States of America* (2018), for example, the Administrative Court applied *Dean*, noting that compliance with Article 3 does not require a guarantee of safety in detention.

Dean has also been applied or followed in other cases as authority for the presumption that State assurances concerning prison conditions (or protective measures upon extradition) are given in good faith and can generally be relied upon when assessing the risk of ill-treatment under Article 3 (see *Giese* and *Bazys and another v. Vilnius County Court, Republic of Lithuania and another* (2022)).

Influence on Reform of Taiwan Prison Conditions

At a local level, the issue of Dean's alleged special treatment and concerns about deficient prison conditions, highlighted during the extradition proceedings, attracted attention in Taiwanese media. Around the same time that Dean initiated proceedings challenging his extradition, Taipei authorities proposed plans to improve prison conditions.

The Legal Representatives were Lord Advocate and David J Dickson for the Appellant; and Mungo Bovey KC and Graeme R Brown for the Respondent.

ADDITIONAL RESOURCES

- Brian Hioe, 'Zain Dean extradition to cause controversy' (New Bloom, 7 October 2017).
- David Blair and Dominic Scullion, 'Extradition, state assurances and article 3' (Law Society of Scotland publication, 14 August 2017).
- Jake Chung, 'Ministry mulls correctional facility reform' (Taipei Times, 10 March 2017).
- James Hamilton, 'Lord Advocate of Scotland mulling Zain Taj Dean case appeal' (The National, 26 November 2016).
- Law Society of Scotland, 'Supreme Court allows Lord Advocate's appeal in Taiwan extradition case' (Law Society of Scotland publication, 28 June 2017).
- Paul Arnell, 'Extradition, Taiwan and the speciality principle' (Scots Law Times (online), 2019 (25) 89-92).
- Stephen Allen, 'Non-State Actors and Non-Refoulement: the Supreme Court's Decision in Zain Taj Dean' (EJIL:Talk! Blog of the European Journal of International Law, 28 July 2017).
- Taipei Times, 'MOJ guarantees personal safety of Zain Dean' (30 June 2017).
- Taiwan Today 'Ruling on UK national's extradition welcomed by Taiwan' (29 June 2017).

AAA V. SECRETARY OF STATE FOR THE HOME DEPARTMENT (2023)

Link to the judgment

United Kingdom Supreme Court

RWANDA POLICY • ASYLUM • DEPORTATION • *NON-REFOULEMENT* • DIPLOMATIC ASSURANCES • CUSTOMARY INTERNATIONAL LAW

CASE SUMMARY

AAA was a successful challenge to the legality of the UK Government's 'Rwanda policy', which aimed to relocate asylum seekers to Rwanda and declare their asylum claims inadmissible in the UK. Asylum seekers at risk of removal brought various challenges to prevent the implementation of the policy. The UK Supreme Court rejected the Government's appeal, upholding the earlier finding that the Rwanda policy was unlawful. It held that there was real risk of *refoulement*, contrary to Article 3 ECHR and other binding international and domestic obligations.

The judgment was a major setback to the UK Government's efforts to implement the policy and prompted further legislative changes. At the time of drafting this Casebook, the Rwanda policy remains controversial, with continuing legal and political debate, and the current Labour Government has pledged to abandon the scheme.

THE FACTS AND PROCEDURAL HISTORY

As part of the Rwanda policy, individuals seeking asylum in the UK were to be transferred to Rwanda, where their asylum claims would be assessed and determined by Rwandan authorities. The legal basis for the policy lay in paragraphs 345A–345D of the Immigration Rules (as then in force) made under Section 3 of the Immigration Act 1971. The policy relied on the UK Government's designation of Rwanda as a "safe third country" to demonstrate compliance with the principle of *non-refoulement*, which prohibits the return of individuals to territories where they may face risk of persecution or torture, inhuman or degrading treatment or punishment.

On 13 April 2022, the UK and Rwanda Governments formalised arrangements for the transfer of asylum seekers through a Migration and Economic Development Partnership (MEDP). This comprised a Memorandum of Understanding (MOU) containing undertakings as to the treatment of relocated individuals, and two diplomatic

"Notes Verbales" addressing the process for transfer, reception and accommodation. These instruments were non-binding in international law and conferred no rights to individuals. They did provide assurances from the Rwandan authorities that certain standards would be met and that deficiencies in Rwanda's asylum system would be addressed. The UK Home Secretary relied heavily on these assurances in the MEDP in designating Rwanda a "safe third country".

A group of asylum seekers from Syria (AAA), Vietnam (HTN), Iran (RM and AS), Sudan (SAA), and Iraq (ASM), with intervention from the United Nations High Commissioner for Refugees, challenged the lawfulness of the policy. They argued that systemic deficiencies in Rwanda's asylum system meant that it lacked the safeguards necessary to prevent mistreatment and therefore violated the *non-refoulement* principle. In a judgment dated 19 December 2022, the High Court of England and Wales ruled that the policy was lawful in principle, although procedural flaws in its application to individual cases required reconsideration.

On appeal, in a judgment dated 29 June 2023, the Court of Appeal of England and Wales overturned the High Court's decision and declared the policy unlawful due to systemic deficiencies in Rwanda's asylum process that posed a real risk of *refoulement*.

The Home Secretary appealed this decision to the Supreme Court. One of the asylum seekers, ASM (Iraq), cross-appealed on the basis that the Rwanda policy fell foul of Articles 25 and 27 of the 2005 Asylum Procedures Directive, a pre-Brexit EU measure providing protections against removal to a country with which an individual had no prior connection. It was not in dispute that, if these provisions continued to apply in the UK (i.e. had been "retained"), the Rwanda policy would be incompatible with them. The question for the Supreme Court was whether these provisions remained in effect in the UK following Brexit.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision issued on 15 November 2023, the Supreme Court unanimously dismissed the Home Secretary's appeal and upheld the Court of Appeal's finding that the Rwanda policy was unlawful, as it would violate Article 3 ECHR (prohibition of torture and inhuman or degrading treatment or punishment).

Unlawfulness of the Rwanda Policy

The Supreme Court found, on its own assessment of the risk of harm, that the Court of Appeal was correct to conclude that Rwanda was not a "safe third country". It held that, until certain deficiencies in Rwanda's asylum process were resolved, the policy posed serious risk of violating the *non-refoulement* principle [74, 105] contrary to Article 3 ECHR and other domestic and international legal obligations.

The Court did not accept that the assurances provided in the MEDP were sufficient to designate Rwanda a "safe third country" [46-48, 51-56]. It placed significant weight on evidence from the United Nations High Commissioner for Refugees, which highlighted procedural failures in the Rwandan asylum system and past breaches of *non-refoulement* obligations [64, 70]. These concerns included the risk that Rwanda might fail to

properly assess asylum claims and that refugees could be forcibly returned, directly or indirectly, to countries where they faced persecution, without adequate avenues of appeal [73, 77-94].

Protections in the Asylum Procedures Directive

The Supreme Court dismissed the cross-appeal brought by ASM (Iraq), holding that the relevant provisions of the Asylum Procedures Directive no longer had effect in the UK – i.e. it was not "retained" EU law – having been disapplied by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 [148].

IMPACT OF THE CASE

Non-Refoulement as a Principle of Customary International Law

Around the time of the ruling, there was significant political discourse framing the ECHR as the sole barrier to implementing the Rwanda policy. However, the Supreme Court strongly emphasised that its ruling was not solely based on ECHR rights, noting that the *non-refoulement* principle is also enshrined in the 1951 Convention Relating to the Status of Refugees and is reinforced by other international treaties to which the UK is a signatory, such as UNCAT and ICCPR. The Supreme Court further noted that the principle of *non-refoulement* is considered part of customary international law, thereby binding all States regardless of their treaty obligations [25].

Any expulsion of an individual that violated the *non-refoulement* principle would breach various provisions, including Section 2 of the Asylum and Immigration Appeals Act 1993, which requires the Refugee Convention to be upheld by new immigration rules, and Section 6 of HRA, which makes it unlawful to remove asylum seekers where there are substantial grounds to believe they would be at real risk of treatment contrary to Article 3 ECHR [27-29].

The Correct Legal Test for *Non-Refoulement*

The Supreme Court found that the Court of Appeal had applied the correct test – namely, whether the Court itself (rather than the State) considered there to be substantial grounds for believing that the removal of asylum seekers to Rwanda would expose them to a real risk of ill-treatment due to *refoulement*. Relevant factors included the general human rights situation in the receiving State, its laws and practices, its record in complying with assurances given in the past, and the existence of monitoring mechanisms. The Supreme Court agreed that the High Court had failed to apply the correct test in declaring the policy lawful, and that the Court of Appeal was right to overturn that declaration.

Legislative Response

In response to the Supreme Court's judgment, the UK Government agreed a treaty with Rwanda and, in April 2024, passed the Safety of Rwanda (Asylum and Immigration) Act 2024 (2024 Act) which re-affirmed Rwanda as a "safe third country" and, in effect, raised the threshold for legal challenges on the basis of *non-refoulement* protections. The 2024 Act purports to prohibit consideration of the non-refoulement principle when assessing whether Rwanda may be unsafe for the removal of individuals and significantly restricts individuals' ability to challenge removal under the Rwanda policy.

Among other things, the 2024 Act allows ministers to disregard interim measures issued by the ECtHR and prevents UK courts from taking them into account when deciding cases domestically. Additionally, interim remedies may only be granted by UK courts if they are satisfied that the individual would face a "real, imminent and foreseeable risk of serious and irreversible harm" – a high threshold.

Since coming into power in 2024, however, the Labour Government has pledged to abandon the Rwanda policy and, at the time of drafting this Casebook, Parliament is considering further amendments to the law, including the Border Security, Asylum and Immigration Bill, which if passed in present form, would repeal the 2024 Act.

The Legal Representatives were (i) Lord Pannick KC, Sir James Eadie KC, Neil Sheldon KC, Edward Brown KC, Mark Vinall, Sian Reeves, Jack Anderson and Natasha Barnes for the Secretary of State for the Home Department; (ii) Raza Husain KC, Phillippa Kaufmann KC, Christopher Knight, Jason Pobjoy, Anirudh Mathur, Emmeline Plews, Will Bordell, and Rayan Fakhoury For AAA (Syria) and HTN (Vietnam); (iii) Phillippa Kaufmann KC, Alasdair Mackenzie, David Sellwood, and Rosa Polaschek For RM (Iran); (iv) Sonali Naik KC, Adrian Berry, Mark Symes, Eva Doerr, and Isaac Ricca-Richardson for AS (Iran); (v) Manjit Gill KC, Rambert Demello, Tony Muman, Professor Satvinder Juss, Rashid Ahmed, Harjot Singh (Solicitor Advocate), and Mohd Mosem (Solicitor Advocate) for SAA (Sudan) and others; and (vi) Richard Drabble KC, Leonie Hirst, Sarah Dobbie, and Angelina Nicolaou for ASM (Iraq) and others. Intervener: United Nations High Commissioner for Refugees.

ADDITIONAL RESOURCES

- British Institute of Human Rights, 'The Safety of Rwanda (Asylum and Immigration) Act' (BIHR Publication, undated).
- Colin Gregory 'Government loses Supreme Court appeal on Rwanda policy' (Legal Action Group publication, 28 November 2023).
- New Law Journal 'Rwanda policy ruled unlawful' (New Law Journal, Issue 8049, 15 November 2023, Lexis Nexis).
- Professor Valsamis Mitsilegas, 'Expert Analysis: The Supreme Court rules the UK-Rwanda Policy Unlawful' (University of Liverpool School of Law and Social Justice Blog, 17 November 2023).
- REDRESS, 'Government's Rwanda Bill Would Breach UK's International Law Obligations' (REDRESS, 12 December 2023).
- REDRESS, 'UK Passes Rwanda Law, Putting Asylum Seekers at Greater Risk of Torture' (REDRESS, 12 April 2024).
- Sarah Atkins and Kieran Walsh, 'R (AAA) v SSHD and the implications of customary international law for the UK' Legal Studies (2024), 44, 391–397, Cambridge University Press.

EXTRATERRITORIALITY AND EXTRAORDINARY RENDITION

R (ABBASI) V. SECRETARY OF STATE FOR FOREIGN AFFAIRS (2002)

Link to the judgment

Court of Appeal (Civil Division)

***HABEAS CORPUS* • EXTRATERRITORIAL OBLIGATIONS • GUANTÁNAMO BAY • ARBITRARY DETENTION • FOREIGN POLICY • DUTY OF DIPLOMATIC AUTHORITIES**

CASE SUMMARY

Feroz Abbasi was a British citizen who was captured by US forces in 2001 while he was in Afghanistan and then transferred to Guantánamo Bay. Abbasi and his mother argued that the UK's FCO had a legal duty to intervene diplomatically over his detention. The case tested how far English courts can scrutinise foreign governments' conduct and executive decisions in foreign relations. The Court of Appeal concluded that the British Government had met their reasonable obligations but highlighted "deep concern" over Abbasi's continuing detention.

THE FACTS AND PROCEDURAL HISTORY

Abbasi was a British citizen who had left the UK for Afghanistan in November 2000. He was captured by US forces in 2001 during the early stages of 'Operation Enduring Freedom' which targeted the Taliban and al-Qaeda in Afghanistan after 9/11. In January 2002, Abbasi was transferred from Afghanistan to Guantánamo Bay, and soon after he and his mother sought legal redress in both the American and British courts.

Abbasi's application to the Administrative Court of the High Court's King's Bench Division for permission to seek judicial review was refused on 15 March 2002. The Court of Appeal granted permission to appeal, and it retained the case due to its complexity and importance. There were no claims in this judicial review that Abbasi had been subjected to torture or ill-treatment at Guantánamo Bay – indeed, the Court of Appeal was at pains to note that, upon the British Government's visit, detainees appeared "well treated" and that they "believe[d] that the United States courts have the same respect for human rights as our own" [5, 107(iii)].

Instead, it was submitted by the claimants that the UK's Secretary of State for Foreign and Commonwealth Affairs (Foreign Secretary) had a duty to "take all reasonable steps […] to cause, seek or require the government

of the United States" to extradite or release Abbasi, or to bring him before the US courts and allow him access to a lawyer. This was derived from the general accord that, although he had not received a response to his initiation of *habeas corpus* proceedings, they had little prospect of success [8]. At the time, US courts had indicated that non-American detainees in Guantánamo Bay had no *habeas corpus* rights, as the detention centre was not situated on US territory. In the judgment, it is noted that this is a "surprising" position and position and that it is "objectionable" that Mr Abbasi was in 'a legal black hole', "subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal" [66].

Nonetheless, there were several legal questions with which the Court of Appeal needed to grapple to resolve the judicial review of the FCO's actions in light of this US position. The first was whether there is an enforceable duty on the British Government to protect its citizens in circumstances where they are "suffering or threatened with injury in a foreign State", and the others derived from a question as to whether the Court could adjudicate in this case on the Foreign Secretary's actions.

THE DECISION AND ITS SIGNIFICANCE

No Enforceable Duty on the British Government to Protect its Citizens

The Court of Appeal considered whether there already existed a duty on States to exercise diplomatic protection when nationals have suffered a breach of a *jus cogens* norm, such as torture. Diplomatic protection refers to a formal State-to-State process employed by the State of nationality when a national suffers injury as a result of an internationally wrongful act committed directly or indirectly by another State.

The Court noted, however, that many States did not accept that such a right either exists in international law or could be introduced at this stage based on progressive development [41]. Although the Court of Appeal did recognise that the relevant FCO policy was "capable of giving rise to a legitimate expectation" of diplomatic protection [87], it considered that in this case the FCO had effectively already complied with the obligatory element [107(i)]. The Court recognised that it is vital that the Government examines the nature and extent of the injustice claimed so that a balance can be struck between the interest of the individual and foreign policy considerations [100].

The Court also found that neither the ECHR nor the HRA imposed an obligation on the UK to ensure that third-party States comply with human rights standards [41-79]. As such, it was held that there was "nothing [in the authorities] which supports the imposition of an enforceable duty to protect the citizen" [106(ii)].

However, the Court of Appeal was clear that none of these conclusions affects the discretionary right of the UK to protect its citizens, and "there is no reason why its decision or inaction should not be reviewable if it can be shown that the same were irrational or contrary to legitimate expectation" [106(iii)]. It could therefore be argued that the more egregious the ill-treatment or injustice alleged on the part of the affected individual, the more the balance will be tipped in favour of the recognition of an obligatory element in the protection offered.

Court Adjudication on the Foreign Secretary's Actions

On the question of the Court's authority over the Foreign Secretary's actions in this case, the Judges considered several issues. The first was whether the English courts could evaluate the legitimacy of another State's actions. This question arose because the claimants argued that, if the US was in breach of international law by arbitrarily detaining Abbasi, this would place additional pressure – both under international law and, presumably, through public scrutiny – on the Foreign Secretary to intervene. The Court held that, while allegations of a foreign State breaching international law require a cautious approach, domestic courts are "free to express a view in relation to what [they] conceive […] to be a clear breach of international law, particularly in the context of human rights" [57]. The denial of a writ of *habeas corpus* to Abbasi appeared to breach US and international law [64].

The second key question related to the degree of scrutiny that the Court could exercise over the executive. This was the fundamental issue in the judicial review, despite the concerns about violations of Abbasi's human rights; as the Court observed, "the United States Government is not before the court and no order of this court would be binding upon it" [67]. As such, the judgment emphasised the importance of placing the matter within the wider geopolitical context. At the time, UK-US relations were central to the so-called 'war on terror'. The Court noted that compelling the British Government to take specific diplomatic action could undermine broader foreign policy strategy, including other diplomatic channels through which the UK was already expressing concerns about Guantánamo Bay.

Given this, the Court drew on the notable decision in *Council of Civil Service Unions v. Minister for the Civil Service* (1985), in which the House of Lords had established a wide scope for judicial review, but had noted that "many of the most important prerogative powers concerned with […] foreign policy […] are unsuitable for discussion or review in the Law Courts" (cited in *Abbasi* at [83]). It was, however, clear that the general practice, policies, and statements of the FCO in relation to protection of its citizens overseas did give rise to a legitimate expectation which was justiciable. Such an expectation involved the FCO considering making representations to the foreign State [99-104]. It was held that, in Abbasi's case, those expectations had been met.

No Unlawfulness Found; Expression of Concern

The Court of Appeal ruled that the FCO had acted in accordance with Abbasi's legitimate expectation that his case would be considered for diplomatic intervention and so had not acted unlawfully. Evidence showed that discussions about the British detainees were ongoing between the UK and US Governments at various levels. Consequently, the Court declined to compel the Foreign Secretary to make specific diplomatic representations.

However, the judgment expressed grave concern about Abbasi's arbitrary detention and highlighted the potential violation of human rights under both international law and common law principles. Despite these concerns, the Court emphasised the limits of its power, both in terms of its ability to hold the US Government to account and reiterating that foreign policy decisions are primarily the responsibility of the executive.

IMPACT OF CASE

Individual Impact on Abbasi and *Habeas Corpus* Rights

Abbasi remained detained at Guantánamo Bay for a further three years before being released without charge in January 2005. His release followed a US Supreme Court ruling on 28 June 2004 in *Rasul v. Bush* (2004), brought by other Guantánamo detainees. The US Supreme Court held that the US courts have jurisdiction to hear *habeas corpus* applications made by non-US citizens detained at Guantánamo Bay. It found that, because the US exercised long-term control over the land under a long lease, the base should be treated as US territory for this purpose.

Limits of Judicial Review in Foreign Policy Matters

Although no violation was found in this case, the Court emphasised that decisions involving foreign policy, while within the scope of the Royal Prerogative, remain subject to procedural review. The judiciary may ensure such decisions are rational, consistent with legitimate expectations, and made in good faith, but cannot dictate substantive diplomatic actions.

This approach was demonstrated in *R (Al Rawi and others) v. Secretary of State for Foreign & Commonwealth Affairs and another* (2006), which involved a similar judicial review concerning two other Guantánamo detainees. As in *Abbasi*, and despite the finding in *Rasul*, there had been no ruling on their *habeas corpus* petitions. However, the case differed in one aspect: the two men were recognised refugees in the UK, not British citizens. Their representatives therefore employed different arguments to challenge the finding in *Abbasi* and the limits of judicial review over FCO decisions. These included a claim that, as refugees, the men were protected by the United Nations High Commissioner for Refugees' (UNHCRs') 1967 Protocol Relating to the Status of Refugees (Refugee Protocol) – to which the US and UK were both party – which amends and incorporates the 1951 Convention Relating to the Status of Refugees (Refugee Convention). Article 16 of the Convention guarantees refugees access to the courts of any contracting State. The claimants argued that the UK had standing under international law to challenge the US for an alleged breach of Article 16.

Laws LJ held that the Refugee Protocol imposed obligations only on the US, not on the UK, to facilitate the detainees' access to courts [124-125]. As a result, the Court could not find that the FCO was required to make a formal request for their release [129].

An additional ground for judicial review was that the FCO's decision breached the *Wednesbury* 'unreasonableness test'. The Court rejected this, holding that the claimants' submissions did not satisfy two principles: "first, they invite the court to enter into what in *Abbasi* was described as a 'forbidden area' that is, the conduct of foreign relations"; and, "secondly what is and what is not a relevant consideration for a public decision-maker to have in mind is (absent a statutory code of compulsory considerations) for the decision-maker, not the court, to decide" [131]. The Court concluded that the claimants would need "to show, at the least, that the [FCO's] judgment on the question is frankly perverse" and that this degree of irrationality was "manifestly unachievable" on the evidence presented [141].

Despite the Government's success in the Court of Appeal, the UK Government ultimately decided to intervene with the US authorities on the detainees' behalf before the case reached the House of Lords.

Both *Al Rawi* and *Abbasi* demonstrate the Courts' caution in avoiding interference with certain executive functions, particularly where foreign policy considerations are central. However, both judgments also outline

the circumstances in which the Courts will scrutinise FCO's decision-making more closely, providing useful information for other strategic litigation.

Protection of Citizens Abroad from human rights violations

In addition, *Abbasi* highlighted the challenges in implementing the legal obligations to protect British citizens from breaches of their human rights by foreign States. The emphasis throughout the judgment on foreign policy and geopolitical ramifications underlines the Court's view that decisions about intervention are political questions, rather than legal ones. This is particularly true where, as in this case, the actions of the foreign State raise novel legal issues that test established understandings of international law.

Nonetheless, the decisions in *Abbasi* and *Al Rawi* followed from the very specific factual circumstances of those cases, further complicated by novel legal questions arising from Guantánamo Bay in both the US and the UK. In the subsequent case of *Foreign Secretary and another v. Yunus Rahmatullah* (2012), concerning the arbitrary detention of a Pakistani citizen at a US airbase in Afghanistan after being captured by the British forces in Iraq, the situation and arguments were distinguished from those in *Abbasi*.

Unlike in *Abbasi*, the claimant in *Rahmatullah* had first been detained by British forces before being transferred to US custody under a Memorandum of Understanding between the US and the UK. Rather than seeking diplomatic intervention, he applied for a writ of *habeas corpus* requiring the FCO to assess whether the UK's prior detention of him gave it sufficient legal "control" to request his return from the US. Because of these distinguishing factors, the Court of Appeal issued a writ of *habeas corpus* compelling the UK Government to seek Rahmatullah's return, and the Supreme Court upheld that decision when the FCO appealed. However, the Supreme Court rejected the claimant's cross-appeal alleging that the UK's efforts to secure his return had been insufficient. The judgment reinforces the approach in *Abbasi* and *Al Rawi*, underlining the significance of diplomatic policy and the limits of judicial review in such matters.

The Legal Representatives were N Blake KC, Philippe Sands, and Ben Cooper for the Claimants; and Professor C Greenwood KC and Philip Sales for the Defendants.

ADDITIONAL RESOURCES

- Amnesty International, 'United States of America: Restoring the rule of law, the right of Guantánamo detainees to judicial review of the lawfulness of their detention' (June 2004).
- BBC 'UK "to act" over Guantanamo man' (BBC News, 23 March 2006).
- Columbia Center for Oral History, 'The reminiscences of Feroz Ali Abbasi' (The Guantánamo Bay Oral History Project, 2011).
- Emma Dunlop, 'Interpreting article 16 of the 1951 Refugee Convention: A study of State obligations to ensure access to courts for asylum seekers and refugees under international law' (PhD thesis, University of New South Wales 2021).
- Fleur Johns, 'Guantánamo Bay and the Annihilation of the Exception' (2005) 16(4) European Journal of International Law 613.
- 'High Court clarifies scope of Abbasi duty in alleged rendition case' (Brick Court Chambers, 23 March 2023).
- REDRESS, Beyond discretion: The protection of British nationals abroad from torture and ill-treatment (2018), Chapter VIII.

MOHAMED V. SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS (2010)

Link to the judgment

Court of Appeal (Civil Division)

EXTRAORDINARY RENDITION • DISCLOSURE • 'CONTROL PRINCIPLE' • PUBLIC INTEREST IMMUNITY • GUANTÁNAMO BAY • DUTY OF DIPLOMATIC AUTHORITIES

CASE SUMMARY

Binyam Mohamed, a British resident held by the US at Guantánamo Bay, requested that the UK courts order the publication of parts of a redacted High Court judgment relating to his detention and ill-treatment. The Foreign Secretary argued that disclosure would breach intelligence-sharing confidentiality with other States, i.e. the 'control principle'. The Court of Appeal disagreed, holding that disclosure of these parts of the decision would not pose risks to national security, and emphasised the strong public interest in revealing evidence of Mohamed's ill-treatment and the UK authorities' awareness of it.

THE FACTS AND PROCEDURAL HISTORY

Mohamed was arrested in Pakistan in 2002 for suspected terrorist activity. He was held in various locations for two years before being moved to a US Air Force base in Afghanistan and then to Guantánamo Bay.

This appeal arose out of claims brought by Mohamed in the High Court, seeking an order for the UK Government to disclose information about his detention and treatment to assist his defence of terrorism charges in the US. Mohamed claimed the documents would help him show that his confessions were false and had been obtained through inhuman treatment if not torture.

On 21 August 2008, the High Court granted access to the documents. However, seven paragraphs were redacted (Redacted Paragraphs), pending a further hearing to determine whether they should remain excluded from the open version of the judgment. Subsequently, the Foreign Secretary issued three public interest immunity certificates, contending that disclosing the Redacted Paragraphs would undermine intelligence-sharing arrangements between the UK and the US, based on absolute confidentiality (the 'control principle').

The Divisional Court concluded that the Redacted Paragraphs should be included in the open judgment. The Foreign Secretary appealed against this decision to the Court of Appeal.

THE DECISION AND ITS SIGNIFICANCE

In its judgment issued on 10 February 2010, the Court of Appeal dismissed the Foreign Secretary's appeal and held that the UK Government had a duty to assist Mohamed by disclosing the Redacted Paragraphs of the Divisional Court's open judgment [58, 207, 296].

The 'Control Principle' is not Absolute

The Court noted at the outset that the 'control principle' should not be treated as absolute. It considered that a two-stage assessment was appropriate. First, it should consider whether publication of the Redacted Paragraphs would be contrary to national security. Second, it should weigh the public interest in non-disclosure against the public interest in publication [129].

The Court did not agree with the Foreign Secretary's view that national security would be at risk if the material were published [203]. In reaching this conclusion, it relied on a decision from the US District Court for the District of Columbia (*Mohammed v. Obama* (2009), in which a US Judge publicly disclosed, in an open judgment, the torture and ill-treatment to which Mohamed had been subjected while under US control [120-128].

As a result, the Court did not need to undertake the second stage of the assessment concerning the balancing of public interests [188]. However, it recognised the strong public interest in publishing the Redacted Paragraphs, highlighting that they were integral to the Court's reasoning and that their disclosure corroborated Mohamed's allegations of ill-treatment. The Court also emphasised the importance of both Mohamed and the wider public knowing not only that his claim had been upheld, but also the reasons for that conclusion, which included executive involvement in or facilitation of wrongdoing [56].

Following the decision, the Redacted Paragraphs were published, revealing that the MI5 knew Mohamed was "at the very least" subject to cruel, inhuman and degrading treatment by the US authorities. They also detail that Mohamed had been intentionally subjected to continuous sleep deprivation, shackled during his interviews, and threatened with being removed from US custody and "disappearing" [Appendix to the judgment].

IMPACT OF THE CASE

Importance of Disclosing Executive Wrongdoing in Facilitating Torture

The Court held that the 'control principle' governing intelligence-sharing between States may be set aside in the interests of open justice. The judges appeared to attach significant weight to the fact that the Redacted Paragraphs concerned wrongdoing by the UK Government in facilitating torture committed by a foreign State.

First, the Court highlighted that non-disclosure of the Redacted Paragraphs would undermine the general principle that courts' reasons should be published. The Court also referred to the independent media's entitlement to impart, and the public's right to receive, information in accordance with Article 10 ECHR.

Second, it concluded that the failure to disclose the Redacted Paragraphs would undermine the right of litigants and the public to know the reasons for the Court's decision. The Redacted Paragraphs formed a crucial part of the reasoning that there had been executive involvement in torture, entitling Mohamed to relief. This case illustrates how claimants might rely on principles of democratic accountability to support arguments in favour of open justice.

Legislative, Policy, and Social Impact

Following this judgment and the instigation of related private law claims against the Government for damages, in November 2010, the UK Government announced its decision to pay compensation to Mohamed and 15 other Guantánamo Bay detainees who accused the UK authorities of complicity in their mistreatment and torture.

In July 2010, former Prime Minister David Cameron announced a "fully independent" inquiry to investigate claims that UK security services were complicit in the torture and rendition of detainees abroad following 9/11. In January 2012, the inquiry was abandoned by the Government, who stated the inquiry would resume after police investigations took place. However, no charges were brought as a result of such investigations and the MI5 officer alleged to have been involved in Mohamed's mistreatment in Pakistan in 2002 was not prosecuted due to insufficient evidence.

After the inquiry was abandoned, the Government mandated the Intelligence and Security Committee (ISC) to investigate the allegations of complicity. In June 2018, the ISC produced an extensive report detailing the UK Government's complicity in the mistreatment and rendition of detainees between 2001 and 2010. The ISC found at least 232 cases where UK officials supplied questions or intelligence to the US Central Intelligence Agency (CIA) after they knew or suspected the person had been mistreated, and 198 cases where the UK agents received intelligence from the CIA when it was known, or suspected, this intelligence came from interrogations under torture. For example, it was revealed that Mohamed was tortured in Morocco by US officials based on intelligence supplied by the UK intelligence services.

At the time they published their report in June 2018, the ISC also stated that the Government had refused to allow them to interview officers involved at the time, and that it had therefore decided to close its inquiry. In May 2019, the UN Committee against Torture recommended an independent judge-led inquiry into UK complicity in torture and rendition post 9/11, but this was not completed by the UK. In July 2019, the chair of the ISC emphasised that a judge-led inquiry would have provided another opportunity for "full transparency". The Investigatory Powers Tribunal heard two cases in June 2025 (al-Hawsawi and Al-Nashiri v the Secret Intelligence Service and others (2025)) which scrutinised the alleged complicity of the UK in CIA abuses in the period after 9/11. Whilst these cases fall well short of the broad judge-led inquiry which has been demanded, it marked a rare opportunity for UK judges to consider the legal framework relating to State complicity in torture.

The Legal Representatives were Jonathan Sumption KC, Pushpinder Saini KC, and Karen Steyn for the Appellant (Secretary of State for Foreign and Commonwealth Affairs); Dinah Rose KC, Ben Jaffey, and Tom Hickman for the Respondent (Binyam Mohamed); and Thomas de la Mare and Martin Goudie as Special Advocates for the Respondent.

ADDITIONAL RESOURCES

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- BBC, 'No charges for MI5 officer accused over Binyam Mohamed' (BBC News, 17 November 2010.
- Elspeth Wrigley, 'Mutual Confidentiality between Intelligence Services Trumped by Open Justice Requirements' (UK Human Rights Blog, 25 February 2010).
- Intelligence and Security Committee of Parliament, Detainee Mistreatment and Rendition: 2001-2010 (28 June 2018).
- Intelligence and Security Committee of Parliament, 'Statement in relation to Detention and Rendition' (ISC, 18 July 2019).
- Jason Pobjoy, 'Torture, Executive Accountability and Rule of Law' (Human Rights Law Centre post, undated).
- REDRESS, 'UK Tribunal Clarifies When British Intelligence Agencies are "Complicit" in Torture in First Case Scrutinising its Complicity in CIA Abuses' (REDRESS article, 27 October 2025).
- Ruth Blakeley and Sam Raphael, 'Accountability, Denial and the Future-Proofing of British Torture' (2020) 96(3) International Affairs, pp. 691–709.
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AL-SAADOON AND MUFDHI V. UNITED KINGDOM (2010)

Link to the judgment

European Court of Human Rights

DEATH PENALTY • EXTRATERRITORIALITY • INTERIM MEASURES • STATE RESPONSIBILITY • *NON-REFOULEMENT* • EFFECTIVE REMEDIES

CASE SUMMARY

Al-Saadoon and Mufdhi were Iraqi nationals detained by British forces in Iraq who challenged their proposed transfer to Iraq for prosecution, arguing that their transfer would violate their rights to life (Article 2 ECHR) and to be free from torture and inhuman and degrading treatment or punishment (Article 3 ECHR).

This case reaffirmed the extraterritorial application of the ECHR, reinforcing the principle of *non-refoulement* and establishing that States, even when acting outside their own territory, cannot transfer individuals to another State's authorities where there is a real risk of torture or the death penalty. This was the first merits judgment to deal specifically with the death penalty and *non-refoulement*.

The ECtHR examined the applicability of the ECHR at and after the point of transfer, the UK's obligation to comply with interim measures, and whether ECHR obligations take precedence over inter-state agreements. The UK was ultimately found to have violated various provisions of the ECHR.

THE FACTS AND PROCEDURAL HISTORY

Al-Saadoon and Mufdhi were Iraqi nationals detained by British forces in Iraq, suspected of involvement in war crimes during the Iraq conflict. The – then newly established – Iraqi High Tribunal (IHT) requested their transfer to face trial. Bilateral agreements between the UK and Iraqi Governments governed the transfer of prisoners from UK to Iraqi custody.

The applicants brought a judicial review challenge in the UK's Divisional Court to prevent the transfer. The Court noted that a real risk of the death penalty might in normal circumstances engage ECHR protections, but concluded that the transfer was lawful due to the "highly exceptional circumstances of the case" – i.e. the

nature of the arrangements between the UK Government and the IHT in post-conflict Iraq (see *R (Al-Saadoon and another) v. Secretary of State for Defence* (2008), at [204]). The claim was dismissed, though the Divisional Court noted the outcome was troubling.

The applicants were granted leave to appeal, and an interim injunction was issued prohibiting their transfer until 4 pm on 22 December 2008 to allow for an application for interim relief to be made to the Court of Appeal. The Court of Appeal dismissed the appeal at 2:30 pm on 30 December 2008, concluding that (i) the UK was not exercising jurisdiction over the applicants under Article 1 ECHR, but was acting as an agent of the IHT; (ii) even if jurisdiction existed, it would end upon their transfer on 31 December 2008; (iii) it was bound by *R (B) v. Secretary of State for Foreign and Commonwealth Affairs* (2005); and (iv) the imposition of the death penalty (by hanging or otherwise) was not, per se, a crime against humanity or a form of torture. The Court refused interim relief and lifted the injunction preventing the transfer.

On 22 December 2008, before the Court of Appeal's decision, the applicants had lodged an urgent application for interim measures under Rule 39 of the ECtHR's Rules of Court, pursuant to Article 34 ECHR. After learning that the Court of Appeal had lifted the injunction, the ECtHR issued a Rule 39 instruction on 30 December 2008 directing the UK Government not to proceed with the transfer (Rule 39 Notice). Despite this, the UK transferred the applicants to Iraqi custody on 31 December 2008 and later notified the ECtHR.

The applicants applied for permission to appeal the UK Court of Appeal decision to the House of Lords on 9 February 2009, but permission was refused on 16 February 2009.

The ECtHR considered the matter substantively on 2 February 2010, while the applicants remained detained in Iraq.

REDRESS, together with the Bar Human Rights Committee of England and Wales, British Irish Rights Watch, the European Human Rights Advocacy Centre, Human Rights Watch, the International Commission of Jurists, the International Federation for Human Rights, JUSTICE, and Liberty, intervened in the case, emphasising that ECHR's provisions are not displaced by other international legal obligations, and that it is the responsibility of the transferring State to show that protections at least equivalent to ECHR rights are in place in the receiving State. This is especially important in relation to fundamental rights such as the prohibition of torture.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision on 2 March 2010, the ECtHR found that the UK had violated the prohibition of inhuman treatment or punishment (Article 3; unanimously), the right to an effective remedy (Article 13; by six votes to one), and the right of individual application (Article 34 ECHR; by six votes to one). However, it found no violation of the right to a fair trial (Article 6; unanimously), and found it unnecessary to decide on a separate violation of the right to life (Article 2; unanimously).

The Court held that the Article 3 violation was ongoing, and under Article 46 ECHR, the UK was required to take steps to seek assurances that the applicants would not face the death penalty. No damages were awarded beyond costs, with the Court concluding that findings of violation and the Article 46 declaration constituted "just satisfaction".

UK Jurisdiction and ECHR Obligations Relating to Detained Persons

The ECtHR held that British forces had taken active steps to bring the applicants within the UK's jurisdiction by arresting and detaining them in UK-run detention facilities. Accordingly, the UK had exercised jurisdiction and incurred an obligation to protect their ECHR rights [140]. There was no evidence that the UK had attempted to negotiate assurances from Iraqi authorities against the imposition of the death penalty [141]. Although various UK-Iraq Memorandums of Understanding existed regarding detainee transfers [38], they contained no provisions ensuring protection from capital punishment [142]. The ECtHR therefore held that, because of the UK's actions and omissions, the applicants faced a real risk of execution, which caused intense psychological suffering amounting to inhuman treatment under Article 3 ECHR [136-137].

Lack of Effective Remedy

The ECtHR found that although the applicants could, in theory, seek remedies in UK courts, the transfer made this practically impossible [166]. The Court noted that the effectiveness of any appeal to the House of Lords was "unjustifiably nullified" by the transfer, and that there was no objective justification for proceeding despite the Rule 39 notice [165-166].

The ECtHR therefore found that the UK had violated Article 13 by preventing access to an effective remedy, and Article 34 by failing to take all steps necessary to comply with the Rule 39 Notice. It emphasised that the Notice was specifically intended to prevent their transfer until their case could be properly examined. By disregarding it, the UK directly impaired the applicants' ability to pursue domestic remedies.

The ECtHR rejected the UK Government's claim that agreements with Iraq left it no choice but to transfer the applicants, noting that it had taken no reasonable steps to comply with the Rule 39 Notice, such as seeking a temporary arrangement or informing the ECtHR of any difficulties before their actual transfer [163].

IMPACT OF THE CASE

Applicability of ECHR and Extraterritoriality

The case raised important questions of sovereignty, jurisdiction, and the extraterritorial application of ECHR. It established the principle of *non-refoulement* in the context of the death penalty, making it clear that the UK's human rights obligations apply when it exercises control over individuals abroad, even temporarily. It also confirmed that ECHR obligations may take precedence over international agreements that would otherwise conflict with those obligations.

In the domestic proceedings, the Court of Appeal had adopted a restrictive view, finding that extraterritorial jurisdiction only arose where the UK exercised authority conferred by law equivalent to that of a sovereign State. The ECtHR rejected this approach, holding instead that the UK's physical custody and control over the applicants were sufficient to trigger Article 1 ECHR jurisdiction. It also held that ECHR obligations did not end with transfer but extended beyond the period under UK control to ensure that the applicants were not exposed to real risks of execution or torture. This broader approach was later confirmed and developed in *Al-Skeini v. United Kingdom (2011)*.

Importance of Interim Measures and State Responsibility

The judgment was also significant in affirming the binding nature of ECtHR Rule 39 interim measures. By finding violations of Articles 13 and 34 ECHR, the Court made clear that failure to respect such measures undermines the right of individual petition and access to effective remedies. This established an important precedent that States cannot evade responsibility over human rights obligations or contravene instructions from the ECtHR by relying on competing obligations under bilateral or international agreements. They must at least seek solutions that comply with ECHR obligations, or directions from the ECtHR.

Subsequent Proceedings

The treatment of Al-Saadoon by the British military continued to attract public attention and was considered as part of a wider investigation into historical abuse of Iraqi prisoners by UK authorities during the conflict. Various civil claims followed, which led to further proceedings considering the application of ECHR, and investigatory obligations in the circumstances of Al-Saadoon's detention (see *Al-Saadoon and others v. Secretary of State for Defence and others* (2016)).

Reception and Relevance

The case received significant UK press attention, and the judgment remains an important authority on extraterritorial jurisdiction, detainee transfers, and the application of Article 3 ECHR in overseas military operations, such as those carried out during armed conflict and in occupation contexts. The ECtHR's findings remain relevant to the work of organisations such as REDRESS and Rights and Security International, as well as other organisations that monitor compliance with human rights obligations, particularly in contexts involving national security, the transfer of individuals, and the risk of torture or the death penalty. It set standards for State accountability in transfer scenarios where torture or the death penalty is a risk and reinforced the principle that human rights obligations do not end at the border.

The Legal Representatives were P. Shiner for the Applicants; and D. Walton for the Government (Foreign and Commonwealth Office).

ADDITIONAL RESOURCES

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- Marko Milanovic, 'Al-Saadoon and Mufdhi Merits Judgment' (EJIL: Talk! Blog of the European Journal of International Law, 2 March 2010).
- Michael Dunstan, 'Protection from Cruel Treatment and the Death Penalty: UK Breaches Convention Obligations by Transferring Prisoners to Iraqi Custody' (Human Rights Law Centre, undated).
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- Rights and Security International 'Al-Saadoon and Mufdhi v The UK, Application No. 61498/08 ECTHR' (Rights and Security International post, undated).

AL-SKEINI AND OTHERS V. UNITED KINGDOM (2011)

Link to the judgment

European Court of Human Rights

IRAQ • UNLAWFUL KILLINGS • MILITARY FORCES • FAILURE TO INVESTIGATE • EXTRATERRITORIALITY • ECHR JURISDISCTION

CASE SUMMARY

After six Iraqi civilians were killed by British troops in Basra following the 2003 invasion of Iraq, their relatives claimed that the UK had breached its obligations relating to the right to life under Article 2 ECHR by failing to conduct effective investigations into the deaths. They further maintained that the UK exercised jurisdiction in the circumstances, which the UK Government disputed, contending that ECHR jurisdiction is primarily territorial and that Iraq fell outside the Convention's "legal space". The ECtHR held that the Convention could apply extraterritorially in exceptional circumstances.

After the fall of the Ba'ath regime, the UK exercised significant governmental authority and responsibility in Southeast Iraq, especially over security, bringing individuals affected by British forces within its jurisdiction under Article 1 ECHR. The Court found that the UK violated its procedural obligations under Article 2 ECHR in respect of the first five applicants, as the investigations were not independent, prompt, or adequate. In relation to the sixth applicant (who died in British custody), the ECtHR found no violation, as a full public inquiry was underway and the applicant was no longer a "victim" for the purposes of Article 34 ECHR.

This case clarified State obligations under ECHR during military occupation, especially the duty to conduct effective, independent investigations into deaths abroad.

THE FACTS AND PROCEDURAL HISTORY

Six Iraqi families brought claims after their relatives died in separate incidents involving British military personnel during the 2003 occupation of Basra, Iraq. Most of the deaths resulted from shootings during patrols or security operations, while one individual (Mousa) died in a British military base following severe ill-treatment

in detention. These events occurred while the UK, as part of the Coalition Provisional Authority, was responsible for maintaining security and public order in Southern Iraq.

The applicants initiated proceedings in the UK under the HRA, alleging that the UK had violated Article 2 ECHR both substantively, through unlawful killings, and procedurally, by failing to effectively investigate the deaths.

In December 2004, the Divisional Court held that only the death in a British-run military detention facility fell within UK jurisdiction under the ECHR; the five other deaths during field operations were held to fall outside the scope of Article 1 ECHR (*Al Skeini and others v. Secretary of State for Defence* (2004)). The Court of Appeal (*Al Skeini and others v Secretary of State for Defence* (2005)) and the House of Lords (*Al Skeini and others v. Secretary of State for Defence* (2007)) largely upheld this reasoning, holding that, except in detention cases, the UK's human rights obligations did not extend extraterritorially. The applicants subsequently appealed to the ECtHR.

The central issue was whether, in the context of military occupation and security operations, deaths caused by British forces engaged the UK's jurisdiction under Article 1 ECHR, therefore triggering its duty under Article 2 to conduct effective investigations.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision of 7 July 2011, the ECtHR unanimously held that the UK had jurisdiction in respect of all six deaths under Article 1 ECHR, and that the UK breached its procedural obligations relating to the right to life (Article 2 ECHR) by failing to investigate the deaths of the first five applicants.

Drawing on earlier caselaw, the ECtHR determined that when State agents exercise authority and control over individuals outside their territory — especially when discharging core governmental functions — those individuals fall within the State's jurisdiction under Article 1.

It held that the investigations into the deaths of the first five applicants lacked independence, promptness, and thoroughness because the military chain of command exercised excessive control over the investigative process, key decisions could be influenced by those implicated in the events, and important evidence, especially from local witnesses, was not adequately secured or considered. The ECtHR stressed that even in difficult security conditions, States must carry out independent and effective investigations into deaths caused by their agents. Compensation and public acknowledgment alone could not satisfy Article 2 standards.

In the sixth case, concerning Mousa's death, the ECtHR unanimously found no violation because, by the time of the judgment, a public inquiry had been established.

IMPACT OF THE CASE

Extraterritorial Application of ECHR

Building on principles recognised in *Al-Saadoon and Mufdhi*, *Al-Skeini* further clarified the extraterritorial application of the ECHR. The ECtHR confirmed that ECHR obligations are not confined to national territory but extend where a State exercises "effective control" over an area or "authority and control" over individuals abroad. It rejected the UK Court's restrictive approach and established that individuals affected by UK military operations in Iraq fell within the UK's jurisdiction.

Importance for Military Operations Abroad

This decision sets a precedent that States may be liable for human rights abuses committed abroad where they exercise effective authority and control, with substantial and far-reaching implications for States engaged in overseas military operations. It requires governments to uphold ECHR rights wherever their forces exercise authority and control. This imposes a legal and operational obligation on military and government actors to provide effective oversight, accountability, and independent investigations in conflict zones. Additionally, *Al-Skeini* has influenced how other jurisdictions and courts interpret the reach of their human rights obligations, promoting a broader, more protective approach to extraterritorial human rights enforcement and shaping ongoing debates on the legality of extraterritorial State conduct in international law, including interactions between international humanitarian law and human rights law (see, for example, *Alseran and Others v. Ministry of Defence* (2017), at [582]).

Subsequent Judicial Consideration – Smith and others v. Ministry of Defence (2013)

The UK Supreme Court's decision in *Smith* expanded on the principles established in *Al Skeini*. In this case, relatives of British soldiers who died in Iraq claimed that the Ministry of Defence breached Article 2 ECHR by failing to provide adequate equipment (such as Snatch Land Rovers) and training.

Although the Ministry of Defence contended that Article 2 ECHR should not apply to deaths during active military operations overseas, including based on "combat immunity", the Supreme Court rejected this. It held that Article 2 obligations can apply to UK forces abroad, including to its own personnel, while recognising the unique context of armed conflict and allowing a "margin of appreciation" for operational decisions. As a result, while not unlimited, claims about equipment, training, and protection may be subject to scrutiny where failures have endangered lives.

Taken together, *Al Skeini* and *Smith* establish that the UK may be held responsible both for human rights violations against civilians committed by its agents overseas where it exercises authority and control, and for the protection of its own personnel operating abroad under UK command. Both cases reinforce that human rights under ECHR must be practical and effective, not purely notional, even in overseas military contexts.

The Legal Representatives were R. Singh KC, R. Husain KC, S. Fatima, N. Patel, T. Tridimas, H. Law for the Applicants; and J. Eadie KC, C. Ivimy, and S. Wordsworth for the Respondent Government.

ADDITIONAL RESOURCES

- Aleisha Brown, 'Human rights obligations can travel: The extraterritoriality of human rights and the Iraq War' (Human Rights Law Centre, 7 July 2012).
- Natasha Holcroft-Emmess, 'Life after Bankovic and Al-Skeini v UK: Extraterritorial Jurisdiction under the European Convention on Human Rights' (Oxford University Undergraduate Law Journal, 2021).
- Pauline Collins, 'Al-Skeini v United Kingdom (2011) 53 EHRR 18' (Australian International Law Journal, 2012).
- Philippa Osim-Inyang, 'The extraterritorial application of the ECHR after Al-Skeini' (International Journal of Law, 8 May 2021).

BELHAJ & ANOTHER V. STRAW & OTHERS (2017)

Link to the judgment

Supreme Court

UNLAWFUL DETENTION • RENDITION • SOVEREIGN IMMUNITY • STATE IMMUNITY • 'FOREIGN ACT OF STATE' DOCTRINE • SECURITY SERVICES • JURISDICTION

CASE SUMMARY

Two sets of claimants brought actions against the UK Government alleging involvement in their unlawful detention and mistreatment overseas. Belhaj and his wife Boudchar alleged that UK officials were complicit in their 2004 abduction and rendition from Malaysia and Thailand to Libya, where they suffered prolonged detention and torture. In parallel, Rahmatullah alleged that the UK was responsible for his transfer to US custody in Iraq and subsequent decade-long detention in Afghanistan without trial.

The UK Government argued that the claims should be dismissed based on the 'Foreign Act of State' doctrine and principles of State immunity. The Supreme Court disagreed, finding that such claims were not barred and held that certain private law claims of complicity in torture violations are justiciable before the English courts.

THE FACTS AND PROCEDURAL HISTORY

The case concerns two separate actions that were heard together at the appeal phase.

In the first case, Belhaj and his wife Boudchar alleged that they were victims of an extraordinary rendition in February/March 2004 involving Malaysian, Thai and US agents, which resulted in their transfer from Malaysia to Libya via Thailand. Boudchar was detained until 21 June 2004, and Belhaj until 23 March 2010, during which time he was allegedly tortured. They brought tort claims, alleging that the UK "arranged, assisted and encouraged" their rendition by informing Libyan authorities of their whereabouts, and that it conspired in, and assisted the torture and inhuman or degrading treatment inflicted on them by US and Libyan authorities.

At first instance, Simon J dismissed the UK Government's plea of State immunity but held that the 'Foreign Act of State' doctrine barred the claims. The Court of Appeal upheld the judgment on State immunity and accepted that the 'Foreign Act of State' doctrine was engaged (*Belhaj and Boudchar v. The Rt Hon Jack Straw and others* (2014)). However, it allowed the claimants' appeal on the grounds that: (i) the doctrine was limited to acts within the jurisdiction of the State in question; and (ii) it was subject to a policy exception for grave violations of human rights [180].

In the second case, Rahmatullah was detained by British forces in Iraq on 28 February 2004 before being transferred to US custody in Iraq and then Afghanistan, where he was held for over ten years without charge or trial on suspicion of links to terrorist organisations. He alleged, in part, that British officials acted in combination with US authorities and/or assisted or encouraged his unlawful detention and mistreatment. In the High Court (*Rahmatullah v. Ministry of Defence* (2014)), Leggatt J held that claims relating to Rahmatullah's initial detention by British forces and transfer into US custody were barred by the defence of 'Crown Act of State', on the assumption that they were authorised by lawful UK policy.

This aspect of *Rahmatullah* was joined with the appeal in *Mohammed v. Secretary of State for Defence* (2015), where the Court of Appeal held that 'Crown Act of State' is a nuanced defence, applicable only where "there are compelling considerations of public policy which require the Court to deny a claim founded on an act of the Executive performed abroad" [359, 376(3) of *Mohammed*]. Before the Supreme Court, the only issues concerned Rahmatullah's tort claims against the Ministry of Defence and Foreign and Commonwealth Office, which related to the alleged acts or omissions of US personnel during his detention.

In both proceedings, the UK Government argued before the Supreme Court that the claims were inadmissible or non-justiciable due to principles of sovereign immunity or 'Foreign Act of State'.

THE DECISION AND ITS SIGNIFICANCE

No Sovereign Immunity, Claims Admissible

In its judgment of 17 January 2017, the Supreme Court dismissed the appeal, finding that the 'Foreign Act of State' doctrine and State immunity did not bar the claims from proceeding. Sovereign immunity did not apply because the foreign Governments in question were not parties to the case and their legal interests were not directly affected; reputational damage alone was not a sufficient "interest" to trigger such immunity [29].

The Court distinguished between three types of 'Foreign Act of State' (Lords Sumption and Hughes JJ.S.C. dissented from this classification), drawing on earlier caselaw including from the US and Germany:

- Firstly, a rule of private international law recognising a foreign State's legislation as valid insofar as it affects property within that jurisdiction [35, 135].
- Secondly, a rule preventing domestic courts from questioning the legality of a foreign State's acts with respect to property in its territory [38, 74-78].
- Thirdly, a broader principle of abstention that a domestic court will treat as non-justiciable certain categories of sovereign acts by a foreign State abroad, even where they occur outside the foreign State's jurisdiction [40, 123].

The first two types were held inapplicable because they were limited to property disputes. As to the third, the Court held it did not apply in this case due to the "nature and seriousness of the misconduct alleged", which involved breaches of fundamental rights [98, 102]. The Court noted that, if the case were treated as non-justiciable, the applicants would not be able to pursue their claim "anywhere in the world", since the defendants would benefit from sovereign immunity in foreign jurisdictions [102].

The Court further noted that even if the 'Foreign Act of State' doctrine applied, the claims would fall within a public policy exception permitting courts to adjudicate allegations of grave violations of human rights and international law [97-99, 141, 155-156, 168, 257, 268, 278, 285]. Although the Justices adopted somewhat different approaches, the Court accepted that English courts can examine and determine the legality of foreign State conduct where it contravenes UK public policy or fundamental principles of international law [99, 155].

IMPACT OF THE CASE

Judicial and Academic Impact

The Supreme Court's judgment, especially its findings on the 'Foreign Act of State' doctrine and sovereign immunity, has been cited in later cases across different legal contexts, including diplomatic immunity, negligence claims, and sovereign debt (see for example, *Law Debenture Trust Corporation plc v Ukraine* (2023) and *Shehabi and another v Kingdom of Bahrain* (2023)).

Recognised as a landmark case by commentators, the decision effectively allows claimants to bring forward cases in the UK against the security services if they contend that they have been victims of rendition committed with UK complicity. It has been cited in subsequent academic writing as having clarified and restated the 'Foreign Act of State' doctrine and its constitutional foundations. Subsequent judicial treatment and academic commentary also suggest that the scope of non-justiciability may be further narrowed to give effect to ordinary private law rights, as seen in later cases such as *High Commissioner for Pakistan in the United Kingdom v. Prince Muffakham Jah and others* (2019).

Legislative, Policy, and Social Developments

From the mid-2000s, the UK Government came under sustained pressure over its involvement in rendition operations. The UK's participation in these operations generally was consistently reported, with particular attention (across the political spectrum) to the treatment suffered by Belhaj and Boudchar, and the UK's alleged complicity. Parliamentary committees and civil society organisations published reports condemning UK involvement in rendition operations and torture of foreign detainees. This led to two important developments.

First, Prime Minister David Cameron appointed a Commission of Inquiry, later subsumed into the work of the Intelligence and Security Committee (ISC) of Parliament. In a Report in June 2018, the ISC found evidence of (i) UK involvement in detainee mistreatment by third-party actors (in two cases); (ii) UK failures to act despite awareness of detainee mistreatment by foreign partners; (iii) receipt of intelligence based on evidence that they knew (or ought to have known) was obtained through torture or ill-treatment; (iv) UK financing of rendition operations (in three cases); and (v) broad acquiescence in rendition by foreign partners. Shortly before the

ISC Report was published, the UK Government began rewriting its guidance to intelligence officers on avoiding complicity in human rights abuses. Initially, this review process was envisaged as a "light touch" review conducted by the Cabinet Office with no input from the public or civil society, but following criticism from human rights NGOs, including REDRESS, a more comprehensive public consultation was put in place.

The ISC was highly critical of the Government's position and urged it to publish its policy on rendition within three months. The ISC Report stated that "[t]here is no clear policy on, and not even agreement as to who has responsibility for, preventing UK complicity in unlawful rendition. We find it astonishing that, given the intense focus on this issue ten years ago, the Government has still failed to act. Through this Report, we formally request that HMG should publish its policy on rendition, including the steps that will be taken to identify and prevent any UK complicity in unlawful rendition, within three months of publication of this request."

The Government presented a response to the ISC Report in November 2018, in which it

- Accepted some of the ISC's concerns, including failures by UK personnel to respond to mistreatment and illegal detention by other foreign soldiers in their presence, and gaps in record-keeping and transparency;
- Stated that policies were already in place (some revised in July 2010), and emphasised its commitment to transparency, reporting, and oversight;
- On rendition specifically, affirmed that it believed it was lawful to support transfer of terrorist suspects to appropriate jurisdictions, while it acknowledged that post 9/11 agencies did not always appreciate the risks or check legality as rigorously as required now, but that at no point did they knowingly contribute to a transfer they knew or believed to be unlawful; and
- Disagreed with certain ISC's findings, such as alleged complicity in permitting a possible rendition flight, while it accepted the need for improved or effective training and formal documentation.

Second, in May 2018, following the *Belhaj* decision, Prime Minister Theresa May issued a formal apology to Belhaj and Boudchar before Parliament for the UK's role in their rendition and subsequent mistreatment. Given that the Government had contested the case up to the Supreme Court, the apology drew criticism of the Government's defence and calls for greater openness and transparency in addressing UK involvement in abuses.

The Legal Representatives were (i) Rory Phillips KC, Sam Wordsworth KC, Karen Steyn KC, and Sean Aughey for the Appellant Rt Hon Jack Straw MP and 6 others; (ii) James Eadie KC, Karen Steyn KC, and Melanie Cumberland for the Appellant Ministry of Defence and another; (iii) Richard Hermer KC, Ben Jaffey, and Maria Roche for the Respondents Belhaj and another; (iv) Phillippa Kaufmann KC, Edward Craven, Richard Hermer KC, Nikolaus Grubeck, and Maria Roche for the Respondent Rahmatullah. Interveners: UN Special Rapporteur on Torture and another; REDRESS, International Commission of Jurists, JUSTICE, and Amnesty International.

ADDITIONAL RESOURCES

- Amnesty International, 'UK: Highest court dismisses Government attempt to block cases seeking justice for UK involvement in torture and kidnap abroad' (17 January 2017).
- Jing Tao Qin, 'Liability for Complicity: State Responsibility for Torture Case Note - Belhaj v Straw, Rahmatullah v Ministry of Defence', Vol 2, LSE Law Review (2017).
- Kartik Raj, 'Libyan Torture Victims Get Long Overdue Apology From UK' (Human Rights Watch, 10 May 2018).
- Marcus Teo, 'Narrowing Foreign Affairs Non-Justiciability', Vol 70, Issue 2, International and Comparative Law Quarterly (March 2021).
- Massimo Lando, 'Reframing the English Foreign Act of State Doctrine', Vol 82, Issue 2, Modern Law Review (March 2024).
- Natasha Simonsen, 'The UK Supreme Court's Blockbuster Decision in Belhaj' (EJIL:Talk! 18 January 2017).
- UK Government, 'Government response to the Intelligence and Security Committee of Parliament Reports into Detainee Mistreatment and Rendition' (November 2018).
- UK Intelligence and Security Committee of Parliament, 'Detainee Mistreatment and Rendition: Current Issues' (28 June 2018).
- REDRESS & Others, Joint statement by leading human rights organisations on the review of the UK's torture policy (21 August 2018),

AL-HAWSAWI AND AL-NASHIRI V. THE SECURITY SERVICE AND OTHERS (2025)

Link to the judgment

Investigatory Powers Tribunal

COMPLICITY IN TORTURE • SECURITY SERVICES • CIA RENDITION PROGRAMME • PROHIBITION OF TORTURE AS CONSTITUTIONAL PRINCIPLE • TRANSPARENCY ISSUES

CASE SUMMARY

Mustafa al-Hawsawi and Abd al-Rahim al-Nashiri were identified as 'High-Value Detainees' (HVDs) and tortured by US forces after their arrests in 2003 and 2002 respectively, in the context of the CIA's rendition programme after 9/11. In an unprecedented trial in June 2025, the Investigatory Powers Tribunal (IPT), the UK's tribunal overseeing complaints about the intelligence agencies, examined allegations of British involvement in the torture of al-Hawsawi and al-Nashiri. The judgment in this case set out clear legal duties for the Security Service (MI5), the Secret Intelligence Service (MI6), Government Communications Headquarters (GCHQ), and Defence Intelligence, Ministry of Defence to prevent complicity in torture when cooperating with foreign intelligence services.

THE FACTS AND PROCEDURAL HISTORY

Both al-Hawsawi and al-Nashiri were suspected by the US of involvement in Al-Qaeda in the post-9/11 context. They were arrested in 2003 and 2002, respectively, and then held by the CIA. From the time of their arrests until September 2006, they were tortured and detained in secret CIA black sites as part of the CIA's Rendition, Detention, and Interrogation (RDI) Programme.

In September 2006, they were transferred to Guantánamo Bay, Cuba, where they remain to date. A 2004 confidential report of the International Committee of the Red Cross found that detainees labelled by the US as HVDs were at particular risk of torture and other ill-treatment.

The men's current conditions of detention impede their ability to communicate with their legal representatives, and so the factual basis of their claims before the IPT relied on information from open-source documents. These included the redacted Executive Summary of the US Senate's Select Committee on Intelligence of its

investigation into the RDI programme, released in December 2014, CIA documents in the public domain, various judgments of the ECtHR (including the men's own cases against various European States involved in the RDI programme), and the 2018 report of the Intelligence and Security Committee of Parliament on 'Detainee Mistreatment and Rendition 2001-2010'.

Both men face ongoing (but separate) cases before the US Military Commissions in Guantánamo Bay.

The complaints before the IPT alleged that British agencies – including MI5, MI6, GCHQ, and the Ministry of Defence's intelligence section – were likely to have been complicit in the men's torture by supplying questions or information for their CIA interrogators, and receiving information obtained through torture, despite knowing of the CIA's systematic abuse of HVDs. The complaints to the IPT included requests for the following:

- Access to any documents or information held by UK intelligence agencies concerning the detention and ill-treatment of the two men.
- A declaration that UK intelligence agencies or their agents were complicit in their torture and ill-treatment, and acted unlawfully, by providing questions for their interrogation to US officials or receiving information obtained through it – whilst knowing that they were being subjected or were likely to be subjected to torture or ill-treatment.

THE DECISION AND ITS SIGNIFICANCE

In its judgment on 27 October 2025, the IPT reaffirmed the prohibition of torture as a 'constitutional principle', marking the first case in which a UK court or judicial body had clarified what it means for UK intelligence services to be "complicit" in CIA abuses committed after 9/11.

Limits to Intelligence-Sharing and Obligations of the UK Intelligence Services

While the IPT confirmed that UK intelligence services have the legal power to liaise with foreign intelligence services, it ruled that they cannot legally engage in intelligence-sharing "without having regard to the fundamental norms concerned, in particular the prohibition of torture" [134]. The IPT contrasted the "passive receipt" of information obtained through torture, which would be lawful according to the Tribunal, with a situation in which actions are taken to encourage the obtaining of information by torture, which would be unlawful.

The IPT particularly considered circumstances in which UK intelligence services share information with foreign intelligence services, such as putting questions to detainees or using information from their interrogations, and ruled that the intelligence services are subject to the following legal obligations:

- They must assess whether a detainee faces a risk of torture or other ill-treatment before sharing information with a foreign intelligence service.
- They must make reasonable enquiries of the foreign State concerned and, if necessary, seek assurances that a detainee will not be ill-treated.
- They cannot cooperate where they "know or reasonably ought to know" that a detainee is "at risk" of torture or other ill-treatment.

Transparency and Accountability Issues

Despite its groundbreaking clarification of the law, the IPT's investigation into the facts led it to conclude that the UK intelligence services did not act unlawfully. However, its investigation into the facts was undertaken behind closed doors and neither of the complainants (or their legal representatives) will ever see the outcome of that investigation. In addition, the IPT did not explain how the legal principles on complicity were applied to the facts they found. The outcome of the investigation therefore lacks the transparency required by international legal standards.

IMPACT OF THE CASE

Potential Impact on Policy Reforms

The judgment, whilst only delivered on 27 October 2025, is expected to have an immediate impact by informing two reviews being undertaken by the UK Government (which remain pending as of April 2026). One review is focused on the "Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees" (July 2019) (the Principles). The other review relates to the "Overseas Security and Justice Assistance (OSJA): Human Rights Guidance" (2017), which aims to mitigate "broader human rights and international humanitarian law risks which may result from assistance in the security and justice sector and which fall outside the scope" of the Principles. Both are policy documents designed to provide guidance to UK personnel, and to assist them in avoiding the risk that they are complicit in torture and/or ill-treatment.

Trailblazing Ruling but a Missed Opportunity for Transparency

This judgment is historically significant as the first time a UK court or tribunal has clarified what it means for UK intelligence services to be "complicit" in CIA abuses committed after 9/11. The IPT's reaffirmation of the prohibition of torture as a 'constitutional principle' reinforces the UK's legal and moral obligation to prevent torture and ill-treatment, including when cooperating with foreign partners. Importantly, the obligations are not limited only to situations of torture, but also apply to cruel, inhuman and degrading treatment. The case sets an important precedent, sending a message that UK intelligence agencies are not exempt from judicial scrutiny and must operate within clear legal boundaries when dealing with detainee-related intelligence. As noted by al-Hawsawi's legal representative Chris Esdaile, REDRESS Senior Legal Advisor, this decision helps establish "clear markers" to prevent future UK involvement in torture overseas.

However, the case also highlights a critical shortcoming: the lack of transparency in the factual investigation, and in how the legal principles were applied to the facts. The Tribunal's closed-door investigative process in relation to the factual material (which was considered to be "secret") means that neither the complainants nor the public will see how the final conclusions were reached. REDRESS has criticised this opacity, emphasising that the outcome "lacks the transparency required by international legal standards". Given the severity of the alleged abuses, and the UK's past record on rendition and ill-treatment, this was a missed opportunity to provide a more open and accountable resolution.

The Legal Representatives were (i) Edward Craven KC and Florence Iveson for Mustafa al-Hawsawi; (ii) Hugh Southey KC and Robbie Stern for Abd al-Rahim al-Nashiri; (iii) David Blundell KC, Rory Phillips KC, Charlotte Ventham KC, Rosemary Davidson, Amelia Walker, Karl Laird and Thomas O'Donohoe for the Security Services; and (iv) Samantha Broadfoot KC and Matthew Fraser as Counsel to the Tribunal.

ADDITIONAL RESOURCES

- HM Government, 'Overseas Security and Justice Assistance (OSJA): Human Rights Guidance', 2017.
- HM Government, 'The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees', July 2019.
- Intelligence and Security Committee of Parliament, 'Detainee Mistreatment and Rendition: 2001–2010', 28 June 2018.
- Middle East Eye, 'UK judges clarify limits on intelligence agencies' complicity in foreign torture', 28 October 2025.
- REDRESS, 'UK Tribunal Clarifies When British Intelligence Agencies are "Complicit" in Torture in First Case Scrutinising its Complicity in CIA Abuses', 27 October 2025.

UNIVERSAL JURISDICTION AND IMMUNITIES

PINOCHET (REGINA V. BOW STREET MAGISTRATE, EX PARTE PINOCHET (NO. 3) (1999)

Link to the judgment

House of Lords

STATE IMMUNITY • EXTRADITION • UNIVERSAL JURISDICTION • 'FOREIGN ACT OF STATE' DOCTRINE • DOUBLE CRIMINALITY • EXTRADITION CRIME • *JUS COGENS* • WAR CRIMES

CASE SUMMARY

Spain sought the extradition from the UK of former Chilean president Augusto Pinochet to stand trial for alleged torture, murder, and hostage-taking committed during his presidency. The House of Lords was asked to determine whether Pinochet benefitted from immunity from prosecution and extradition for acts carried out as Head of State, particularly in light of the increasing recognition in international law of core human rights prohibitions. It held that there was no procedural bar to the extradition.

The case established the now widely recognised principle that heads of State cannot invoke immunity for acts amounting to crimes under international law committed while in office.

THE FACTS AND PROCEDURAL HISTORY

After investigating the fate of some of its citizens under the Pinochet regime, Spain sought Pinochet's extradition for murder, torture, and hostage-taking alleged to have been committed while he was Chile's Head of State (1973-1990). Following his provisional arrest in London on a Spanish arrest warrant, Pinochet challenged the arrest by bringing judicial review proceedings (JR). The Divisional Court held that, as a foreign Head of State at the time of the alleged acts, Pinochet was entitled to immunity from criminal proceedings before UK courts.

The House of Lords initially allowed an appeal against that decision (*R (Pinochet Ugarte) v. Bow Street Metropolitan Stipendiary Magistrate (No. 1)* (2000)), holding that torture and hostage-taking could not be considered official acts and therefore did not attract sovereign immunity. However, Pinochet successfully petitioned to have that judgment set aside on the basis that links between one of the Judges (Lord Hoffman) and Amnesty International

created an appearance of bias (*R (Pinochet Ugarte) v. Bow Street Metropolitan Stipendiary Magistrate (No. 2)* (2000)). The appeal was then reheard.

REDRESS, together with Amnesty International and the Medical Foundation for the Care of Victims of Torture (now Freedom from Torture), was permitted to intervene in the proceedings before the House of Lords. Represented by Professor Ian Brownlie KC and supported by a legal team, the group was granted leave to make written and oral submissions – a significant development at the time. Human Rights Watch also submitted written arguments, represented by Philippe Sands. The interveners' submissions played an important role in clarifying that acts of torture cannot be characterised as official acts for the purposes of State immunity.

THE DECISION AND ITS SIGNIFICANCE

In its judgment of 24 March 1999, the House of Lords addressed the legal questions of extradition and immunity in relation to serious international crimes. Spain sought Pinochet's extradition for several alleged offences, which the House of Lords summarised as: (i) conspiracy to torture; (ii) conspiracy to take hostages; (iii) conspiracy to torture in furtherance of which murder was committed abroad; and (iv) conspiracy to murder. This case dealt exclusively with the legal issues of extradition and immunity. It did not address Pinochet's culpability for the alleged crimes.

Clarifying the Scope of 'Extradition Crimes'

To be extradited, the conduct must amount to an 'extradition crime'. The House of Lords held that, under the Extradition Act 1989, an 'extradition crime' must have been a criminal offence under UK law at the time it was committed (rather than at the time of the extradition request) and an offence in the requesting State (the double criminality requirement).

Because torture became a specific criminal offence under UK law on 29 September 1988, only acts of torture alleged to have been committed by Pinochet after that date could qualify as 'extradition crimes'. Likewise, the charges related to hostage-taking did not satisfy the double criminality test, as the underlying acts did not meet the requirement in Section 1(b) of the Taking of Hostages Act 1982 that the hostage must have been taken to compel another person to act or refrain from acting.

Despite this limitation, the Magistrate had ruled that pre-1988 conduct - such as the establishment of the secret police and Operation Condor – could be used as evidence of a continuing conspiracy to torture, enabling Spain to advance an extradition case based on post-1988 offences.

The charges of murder and conspiracy to murder met the double criminality requirement and were 'extradition crimes'. However, they were subject to challenges based on sovereign immunity.

Some Immunity to Former Heads of State

The majority of the House of Lords ruled that sovereign immunity is "a basic principle of international law", but that a former Head of State is immune from criminal jurisdiction only for acts performed in an official capacity. It concluded that torture could not fall within the official functions of a Head of State. This is because

torture is recognised as an international crime and the prohibition against it is an inviolable, *jus cogens* norm, reflected in the ratification of UNCAT by Chile, Spain, and the UK (per four of the judges), and in customary international law (per two of the judges). Lord Browne-Wilkinson noted that UNCAT established a "worldwide universal jurisdiction" enabling domestic courts to adjudicate matters of an international character. Pinochet was therefore not immune from the conspiracy to torture charges.

Pinochet was, however, found to have immunity in respect of the charges of murder and conspiracy to murder, as these were not considered international crimes. He therefore could not be extradited on those charges. Immunity in relation to hostage-taking charges was not considered, as those charges did not meet the definition of 'extradition crimes'.

Lord Hutton also considered whether the doctrine of 'Foreign Act of State' – which grants States immunity for civil proceedings – rendered the case non-justiciable. He concluded that applying the doctrine here would be inconsistent with the universal jurisdiction to prosecute torture established under UNCAT.

Because Pinochet was not granted immunity from the relevant new conspiracy to torture charges, the Home Office reconsidered the case and ordered his extradition. The extradition ultimately did not proceed, due to medical grounds resulting in a determination that Pinochet was unfit to stand trial – a controversial decision on the part of the Home Office.

IMPACT OF THE CASE

Immediate Legal Impact

In Pinochet's case, the judgment had limited immediate practical effect. It addressed only the legal questions of extradition and immunity, and the Home Secretary ultimately halted the extradition proceedings – allowing Pinochet to return to Chile – on the basis that he was medically unfit to stand trial.

Nevertheless, the judgment broke new ground in establishing key principles on the criminal liability of former Heads of State for international crimes. It clearly established that acts amounting to international crimes cannot fall within the official functions of a Head of State and therefore cannot attract immunity from prosecution. The judgment was also significant for the extent to which the UK courts relied on an international human rights treaty, particularly UNCAT, when determining questions of domestic law.

Prohibition of Torture as a *Jus Cogens* Norm

The Pinochet judgment followed only three months after *Prosecutor v. Furundžija* (1998), which had reached similar conclusions about the fundamental unlawfulness of torture (committed, in that case, in Yugoslavia), and which has been recognised as helping to affirm the prohibition of torture as a *jus cogens* norm. Pinochet's representatives argued that the relative novelty of UNCAT (only 15 years old at the time) meant that the prohibition of torture could not yet be considered a *jus cogens* obligation binging on the international community. Lord Browne-Wilkinson rejected this argument, drawing on the trials of Nazi war criminals as well as jurisprudence from the Rwanda and Yugoslavia tribunals to emphasise that, although torture has been a recurrent feature of

war, it is "an international crime on its own" and has long been regarded as a repudiated practice – predating and extending beyond the adoption of UNCAT.

State Immunity

The narrow *ratio* of the *Pinochet* judgment – focused on the specific circumstances of an extradition request for a former Head of State of a third country – arguably limited its broader impact. UK courts have since held that, in civil proceedings, States continue to benefit from immunity in cases involving allegations of torture (see *Jones v. Kingdom of Saudi Arabia* (2006)). The ECtHR has followed similar reasoning, finding no exception to State immunity in civil suits concerning torture (*Jones and Others v. UK* (2014) and *Al-Adsani v. UK* (2001)).

The International Court of Justice has also held that customary international law does not recognise any exception to immunity from foreign criminal jurisdiction and inviolability of incumbent Ministers for Foreign Affairs, even when they are suspected of war crimes or crimes against humanity. However, it has recognised that these immunities "do not represent a bar to criminal prosecution in certain circumstances", such as once the person has left the office, their country has lifted their immunity or decided to exercise jurisdiction, or where certain international criminal courts have jurisdiction (see *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium* (2002), [61]).

A further limitation of the *Pinochet* judgment is the finding that individuals on a special mission invited by the UK Government are immune from criminal proceedings for the duration of that mission (see, for example, *R. Ex. Rel. Freedom and Justice Party v. Secretary of State for Foreign & Commonwealth Affairs* (2018)).

Combatting Impunity

The *Pinochet* judgment marked part of a broader international trend towards combatting impunity, which culminated in the establishment of the International Criminal Court. It was the first time that a former Head of State had been arrested and brought before a national court, and it helped create the political space and momentum for further accountability efforts internationally and within Chile. Internationally, this was reflected in developments such as the indictment in Senegal of Hissène Habré, former dictator of Chad, on charges of torture in 2000, and his eventual conviction by a hybrid court in Senegal in 2017. Domestically, following the *Pinochet* judgment, a second truth and reconciliation report, the 'Valech Report', was commissioned in Chile.

The issue of State or sovereign immunity continues to feature prominently in debates and publications at the United Nations, particularly in relation to the obligation to extradite or prosecute. Such obligations are now widely viewed as extending to other *jus cogens* violations, including genocide, crimes against humanity, war crimes, and other international crimes (see for example, the Hague Ljubljana Convention – which has been adopted by several States, although it has not entered into force as of April 2026).

The Legal Representatives were (i) Clive Nicholls KC, Clare Montgomery KC, Helen Malcolm, James Cameron, and Julian B. Knowles for the Applicant; (ii) Alun Jones KC and David Elvin for the Crown Prosecution Service as Respondents; (iii) David Lloyd Jones was an independent amicus curiae; and (iv) Lawrence Collins KC for the Republic of Chile as an Intervener. Interventions were also made by Amnesty International; REDRESS and the Medical Foundation for the Care of Victims of Torture (now Freedom from Torture); and Human Rights Watch; and others.

ADDITIONAL RESOURCES

- Andrea Bianchi, 'Immunity Versus Human Rights: The Pinochet Case' (1999) 10 European Journal of International Law 237.
- David Sugarman, 'The hidden histories of the Pinochet case' (2024) 51 Journal of Law and Society 459.
- ILC, 'Final Report of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)' (2014) UN Doc A/CN.4/L.844.
- Madeleine Davis (ed), Institute of Latin America Studies, *The Pinochet Case: Origins, Progress and Implications* (University of London, 2003).
- Michael Byers, 'The law and politics of the Pinochet case' (2000) 10 DJCIL 415.
- Naomi Roht-Arriaza, '*The Pinochet Effect: Transnational Justice in the Age of Human Rights*' (University of Pennsylvania Press, Philadelphia, 2005).
- Philippe Sands, *38 Londres Street: On impunity, Pinochet in England, and a Nazi in Patagonia* (Weidenfeld & Nicolson, London, 2025).
- Reed Brody and Michael Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (Kluwer Law International, The Hague, 2000).

JONES V. MINISTRY OF INTERIOR AL-MAMLAKA AL-ARABIYA AS SAUDIYA (THE KINGDOM OF SAUDI ARABIA) (2006)

Link to the judgment

House of Lords

STATE IMMUNITY • CIVIL IMMUNITY OF FOREIGN OFFICIALS • RIGHT TO A FAIR TRIAL • *JUS COGENS* • COMPENSATION • CUSTOMARY INTERNATIONAL LAW

CASE SUMMARY

Jones and three other British nationals (Mitchell, Sampson, and Walker) brought civil claims arising from allegations that they had been tortured while detained by the Saudi authorities. Jones sued the Kingdom of Saudi Arabia and a Saudi official, while Mitchell, Sampson, and Walker brought claims against Saudi officials. The UK courts were asked to consider whether the principle of State immunity, enshrined in international law and codified in the State Immunity Act 1978 (1978 Act), prevented the claims from being heard. Although the Court of Appeal held that civil proceedings could be brought against foreign officials for torture committed abroad, this was ultimately overturned by the House of Lords, which held that both Saudi Arabia and its officials benefitted from State immunity under the 1978 Act.

THE FACTS AND PROCEDURAL HISTORY

The case arose from allegations of torture committed in Saudi Arabia against three British nationals and one British-Canadian national. The four men had been detained on terrorism or espionage-related charges following a series of bombings in 2001 and 2002. They alleged that during their imprisonment – lasting for more than 900 days for two of them – they had been subjected to "severe, systematic and injurious torture" by Saudi officials [4]. The case sparked significant public outcry, and the men were eventually released.

Upon their return to the UK, the claimants brought civil proceedings in the High Court against Saudi Arabia and separately against the individual officials responsible for the alleged acts of torture. The first claimant, Jones, brought claims against: (i) the Ministry of Interior of Saudi Arabia, accepted for the purposes of the claim to be the Kingdom itself; and (ii) its agent, Lieutenant Colonel Abdul Aziz, for assault, battery, trespass against the person, false imprisonment, and torture. The remaining claimants (Mitchell, Sampson, and Walker) brought

damage claims for assault against four named officials, and additional claims for negligence against two of those officials who held responsibilities within the Saudi criminal justice system.

Master Whitaker dismissed the claims in the High Court on the basis of State immunity under the 1978 Act. The claimants appealed to the Court of Appeal. In the hearing, the UK's Secretary of State for Constitutional Affairs, Lord Falconer, intervened on behalf of Saudi Arabia. REDRESS and other NGOs submitted third-party interventions.

The Court of Appeal partially overturned the High Court's decision. It upheld the earlier finding that Saudi Arabia itself was entitled to immunity under the 1978 Act but allowed the claims against individual officials to proceed, specifically by permitting service out of the UK's jurisdiction. Relying on Section 3(1) of the HRA, which requires UK legislation to be interpreted compatibly with the ECHR so far as possible, the Court took the view that the 1978 Act did not expressly extend civil immunity to foreign officials for international crimes such as torture. To avoid a breach of the claimants' right to a fair trial under Article 6 ECHR, the Court interpreted the Act narrowly, concluding that the officials were not entitled to the same immunity as the State.

Each party appealed the adverse conclusions of the judgment to the House of Lords. In this final domestic appeal, the claimants proceeded only with their claims of torture [6].

The House of Lords unanimously reversed the Court of Appeal's finding that the 1978 Act did not apply to State officials in cases of torture and upheld the conclusion that both the State and its officials were immune, largely adopting the High Court's reasoning [35]. Delivering the leading judgment, Lord Bingham distinguished *Pinochet (No. 3)* on the basis that it concerned criminal proceedings rather than civil proceedings. He held that the principle of "universal jurisdiction under the Torture Convention" applies only in the criminal context and not to civil claims [32]. There was therefore no basis to conclude that an exception under the 1978 Act should apply to this case.

The claimants subsequently applied to the ECtHR in *Jones and others v. UK* (2014). A majority of the Court held that the House of Lords' decision did not violate the right to a fair trial under Article 6(1), finding that "the grant of immunity to the State officials in the present case [in civil proceedings] reflected generally recognised rules of public international law" (*Jones and others v. UK*, at [215]). The ECtHR nevertheless noted that when the application of State immunity restricts access to a court, it must examine whether such restriction is justified [187]. It also emphasised that State practice on the law of functional immunity was "in a state of flux," noting that "international opinion on the question may be said to be beginning to evolve" [213].

THE DECISION AND ITS SIGNIFICANCE

No Violations, State Immunity can be Proportionate

None of the domestic courts – the High Court, Court of Appeal, or House of Lords – made a finding on whether the prohibition of torture had in fact been violated. In its judgment of 14 June 2006, however, the House of Lords indicated that even if such a violation had been established, upholding immunity for the defendants in civil proceedings would not, in the circumstances of the case, infringe the right to a fair trial under Article

6 ECHR. Lord Bingham reasoned that the application of immunity was not "disproportionate as [it was not] inconsistent with a peremptory norm of international law" [28]. This conclusion was later echoed by the ECtHR in its judgment on the case.

Significance

This case has been viewed as a judicial response to *Pinochet (No. 3)* and as signalling an intention to delineate the impact of the HRA on the doctrine of State immunity in civil, as opposed to criminal, proceedings. Later decisions have reinforced this distinction. In *R (the Freedom and Justice Party and others) v. Secretary of State for Foreign and Commonwealth Affairs and others* (2016), Lloyd Jones LJ noted that Jones conclusively distinguishes between "substantive prohibitions on conduct in the area of criminal responsibility with the distinct procedural question as to whether there exists adjudicative jurisdiction in respect of that conduct" (*Freedom and Justice Party* [179]).

IMPACT OF THE CASE

Article 6 ECHR and Access to Justice for *Jus Cogens* Violations

The House of Lords expressed doubt as to whether Article 6 could be engaged where a State lacks jurisdiction due to State immunity, given its status as a *jus cogens* principle of international law itself. They held that State immunity does not negate the prohibition of torture. Citing Helen Fox KC in *The Law on State Immunity* (Oxford University Press 2004) 525, the House of Lords noted that "State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement" [24]. They also cited the International Court of Justice to reaffirm that the "breach of a jus cogens norm of international law does not suffice to confer jurisdiction" [24]. Although the Lords proceeded on the assumption that Article 6 was engaged for the purposes of their reasoning, they left the issue open for future consideration.

Redress under Article 14 UNCAT and Universal Civil Jurisdiction

The claimants relied on Article 14 UNCAT (the right to redress) to argue that victims are entitled to compensation regardless of where the torture occurred, supporting the existence of universal civil jurisdiction. The Lords rejected this interpretation, holding that Article 14 UNCAT does not establish the right to a civil remedy in the English courts for acts of torture committed abroad; rather, they interpreted it as requiring States to provide redress only for acts committed within their jurisdiction [25]. They highlighted the absence of international consensus supporting extraterritorial civil jurisdiction and regarded foreign domestic legislation permitting it – such as US laws including the US Torture Victim Protection Act 1991 – as unilateral and not reflective of customary international law [58].

Individual Immunity Under the State Immunity Act 1978

The claimants further argued that acts of torture, being fundamentally unlawful, could not qualify as official acts attracting individual immunity. The Court rejected this argument, holding that acts of State officials – whether

lawful or unlawful – are attributable to the State and therefore covered by State immunity. This conclusion was considered particularly clear given that officials were "sued as a servant or agent of the Kingdom [and] the conduct complained of took place in police or prison premises" [11]. This position contrasts with *Pinochet (No. 3)*, where the criminal nature of proceedings and the characterisation of torture as an international crime justified treating such conduct as outside the scope of official functions for the purpose of immunity.

Reactions to the ECtHR's Subsequent Decision

The ECtHR's judgment in Jones was met with disappointment by human rights organisations, including REDRESS, Amnesty International, INTERIGHTS and Justice, who had intervened in the case. While the ECtHR found that the UK courts' interpretation on immunity had not been "manifestly erroneous", the interveners warned that permitting such a broad interpretation of State immunity risked undermining the prohibition of torture and States' obligation to provide meaningful redress for victims. Their intervention urged States to clarify and reform legal frameworks to ensure that immunity cannot be used to shield perpetrators from accountability. Despite its conclusion, the ECtHR acknowledged a developing trend in international law towards limiting State immunity, as well as some "emerging support in favour of a special rule or exception" in civil claims for torture against foreign State officials [213]. It noted that these developments need to be kept under review by Contracting States [215].

The Legal Representatives were (i) David Pannick KC and Joanna Pollard for the Appellant (Kingdom of Saudi Arabia); (ii) Michael Crystal KC, Jonathan Crystal, Julian Knowles, and Hannah Thornley for the First Respondent (Jones); (iii) Edward Fitzgerald KC, and Richard Hermer for the Second Respondents (Mitchell and Others). Interveners: REDRESS, Amnesty International, INTERIGHTS, and JUSTICE; and the Secretary of State for Constitutional Affairs as Intervener.

ADDITIONAL RESOURCES

- Greg Falkof, 'State Immunity: An Update in the Light of the Jones Case: A Summary of the Chatham House International Law Discussion Group Meeting held on Tuesday 21 November 2006' (Chatham House, 2006).
- Herbert Smith Freehills Kramer, 'ECHR Reaffirms State Immunity from Civil Proceedings for Acts of Torture in Jones v United Kingdom' (HSF Kramer Notes, 14 February 2014).
- Philippa Webb, 'Jones v UK: The Re-integration of State and Official Immunity' (EJIL:Talk! 14 January 2014).
- Philippa Webb, REDRESS, 'Jones v The Ministry of the Interior of Saudi Arabia & Lt Col Abdul Aziz and Secretary of State for Constitutional Affairs, The REDRESS Trust (Intervenors) and Mitchell, Walker and Sampson v Ibrahim Al-Dali & Others: Comments on the Decision of the Court of Appeal, 28 October 2004' (REDRESS, undated).

R V. FARYADI SARWAR ZARDAD (2007)

Link to the judgment

Court of Appeal (Criminal Division)

UNIVERSAL JURISDICTION • *DE FACTO* PUBLIC OFFICIAL • NON-STATE ACTORS • STANDARD OF PROOF • BURDEN OF PROOF • WAR CRIMES • DEPORTATION

CASE SUMMARY

The conviction of Faryadi Sarwar Zardad, a former Afghan warlord, was the first in the UK for torture committed overseas. This case set an important precedent for prosecuting non-state actors when they can be considered *de facto* public officials and liable for prosecution for acts of torture committed outside the UK.

Zardad was arrested in the UK in 2003 while living under a false identity. He was charged with conspiracy to torture and to take hostages relating to his command of around 1,000 men who were said to have terrorised, tortured, imprisoned, blackmailed and killed civilians. Despite the crimes having been committed abroad by a foreign national, Zardad was convicted on both charges before UK criminal courts. He was sentenced to 20 years' imprisonment and recommended for deportation. On appeal, he argued that the judge had misdirected the jury regarding the standard of proof applicable to a prosecution witness's inconsistent statement and had improperly shifted the burden of proof to the defence. The Court of Appeal accepted only the first argument but held that it did not render the conviction unsafe, and the appeal was dismissed. He was subsequently released on parole and deported to Afghanistan in 2016.

THE FACTS AND PROCEDURAL HISTORY

Following the completion of the Soviet withdrawal from Afghanistan in 1989, mujahideen factions fought to fill the subsequent power vacuum. With the fall of the Afghan Government in 1992, the country succumbed to civil war as the mujahideen continued to vie for control. Zardad, a senior commander in the political and paramilitary organisation Hezb-e Islami led by Gulbuddin Hekmatyar, operated a checkpoint in Sarobi, near Kabul, between 1992-1996. During this time, he and his men reportedly abducted, tortured, and extorted civilians passing along the key route to Pakistan.

Zardad fled to the UK in 1998 on a false passport and claimed asylum. Years later, he was tracked down by a BBC journalist, and the case was referred to the Home Office, which asked the Metropolitan Police Counter Terrorism Command (SO15) to investigate. He was arrested in 2003 and charged with hostage-taking and torture under the Criminal Justice Act 1988 (the 1988 Act).

Zardad faced two interim hearings before trial. The first concerned both the exclusion of identification evidence (which was rejected by the judge) and whether Zardad qualified as "a public official or person acting in an official capacity" under Section 134(1) of the 1988 Act (*R v. Zardad* (2004)). Despite a central Afghan Government nominally holding power at that time, the Judge found that Hezb-e-Islami exercised effective control over the area, and that Zardad, in his senior role as a commander, acted as a *de facto* public official. As such, he could be held liable under Section 134 of the 1988 Act.

The second interim judgment addressed whether the UK courts had jurisdiction over charges for Zardad's alleged hostage-taking under the Taking of Hostages Act 1982 (THA). The THA implements the UNCATH, and the Court held that this included its Article 12 exclusion of hostage-taking during armed conflict (intended to avoid undermining Article 3 of each of the 1949 Geneva Conventions which already contain such provision). However, Treacy J agreed with the Prosecution that, as the conflict in Afghanistan was domestic, the Geneva Conventions would not apply. Therefore, this case was not excluded by Article 12 UNCATH (as incorporated by the THA) and could proceed to trial.

In Zardad's first trial, the jury could not reach a verdict. At a re-trial, Zardad was found guilty of conspiracy to commit torture and hostage-taking, in violation of the 1988 Act and of the THA respectively. Zardad was sentenced to two concurrent 20-year sentences with a recommendation that he be deported. Zardad appealed this judgment to the Court of Appeal on two grounds relating to an inconsistent statement made by a prosecution witness.

THE DECISION AND ITS SIGNIFICANCE

In its 7 February 2007 judgment, the Court of Appeal dismissed the appeal, stating that it was "satisfied as to the safety of the convictions" [41]. On the first ground of appeal, the Court rejected the argument that the trial judge's directions improperly shifted the burden onto the defence. It held that where either party seeks to undermine a witness's testimony by reference to a previous inconsistent statement, they must first adduce evidence – showing that such an inconsistent statement was in fact made. This, the Court held, did not constitute improper transfer of the burden of proof [23]. On the second ground of appeal, as to what standard of proof the jury should apply, the Court found that the trial judge had erred by instructing the jury that they should be "sure" the statement had been made. However, this misdirection did not render the convictions unsafe and the statement, in either form, did not cast doubt on the central facts, namely that "such an incident had happened and that the appellant was involved" [38-40].

Later, in 2016, Zardad was released from prison and deported to Afghanistan where he reportedly received a "hero's welcome".

A *De Facto* Public Official can be Convicted of Torture under the 1988 Act

To be convicted of torture under Section 134 of the 1988 Act (which implements UNCAT in the UK), a defendant must either fall within the definition in Section 134(1) ("a public official or person acting in an official capacity"), or act under the orders from someone who does (Section 134(2)).

The judge considered that Zardad should be treated as a *de facto* public official. In reaching this conclusion, the judge relied on several factors, including: the position of Hezb-e Islami as the controlling faction in the region where the checkpoint was located; Zardad's "senior position within that force"; the fact that local people regarded Hezb-e Islami and Zardad as "the only official authority in the area"; and the fact that representatives of international organisations or aid agencies dealt with them directly rather than with the central Afghan Government (*R v. Zardad* (2004) [31]). As a result, Zardad could be liable under Section 134 of the 1988 Act.

In so finding, the judge rejected the defendant's arguments that the existence of a central, UN-recognised Government in Afghanistan prevented non-governmental actors from being treated as "public officials". Drawing on domestic and international jurisprudence, the judge made comparisons with governments, such as communist China, which despite lacking official recognition from other States, undeniably possessed "all the attributes of statehood" (*R v. Zardad* (2004) [33]). Having analysed the evidence relating to Hezb-e Islami, the judge concluded that the same applied to the group.

This was the first case brought under Section 134 of the 1988 Act. It not only paved the way for subsequent cases but also identified a clear set of factors relevant to interpreting the legislation.

A Pioneering Case

This case marked the UK's first successful use of universal jurisdiction to prosecute a foreign national for torture under the 1988 Act for acts committed abroad. As then Attorney-General Lord Goldsmith observed, "we believe this to be the first time in any country in international law, and certainly in English law, where offences of torture and hostage-taking have been prosecuted in circumstances such as this", pointing to the fact that neither Zardad nor the victims were British. This latter point also distinguished the case from that of Anthony Sawoniuk, who had been convicted of murder under the War Crimes Act 1991 for acts committed on foreign soil against foreign citizens, but who, at the time of his conviction, was a British citizen (*R v. Sawoniuk* (2000)).

The case broke new ground not only legally but also practically: UK authorities coordinated closely with Afghan officials to gather evidence, including witness testimony delivered by video link from the British embassy in Kabul. The case also laid an important foundation for subsequent universal jurisdiction prosecutions.

IMPACT OF THE CASE

Legal Impact

Beyond facilitating further cases brought under Section 134 of the 1988 Act, the findings in *Zardad* were also largely upheld by the Supreme Court in *R. v. Reeves Taylor* (2019) over a decade later. In *Reeves Taylor*, Lord Lloyd-Jones noted that the judgment in the first interim hearing of *Zardad*, which considered Zardad's role as a

de facto public official and the definition of governmental activity, was "compelling and in conformity with the preponderant weight of material relevant to the interpretation of Article 1 of UNCAT" (*Reeves Taylor* [64], [65], and [79]). The interpretation proffered in *Zardad* gave the Supreme Court judges grounds to establish a test for when non-state armed groups could be liable for prosecution under Section 134 of the 1988 Act. This was particularly important given the number of civil wars and the rise of powerful non-state actors, such as ISIS, who reportedly committed atrocities against civilians under their control.

It has also been argued by academics that such legislation will prove more likely to be used against non-state actors than to prosecute torture committed by State actors. Whilst the *Zardad* judgment increased the potential for torturers to be brought to justice, it should not detract from the opportunity for UK criminal legislation to be used in order to hold State actors accountable.

Deportation of Zardad

In 2016, Zardad was granted parole for "good behaviour" and, upon release, deported to Afghanistan. Human rights groups raised concerns that Afghan witnesses who had testified against him a decade earlier would not be adequately protected following his return. Although the Metropolitan Police reportedly made efforts to contact witnesses, they were unable to reach them all, and it is unclear whether any additional protection measures were implemented. Reports further indicated that Zardad was briefly taken into custody by the National Directorate of Security and later released following the intervention of a high-ranking Government official. His whereabouts and activities since then remain largely unclear.

The Legal Representatives were F Jennings KC and J O'Keefe for the Appellant; and J Lewis and P Taylor for the Crown.

ADDITIONAL RESOURCES

- Andrew Clapham and Paola Gaeta, 'Torture by Private Actors and "Gold-Plating" the Offence in National Law: An Exchange of Emails in Honour of William Schabas' in *Arcs of Global Justice* (Oxford University Press, 2018).
- Ginevra Le Moli, 'Torture by Non-State Actors: Four Inquiries' (2021) 19(1) Journal of International Criminal Justice 89.
- Human Rights Watch, 'Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity' (Human Rights Watch, 6 July 2005).
- Robert Cryer, 'Zardad' in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009).
- Margaret M deGuzman and Diane Marie Amann (eds.), *Arcs of Global Justice* (Oxford University Press, 2018).
- Patricia Gossman and Sari Kouvo, Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan (Afghanistan Analysts Network, February 2013).
- REDRESS and The Clooney Foundation for Justice, 'Global Britain, Global Justice: Strengthening Accountability for International Crimes in England and Wales' (REDRESS, November 2023).
- REDRESS, 'Not Only the State: Torture by Non-State Actors, Towards Enhanced Protection, Accountability and Effective Remedies' (REDRESS, May 2006).

R. EX. REL. FREEDOM AND JUSTICE PARTY V. SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS (2018)

Link to the judgment

Court of Appeal

IMMUNITY • 'SPECIAL MISSION' STATUS • CUSTOMARY INTERNATIONAL LAW • DIPLOMATIC RELATIONS • RULE OF LAW • UNIVERSAL JURISDICTION

CASE SUMMARY

In 2015, Lt General Mahmoud Hegazy, Director of the Egyptian Military Intelligence Service, visited the UK on an official trip. The claimants sought his arrest due to allegations of his involvement in acts of torture committed in Egypt following the 2013 uprising. However, given that Hegazy had been granted 'special mission' status by the FCO before his arrival, no further action was taken by the Metropolitan Police or the Crown Prosecution Service.

In 2018, the Court of Appeal clarified the interaction between immunities under customary international law and UK domestic law. It held that a rule of customary international law obliges States to grant core immunities — including immunity from criminal prosecution — to members of 'special missions' they accept, and that UK common law recognises and gives effect to that rule. Individuals formally recognised by the UK Government as members of a 'special mission' therefore benefit from immunity from criminal prosecution for the duration of their visit.

THE FACTS AND PROCEDURAL HISTORY

In September 2015, Lt General Hegazy visited the UK in an official capacity. The FCO recognised his visit as a 'special mission'. During the visit, the Freedom and Justice Party (a political party which formed Egypt's elected Government between June 2012 and July 2013, and the appellants in the case) asked the Metropolitan Police to arrest Hegazy in connection with allegations of torture and other crimes committed in Egypt following the 2013 uprising. The Metropolitan Police declined to act, citing that Hegazy, as a member of a 'special mission' visiting the UK, enjoyed 'special mission immunity' from the criminal process. Hegazy subsequently left the UK, and the appellants challenged the decision of the police by way of judicial review.

The case arose against the backdrop of the decision in *Khurts Bat v. Investigating Judge of the German Federal Court* (2000), following which the FCO issued a ministerial statement setting out a new process for determining when visits by officials would qualify as a 'special mission' under the common law, thereby affording visitors 'special mission immunity', including from criminal jurisdiction.

The appellants in Hegazy's case argued that no rule of customary international law requires immunity to be granted to members of 'special missions' – especially as neither Egypt nor the UK had ratified the UN Convention on Special Missions. They further argued that, even if such a rule existed in customary international law, it could not be enforced through English common law.

The Divisional Court dismissed the judicial review claim, holding that the core principles of 'special mission immunity' – including the inviolability and immunity from criminal jurisdiction of members of 'special missions' – had become established rules in customary international law, and formed part of English common law.

The appellants appeal this decision of the Divisional Court to the Court of Appeal. REDRESS, alongside other NGOs, intervened in the appeal proceedings.

THE DECISION AND ITS SIGNIFICANCE

In its judgment of 19 July 2018, the Court of Appeal upheld the Divisional Court's judgment from August 2016, concluding that members of a 'special mission' benefit from immunity from criminal prosecution for the duration of their visit to the UK.

Immunity in 'Special Missions' is a Rule of Customary International Law

The Court confirmed that immunity for 'special missions' is a rule of customary international law and is recognised in English common law. This distinguished the case from *Pinochet (No. 3)*, where the House of Lords held that former Heads of State do not enjoy immunity from criminal prosecution for acts of torture.

In reaching this conclusion, the Court of Appeal analysed extensive State and diplomatic practice, legal belief (*opinio juris*), including responses to international surveys – such as that undertaken by the Committee of Legal Advisers on Public International Law, as well as academic commentary. It found that 'special mission immunity' is established in customary international law, and that its core elements (personal inviolability and immunity from criminal prosecution) are necessary to enable such missions to perform their functions effectively [23].

This case is significant because it clarifies the circumstances in which UK authorities may be precluded from investigating and arresting foreign nationals suspected of torture under the principle of universal jurisdiction. It was also the first English appellate case to consider directly whether 'special missions' form part of customary international law and, if so, whether those rules are incorporated into English common law. The Court rejected the argument that immunity should not apply in cases involving serious international crimes such as torture. Following the ICJ's approach in the *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (2012) case, the Court of Appeal held that procedural immunities may coexist with substantive *jus cogens* norms, including the prohibition of torture [30].

IMPACT OF THE CASE

The Judiciary's Role in Upholding Customary International Law

The Court rejected the argument that only Parliament could legislate for legal immunity. It reaffirmed that, while the executive plays a role in recognising a 'special mission', once that status is granted the courts must give effect to the corresponding immunities under customary international law. The judgment emphasised that English courts can and should recognise such immunity as part of the common law, distinguishing judicial recognition of immunity from Parliament's exclusive role in defining criminal offences [134].

The decision underlines that international law may operate directly through the common law and judicial processes, as well as through legislation. It also reinforces that separation of powers and the rule of law remain engaged in this context, with the judiciary's role counterbalancing executive power.

Legal Certainty for Special Missions

The judgment solidified that recognised members of 'special missions' enjoy personal inviolability and immunity from criminal prosecution for the duration of their authorised mission in the UK, provided that they are formally accepted by the Government.

The Legal Representatives were Sudhanshu Swaroop KC, Tom Hickman, and Philippa Webb for the Appellants; and Karen Steyn KC, Jessica Wells, Guglielmo Verdirame, and Paul Rogers, and Katarina Sydow for the Respondent Government.

ADDITIONAL RESOURCES

- Andrew Sanger, 'Immunity of State Officials from the Criminal Jurisdiction of a Foreign State' (2016) 62(1) International and Comparative Law Quarterly 193.
- Andrew Sanger and Sir Michael Wood, 'The Immunities of Members of Special Missions' (University of Cambridge Faculty of Law Legal Studies Research Paper Series, Paper 22/2018, March 2018).
- Crown Prosecution Service 'Diplomatic Immunity and Diplomatic Premises' (9 September 2022).
- Thiago Olveira, 'Foreign State Officials Do Not Enjoy Immunity Ratione Materiae from Extradition Proceedings: The Not So Curious Case of Khurts Bat – A reply to Dr. Roger O'Keefe' (EJIL: Talk!, 4 September 2013).
- Thomas Garner, 'Diplomatic immunity and the Dunn case' (The Law Society Gazette, 28 October 2019).
- REDRESS, 'Special Mission Immunity and General Hegazy Case' (REDRESS, 2016).

R. V. REEVES TAYLOR (2019)

Link to the judgment

Supreme Court

UNIVERSAL JURISDICTION • *DE FACTO* PUBLIC OFFICIAL • NON-STATE ACTORS • GOVERNMENTAL FUNCTIONS • CRIMINAL JUSTICE ACT 1988 • CIVIL WAR • UNCAT

CASE SUMMARY

Agnes Reeves Taylor, the ex-wife of former Liberian President Charles Taylor, was prosecuted in the UK for torture allegedly committed when she was a member of the National Patriotic Front of Liberia (NPFL), a non-state armed group.

The Supreme Court in this case clarified that non-state actors may, in certain circumstances, be prosecuted for torture under Section 134 of the Criminal Justice Act 1988 (the 1988 Act), which implements UNCAT. The central issue was when individuals associated with non-state armed groups may be regarded as "acting in an official capacity" for the purposes of the 1988 Act.

The Supreme Court held that members of non-state armed groups which, in territory they controlled, exercised functions normally carried out by governments – not merely military functions – over civilian populations may fall within the scope of the 1988 Act. However, applying this test on remittal, the Central Criminal Court concluded that the NPFL did not meet these criteria, and the charges against Reeves Taylor were dismissed.

THE FACTS AND PROCEDURAL HISTORY

In 1989, the NPFL, led by Charles Taylor, launched an armed rebellion against the Liberian Government, leading to the First Liberian Civil War, which continued until Taylor became President in 1997. It was alleged that Reeves Taylor was a high-ranking member of the NPFL and, in 1990, was involved in acts including facilitating the rape of captive women by NPFL soldiers, assaulting a child, and murdering two others.

Reeves Taylor moved to the UK in the late 1990s and, in 2017, was charged by the Crown Prosecution Service with seven counts of torture and one count of conspiracy to torture under Section 134 of the 1988 Act. She could not be prosecuted under the International Criminal Court Act 2001 (ICCA 2001) as it applies only to

crimes committed on or after 1 January 1991 and her alleged offences predated that threshold. Her indictment followed the successful prosecution of her former husband, Charles Taylor, by the Special Court for Sierra Leone in 2013 for supporting rebels in Sierra Leone, for which he was sentenced to 50 years' imprisonment. It also followed the US 2008 conviction of Taylor's son (from a different relationship), under the US 1994 Act against torture (18 U.S.C. §§ 2340-2340A).

At a preparatory hearing, Reeves Taylor denied involvement and argued that she had not acted in an official capacity and that the NPFL was not the *de facto* government authority in the relevant locations at the time. Her defence contended that Section 134 of the 1988 Act applied only to conduct carried out under the authority of, or tolerated by, an official State government. The Court at first instance rejected that argument, holding that Section 134 could extend to individuals who, in situations of armed conflict, act in a private capacity as part of an entity wielding authority (*R v. TRA* (2018) [2]). The Court of Appeal upheld that decision. The case was then appealed to the Supreme Court, which was asked to clarify the meaning of "official capacity" in relation to non-state actors under the 1988 Act.

THE DECISION AND ITS SIGNIFICANCE

The Supreme Court Decision

In its judgment of 13 November 2019, the Supreme Court narrowed the approach taken by the Court of Appeal to the meaning of a "person acting in an official capacity". In the leading judgment, Lord Lloyd-Jones held that the term refers to a person acting "for or on behalf of an organisation or body which exercises, in the territory controlled by that organisation or body and in which the relevant conduct occurs, functions normally exercised by governments over their civilian populations". He highlighted that governmental functions attributable to non-state groups must "be distinguished from purely military activity" and that such groups must have "established a sufficient degree of control, authority and organisation to become an authority exercising official or quasi-official powers" [76-80].

Lord Lloyd-Jones referred to the decision in *Zardad*, noting that the Hezb-e Islami group in that case controlled territory in a manner consistent with the test at the time of the relevant offence [65]. However, he disagreed with Treacy J's view in that judgment that "a degree of permanence" was required. He observed that "the fact that the long-term survival of an entity may be an unlikely prospect should not prevent it from being considered a de facto government provided that it has effectively established itself as such" [78-79].

In a dissenting judgment, Lord Reed expressed concerned that UNCAT, which underpins Section 134 of the 1988 Act, was intended to apply only where State responsibility is engaged [88-90]. He acknowledged developments in the interpretation of Article 1 UNCAT but concluded that they could not apply retroactively to Reeves Taylor's alleged offences in 1990 [96].

The Supreme Court allowed the appeal and remitted the case to the Central Criminal Court to determine whether there was sufficient evidence for a jury to decide whether Reeves Taylor had acted in an official capacity. The Central Criminal Court subsequently held that the evidence did not meet the threshold set by the Supreme Court, as the prosecution could not establish that the NPFL exercised authority beyond military control.

The charges against Reeves Taylor were therefore dropped. She returned to Liberia in 2020 and continues to deny any wrongdoing.

The Significance of the Case in UK Law

Reeves Taylor was the third prosecution for torture brought under the 1988 Act (following *Zardad* and *R v. Lama (Kumar)* (2014)), and the fourth universal jurisdiction prosecution in the UK (also including *R v. Sawoniuk* (2000)). It was the first such case to reach the Supreme Court, enabling authoritative interpretation of the 1988 Act and confirming its potential application to certain non-state actors, thereby increasing its broader legal significance.

Although Reeves Taylor was not convicted, the decision established that members of non-state groups may be liable for torture under UK law where their group exercises sufficient territorial control and governmental authority.

IMPACT OF THE CASE

Broader Interpretation of 'Official Capacity'

A central element of the definition of torture under international law – which distinguishes it from other forms of criminal violence – is the involvement of State officials. This has created difficulties in holding accountable perpetrators affiliated with non-state entities that may exercise comparable governmental functions and control over civilian populations.

Reeves Taylor confirmed in UK law that such members of non-state armed groups may fall within the scope of torture provisions where they exercise governmental functions, as they may qualify as 'a person acting in an official capacity'. This clarification is particularly significant in the context of crimes committed by groups such as ISIS or the Taliban, and against the backdrop of the rise in intra-national conflicts following the end of the Cold War [96]. The decision also opens the possibility of future prosecutions involving rebel or insurgent groups and may encourage other UNCAT States Parties to adopt a similar interpretation to strengthen accountability for torture.

High Threshold for Prosecutions of Non-State Armed Groups

Although the Supreme Court's test expanded the scope of prosecutions to include non-state actors, it set a demanding threshold. The Court distinguished the exercise of governmental functions from mere military functions and required the former to be established. As a result, the test might exclude non-state armed groups that exercise effective control over civilians but do not perform quasi-governmental functions.

In *Reeves Taylor*, for example, the Central Criminal Court found that this threshold was not met, despite the NPFL's control of large areas of territory, operation of detention centres, and eventual seizure of power in Liberia.

Impact of Temporal Bars under the ICCA 2001

This case illustrates the gap in UK law for prosecuting serious international crimes before the ICCA came into force. The temporal bars under the ICCA 2001 meant it would not be possible to prosecute Reeves Taylor for torture as a war crime or a crime against humanity during the First Liberian Civil War. The ICCA may apply to acts of genocide, crimes against humanity and war crimes committed on or after 1 January 1991 (Section 65A), but those sections do not apply to acts committed before 1 September 2001 "unless, at the time the act constituting that crime was committed, the act amounted in the circumstances to a criminal offence under international law" (Section 65A). Generally, this temporal applicability creates limitations for accountability in relation to older conflicts.

Broader Accountability for Atrocities in Liberia

While domestic accountability for atrocities committed during the Liberian civil wars has been limited, trials have taken place under foreign laws (including UK law in *Reeves Taylor*, and in the US, France and Switzerland) keeping conduct during the civil wars in the public consciousness. Additionally, in 2024, 15 years after the Liberian Truth and Reconciliation Commission recommended it, the Office for the Establishment of War and Economic Crimes Court was created in Liberia. The scope and impact of that Court remains to be seen, but it is expected to issue its first indictments in 2027.

The Legal Representatives were Steven Powles KC, Tatyana Eatwell, and Margherita Cornaglia for the Appellant; David Perry KC, Paul Rogers, Kathryn Howarth, and Emilie Pottle for the Respondent (the Crown). Intervener: REDRESS.

ADDITIONAL RESOURCES

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- Human Rights Watch, *Liberia at a Crossroads: Human Rights Challenges for the New Government* (Briefing Paper, 30 September 2005).
- REDRESS, 'Not Only the State: Torture by Non-State Actors, Towards Enhanced Protection, Accountability and Effective Remedies' (REDRESS, May 2006).
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- Victoria Priori, 'The UK Supreme Court in R v Reeves Taylor: A Missed Opportunity to Bridge State and Individual Responsibility' (Opinio Juris, 12 February 2021).

PRISONERS' RIGHTS AND MEDICAL AND HEALTH CASES

D V. UNITED KINGDOM (1997)

Link to the judgment

European Court of Human Rights

MEDICAL TREATMENT • ASYLUM • DETENTION • DEPORTATION • AIDS • HUMANITARIAN CONSIDERATIONS • LIFE EXPECTANCY • EFFECTIVE REMEDIES

CASE SUMMARY

D faced deportation from the UK to his country of origin following his conviction for drug possession and subsequent release on licence to an immigration detention facility pending removal. He was diagnosed with HIV and AIDS, and argued that his removal to St. Kitts, where medical care and living conditions were inadequate, would breach the prohibition of inhuman or degrading treatment under Article 3 ECHR by reducing his life expectancy under distressing circumstances. The ECtHR found in his favour, agreeing that the very exceptional circumstances and humanitarian considerations meant that his deportation to St. Kitts would constitute a violation of Article 3.

This case refined and expanded the scope of Article 3 protection against inhuman treatment in the context of deportation, based on the exceptional circumstances of the case.

THE FACTS AND PROCEDURAL HISTORY

D arrived in the UK in January 1993, seeking leave to enter the UK for two weeks as a visitor. However, at the airport, he was found to be in possession of a substantial quantity of cocaine. His leave to enter was subsequently refused, and he was arrested and imprisoned for drug possession in May 1993.

In August 1994, during his time in prison, D was diagnosed as HIV positive and suffering from AIDS. D was then released on licence on 24 January 1996 and placed in immigration detention pending removal to St Kitts. At this point, he applied for leave to remain in the UK on human rights grounds, arguing that his removal would result in the loss of the medical treatment he had been receiving, consequently reducing his life expectancy. The request was refused by the Chief Immigration Officer.

D's medical reports indicated a poor prognosis, with life expectancy of eight to 12 months. If D were to be removed to St. Kitts, which expert reports confirmed lacked adequate medical treatment for his condition, his life expectancy would be reduced by more than half. Because D had no home or immediate family in St. Kitts, he would be left homeless, without financial resources or access to social support. By the date of the hearing in 1997, D's condition had rapidly deteriorated, and it was apparent that he was weak and close to death.

D lodged a complaint alleging that his proposed removal to St. Kitts would violate his rights to life (Article 2 ECHR), to freedom from inhuman or degrading treatment (Article 3), and to respect for private and family life (Article 8). D further alleged that he had no effective remedy under English law in respect of these violations, contrary to Article 13 ECHR.

The case before the ECtHR originated in D's 1996 application to the UK's High Court for leave to apply for judicial review, which was unsuccessful. On 15 February 1996, the Court of Appeal also dismissed D's renewed application. The case was subsequently brought before the ECtHR.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision issued on 2 May 1997, the ECtHR found that the decision to remove the applicant to St Kitts would violate Article 3 ECHR. However, the Court found no violation of Article 13 ECHR, and deemed it unnecessary to examine Article 2 ECHR. It also found no separate issue under Article 8 ECHR.

The Court found that the removal to St Kitts of D, who was now in the final stages of a terminal and incurable illness, would not only accelerate his death, but it would subject him to a real risk of dying in distressing conditions amounting to inhuman and degrading treatment. D would lack access to shelter, familial support and adequate medical treatment in St. Kitts. Further, due to the advanced stage of his illness, D was entirely dependent on the medical care and support provided to him in the UK, and its sudden withdrawal would hasten his death and subject him to acute mental and physical suffering [52].

Exceptional Protection against Expulsion in Medical Cases

The ECtHR emphasised that foreign nationals who have completed their prison sentences and face removal from the UK are not, in principle, entitled to continue receiving medical, social, or other forms of assistance from the State [54]. However, the exceptional circumstances and "compelling humanitarian considerations" in the present case led the Court to conclude that Article 3 ECHR would be violated if D were deprived of such assistance [54].

The ECtHR acknowledged the UK Government's position that States retain the right to expel foreign nationals who have committed serious offences but found that this did not override the absolute protection guaranteed by Article 3.

Judicial Review as an Effective Remedy in Extradition and Deportation Cases

The Court found no violation of Article 13 ECHR. It held that the applicant's judicial review proceedings provided an effective remedy to his complaints under Articles 2, 3, and 8. In line with its earlier judgments in *Soering v. UK* (1989) and *Vilvarajah and others v. UK* (1991), the ECtHR confirmed that judicial review proceedings in the UK constitute an effective remedy in deportation and extradition cases involving Article 3 complaints.

The ECtHR found that the domestic courts had examined the substance of D's claims and possessed the power to grant appropriate relief. The fact that the Court of Appeal ultimately refused leave to appeal did not undermine the effectiveness of the remedy. Rather, the ECtHR suggested that the difficulty in the present case lay in the application of the remedy by the domestic courts.

Having found a violation of Article 3, the Court considered it unnecessary to examine separately the complaint under Article 2 and found that no separate issue arose under Article 8.

IMPACT OF THE CASE

Article 3 ECHR Protection from Removal in Medical Cases

D v. UK established that the deportation of a seriously ill foreign national could, in exceptional circumstances, violate Article 3 ECHR. However, the Court emphasised the narrow scope of this principle, stressing that it was the "exceptional circumstances" and "compelling humanitarian considerations" in the present case that led it to conclude that D's deportation would breach Article 3.

The judgment was novel because, until that point, Article 3 had generally been applied only where the risk of inhuman or degrading treatment arose directly or indirectly from the conduct of public authorities in the receiving State. The Court made clear, however, that the protection under Article 3 should not be confined to such situations. It held that the UK's decision to remove D would constitute inhuman and degrading treatment, even though D's critical medical condition and the inadequate health infrastructure in the receiving State were beyond the UK's control.

High Threshold for Article 3 ECHR Violations in Medical Deportation Cases

The "exceptional" nature of the circumstances giving rise to a violation of Article 3 in *D V. UK* was underscored in subsequent jurisprudence concerning medical treatment cases. In *N (FC) v. Secretary of State for the Home Department* (2005), later upheld by the ECtHR in *N v. UK* (2008), both the domestic courts and the ECtHR emphasised the high threshold required to establish the "exceptional circumstances" identified in *D v. UK*. The House of Lords in *N v. SSHD* confirmed that this threshold would not be automatically met where deportation was likely to reduce an individual's life expectancy. Rather, the decisive factor in *D* was that the applicant was critically ill and that his removal would expose him to dying in inhuman and degrading conditions, rather than the mere prospect of shortened life expectancy.

The Legal Representatives were N. Blake KC and L Daniel for the Applicant; D. Pannick KC and N. Garnham for the Government; and J C Geus (Delegate) for the European Commission of Human Rights.

ADDITIONAL RESOURCES

- Claudia Broadhead, 'N v. United Kingdom, Application No. 26565/05 – Earth Refuge Legal' (Earth Refuge, 28 May 2008).
- Hannah Noyce, 'D. v UK exception remains exceptional in medical treatment cases under Article 3' (UK Human Rights Blog, 5 February 2015).
- International Network for Economic, Social and Cultural Rights, 'Case of N v. The United Kingdom' (ESCR-net publication, 6 June 2012).
- Louise Rasmussen and Jacob Gronholt-Pedersen, 'European leaders to ask EU for easier expulsion of foreign criminals' (Reuters, 22 May 2025).
- Lourdes Peroni and Steve Peers, 'Expulsion of seriously ill migrants: a new ECtHR ruling reshapes ECHR and EU law – European Area of Freedom Security & Justice' (EAFSJ, 10 January 2017).
- Mark Klaassen, 'A new chapter on the deportation of ill persons and Article 3 ECHR: the European Court of Human Rights judgment in Savran v. Denmark' (Strasbourg Observers, 17 October 2019).
- Michael K. Addo and Nicholas Grief, 'Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?' (1998) 9 EJIL 510.

KEENAN V. UNITED KINGDOM (2001)

Link to the judgment

European Court of Human Rights

MENTAL HEALTH • INADEQUATE MEDICAL CARE • DEATH IN PRISON • STANDARD OF CARE • PSYCHIATRIC CARE • EFFECTIVE REMEDIES

CASE SUMMARY

Susan Keenan brought a case to the ECtHR after her son, Mark Keenan, died by suicide while serving a four-month prison sentence at HMP Exeter. She alleged that the prison authorities failed to protect her son's life, subjected him to inhuman and degrading treatment, and that she had no effective remedy for these complaints.

Keenan v. UK established that inadequate healthcare for both physical and mental health can constitute inhuman and degrading treatment in violation of Article 3 ECHR and highlighted the importance of Article 13 ECHR in ensuring access to effective remedies for such violations, including in cases where the victim suffered psychological harm rather than physical. The ruling has broader implications for the standards of care in State institutions, such as prisons and hospitals.

THE FACTS AND PROCEDURAL HISTORY

Mark Keenan, who had a history of intermittent psychiatric treatment, was imprisoned in the UK at age 28. His mental health deteriorated following a decision to transfer him from the health care centre to the general prison wing after he was deemed fit, despite ongoing concerns about his mental state. Such concerns were later reinforced by incidents where he barricaded himself in a room (on 14 April 1993) and another where a noose made from a bedsheet was found in his cell (on 16 April 1993), after which he was returned to the prison's health centre and checked in on every 15 minutes.

On 30 April 1993, Keenan assaulted two guards, and this resulted in an internal disciplinary punishment of 28 additional days added to his sentence, together with seven days' loss of association and exclusion from work in segregation in the punishment block. On 15 May 1993, a day after this punishment was imposed, he died by suicide at the age of 28. At some point before his suicide, Keenan had pressed the cell's call button, but the alarm buzzer had been deactivated.

His mother brought a complaint before the ECtHR arguing that the UK had violated its obligations under the ECHR.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision of 3 April 2001, the ECtHR found violations of the prohibition of torture and inhuman or degrading treatment or punishment (Article 3) and the right to an effective remedy (Article 13) but held there had been no violation of the right to life (Article 2).

Lack of Appropriate Medical Care Violates Article 3 ECHR

The ECtHR held that "the authorities are under an obligation to protect the health of persons deprived of liberty" and that "[t]he lack of appropriate medical care may amount to treatment contrary to Article 3" [111].

To determine whether Article 3 ECHR had been violated in relation to persons with mental illness, consideration must be given to the individual's "vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment" [111]. Additionally, evidence of the actual impact of the treatment on the person is not always a decisive factor in establishing a breach of Article 3. Indeed, the ECtHR found that "the lack of effective monitoring of Keenan's condition and the lack of informed psychiatric input into his assessment and treatment disclose significant defects in the medical care provided to a mentally ill person known to be a suicide risk," which was relevant to the finding of a violation of Article 3 [116].

The ECtHR (by a majority) concluded that, in the context of inadequate psychiatric care provided to him and lack of effective monitoring of his condition, the imposition of disciplinary punishment consisting of a week's segregation and a 28-day sentence extension, nine days before his expected release, amounted to a violation of Article 3.

No Effective Remedies were Available

The ECtHR considered that no remedy was available to Keenan that could have offered him the prospect of challenging the disciplinary punishment within the short time frame before it was executed or ended. There was not sufficient time to initiate judicial review proceedings or to raise complaints internally [126-127].

The ECtHR also unanimously held that, after Keenan's, the inquest did not provide Keenan's mother with a remedy for determining liability or providing compensation [128]. An action in negligence was unlikely to yield adequate damages for non-pecuniary loss or secure legal aid, and she could not claim under the Fatal Accidents Act as a non-dependent mother of an adult child [129]. This lack of access to a statutory civil claim highlighted the systemic gap in remedies for non-pecuniary harm arising from ECHR violations. The ECtHR stated that for breaches of Articles 2 and 3 ECHR, compensation for non-pecuniary damage should, in principle, be available. Crucially, no effective remedy was available to Keenan's mother to establish where responsibility lay for her son's death, which the ECtHR unanimously deemed an essential element of a remedy under Article 13 [130-132].

Reasonable Measures were Taken under Article 2 ECHR

The ECtHR considered whether the authorities knew or ought to have known of a real and immediate risk to life, and whether they failed to take reasonable measures within their powers to avert that risk. The ECtHR found that the prison authorities were aware that Keenan posed a potential risk to his own life, given his mental state and previous history of suicidal behaviour [95]. It was concluded that the authorities responded in a

reasonable way to Keenan's conduct, given that he had been placed under the care of medical professionals and under watch when he showed a risk of suicide. During his time in segregation, he was subject to daily medical supervision, and doctors, in assessing him, did not find that it was necessary to remove him from segregation. On the day of his death, there were no specific signs which should have alerted authorities to the fact that he was in a disturbed state or that his suicide was likely [98-99]. Accordingly, the ECtHR unanimously found that there was no violation of Article 2 ECHR.

IMPACT OF THE CASE

Immediate Legal Impact

In *Keenan*, the ECtHR clarified and strengthened the duty of public authorities to ensure that the health of persons deprived of their liberty is protected. This duty requires the vulnerability of persons with mental illness to be considered. An Article 3 violation may be found where there is a breach of such duty even though there is no proof of the effect that the conditions in question have had on the person, at least not where there are 'significant defects' in the care received.

Judicial Reception

The standards established in *Keenan* have been consistently applied both by the UK courts and the ECtHR. The ECtHR has cited *Keenan* as authority for requiring that the vulnerable position of persons with mental illness be considered, specifically in relation to disciplinary measures imposed upon them, and the requirement to adequately monitor such persons' health. Some other cases, while not referring expressly to *Keenan*, have reached similar conclusions; for example, it has been held in *Price v. UK* (2001) that detaining a person with a severe disability without providing adequate care for them violates Article 3 ECHR.

The UK courts have cited *Keenan* as authority for the possibility that Article 3 ECHR can be breached because of a lack of proper medical care; the fact that an Article 3 violation does not necessarily require the effect of ill-treatment to be established; and to emphasise the vulnerability of detainees with mental illness (*Savage v. South Essex Partnership NHS Foundation Trust* (2008); and *R (VC) v. Secretary of State for the Home Department* (2018)). Subsequent UK caselaw reaffirmed that the implications of *Keenan* for the positive duty are clear: "in the case of severe mental illness, there must be in place effective monitoring of the detainee and the obtaining of suitable expert advice as to how that person should be dealt with and treated" (*R (MD) v. Secretary of State for the Home Department* (2014) [60]). To illustrate, the judgment in *McGlinchey v. UK* (2003) makes clear that Article 3 ECHR imposes a positive obligation on the State to ensure that prisoners' "health and well-being are adequately secured" [46]. The applicants were family members of an individual who had died in prison due to complications arising from heroin withdrawal. The ECtHR found "not enough was done or done quickly enough" to prevent her deterioration and increased suffering as she experienced withdrawal [52].

Academic Reception

Generally, academics have welcomed the decision in *Keenan*, commending it both for clarifying the duty owed by public authorities to ensure the health of detainees under Article 3 and for highlighting the inadequacy of

treatment of persons with mental illness in the UK. *Keenan* is said to "provide clear authority that there should be no compromise of medical and psychiatric facilities when [an] individual's Convention rights are at issue" [116].

Some commentators have argued that, by finding the detainee's segregation inappropriate due to his mental health condition and heightened risk of suicide, the ECtHR's decision in *Keenan* implies Article 3 may, in certain cases, require confinement in the least restrictive environment compatible with mental health needs. *Keenan* illustrates that Article 3 can offer distinct and additional protection beyond Article 2, focusing not only on safeguarding life but also on the humane treatment of vulnerable detainees. At the same time, the requirement for a least restrictive setting is not absolute; it must be balanced against legitimate concerns such as the seriousness of the individual's offence, their risk of re-offending, and the need to ensure the safety of staff and other detainees. The Court's analysis emphasises that restrictive measures must be justified as necessary and proportionate, ensuring that the response to security or disciplinary concerns does not cause disproportionate harm to someone's mental or physical well-being.

Legislative, Policy and Social Impact

The Joint Committee on Human Rights referred to *Keenan* as authority for the position that Article 3 applies "with particular stringency" to the treatment of detainees with mental illness, and that UK authorities are obliged under Article 3 ECHR to undertake informed psychiatric assessment and treatment, as well as expert monitoring in respect of detainees with serious mental illness who may be at risk of suicide. In its report on deaths in custody, the Joint Committee concluded that the prevention of such deaths can be best achieved in a system which respects the rights of the detainees under Article 3.

The Legal Representatives were T. Owen for the Applicant; and P. Berman for the Government.

ADDITIONAL RESOURCES

- Anna G Preston et al., "I was reaching out for help and they did not help me: Mental healthcare in the carceral state" (2022) 10(23) Health and Justice.
- Anne Stanesby, 'Inhuman and degrading treatment and punishment of mentally ill prisoner' (2002) Journal of Mental Health Law.
- Aryana Noroozi, 'Navigating mental health care in and out of prison' (USC Annenberg Center for Health Journalism, 2024).
- HM Chief Inspector of Prisons, 'The long wait: A thematic review of delays in the transfer of mentally unwell prisoners' (2024).
- Joint Committee on Human Rights, 'Deaths in Custody' (UK Government, 8 December 2004).
- Justice Committee, 'Mental Health in Prison' (HC 2021-22, 72).
- National Institute for Health and Care Excellence, 'Mental health of adults in contact with the criminal justice system' (NICE, 2017).
- Office of the High Commissioner for Human Rights, 'Information Note No. 4: Persons with Disabilities' (United Nations, 2009).

NAPIER V. SCOTTISH MINISTERS (2004 & 2005)

Link to the judgment
The Court of Session Outer House

Link to the judgment
The Court of Session Inner House

SANITATION • PRE-TRIAL DETENTION • PRISONERS' RIGHTS • 'SLOPPING OUT' • STANDARD OF PROOF • PENAL REFORM • SCOTLAND • DAMAGES

CASE SUMMARY

In *Napier*, the Court of Session Outer House held that 'slopping out', combined with other detention conditions, had violated a prisoner's rights to freedom from inhuman or degrading treatment under Article 3 ECHR and to respect for private and family life under Article 8 ECHR. The Scottish Ministers were found to have acted '*ultra vires*' (i.e. outside of their powers) by holding Robert Napier in those conditions and refusing his transfer after becoming aware of his health complaint. Damages were awarded for the physical and psychological damage caused.

In a further judgment in 2005, the Court of Session Inner House confirmed that the applicable standard of proof to domestic cases claiming Article 3 violations is that applied to civil claims – i.e. proof on the balance of probabilities – and not the higher evidentiary threshold of 'beyond reasonable doubt', applied to criminal cases.

Napier significantly influenced improvements to sanitation conditions in Scottish prisons, including the abolition of the practice of 'slopping out' (i.e. manually emptying urine bottles and chamber pots), and opened the door to thousands of compensation claims from prisoners held in similar conditions.

THE FACTS AND PROCEDURAL HISTORY

Prisoners at HMP Barlinnie were confined to their cells for 20-23 hours a day, with little structured activity outside the cell. Napier, on remand at the prison for 40 days in total, shared a single-occupancy cell with another prisoner which lacked a flushing toilet and running water. Prisoners were required to 'slop out', urinating in bottles and defecating in chamber pots in the cell, which were emptied in groups of prisoners up to four times a day when cells were unlocked. These conditions impacted Napier's physical and mental health, causing a severe outbreak of eczema. He requested a transfer on 22 May 2001, arguing his conditions of detention were inhumane and degrading, in breach of Article 3 ECHR. The prison governor refused such a transfer.

Napier brought judicial review proceedings, seeking a determination that his conditions violated Articles 3 and 8 ECHR. He claimed that the Scottish Ministers, by keeping him in such conditions, acted unlawfully under Section 6 HRA and outside of their powers under Section 57 of the Scotland Act 1998 (Scotland Act). He sought compensation in damages.

In June 2001, the Scottish Court of Session – Outer House granted an interim order requiring Napier's transfer within 72 hours to a facility compliant with Article 3 (*Napier v. Scottish Ministers* (2001)). He was then moved to a residential healthcare unit.

The 2004 substantive hearing considered extensive expert evidence on prison conditions, and health impacts, including psychological harm, as well as reports from the prison inspectorate and the Committee for the Prevention of Torture. Conditions at HMP Barlinnie were proved to be far from satisfactory. The Ministers argued that whilst conditions were poor, they did not breach Articles 3 or 8, and that any omissions were attributable to prison staff rather than themselves and therefore did not trigger any responsibility for the executive under Section 57 of the Scotland Act.

In a further hearing in 2005, the Inner House of the Court addressed the standard of proof applicable in cases of alleged Article 3 violations, as a matter of general public importance.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision of 26 April 2004, the Court of Session Outer House held that the Scottish Ministers had violated the prohibition on inhuman and degrading treatment or punishment under Article 3 ECHR by detaining Napier in such conditions whilst on remand awaiting trial and continuing to do so after being informed of his eczema. It also found a violation of the right to private life under Article 8 ECHR due to the conditions of detention in which he had to undertake personal, regular activities of daily life. The Court awarded Napier £2,450 in damages for physical and psychological harm [92-93].

The Inner House further found that the Scottish Ministers had acted contrary to Section 6 HRA (i.e. it being unlawful for a public authority to act in a way which is compatible with the ECHR); acted *ultra vires* (i.e. outside of their powers) under Section 57 of the Scotland Act (i.e, under which the Scottish Government has no power to "do any […] act" which is incompatible with the EHCR) by deliberately continuing to detain Napier in those conditions; and caused harm, including psychological, that warranted damages.

'Slopping Out' and Other Detention Conditions Contrary to Article 3 ECHR

The Court emphasised that the combined effects of 'slopping out', lack of sanitation, overcrowding, and refusal to transfer once his condition was known, resulted in physical and psychological harms, causing feelings of humiliation, anxiety, anguish, worthlessness, and disgust. It also considered the fact that he was only on remand [91]. It concluded that such conditions amounted to inhuman and degrading treatment contrary to Article 3 [75-78].

The Court rejected the Scottish Ministers' argument that responsibility lay solely with prison staff. It held that his continued detention in such conditions – including at HMP Barlinnie on remand – amounted to a "positive act" which was a direct result of the Government's policy [81-90], and thus attributable to the Ministers.

Consideration of Systemic Issues relating to Detention Conditions

The Court also relied on longstanding awareness of the poor conditions of detention in Scottish prisons, highlighted in a 1994 report by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which had noted that the "vices of overcrowding, inadequate lavatory facilities and poor regime activities" amounted to inhuman and degrading treatment, and had recommended the ban of such practices and the introduction of new sanitation facilities. The Court ruled that despite knowing such facts, the Scottish Ministers repeatedly failed to address the issue and instal in-cell sanitation prior [52-59].

Further, justifications based on lack of resources and increasing prison population, including prisoners with substance abuse, were dismissed as insufficient to justify the policy and practice of placing (or keeping) remand prisoners in inhuman conditions [85].

Burden of Proof in Article 3 ECHR

In 2005, the Scottish Court of Session – Inner House addressed the appropriate standard of proof in Scottish civil proceedings concerning alleged breaches of Article 3 ECHR. Although the Scottish Ministers had originally petitioned against the 2004 decision, by the time the Inner House considered the matter in 2005, the Scottish Ministers had settled Napier's claim, having agreed to pay his compensation. Nonetheless, the Inner House proceeded to decide for public interest reasons.

On 10 February 2005, the Inner House confirmed that the standard of proof applicable to proceedings in Scotland concerning ECHR breaches by public authorities is the one used for ordinary civil cases, namely, proof on a 'balance of probabilities' (see *Napier v. Scottish Ministers* (2005)). It held the 'balance of probabilities' standard to be more appropriate than the higher threshold of 'beyond reasonable doubt', used by the ECtHR and in domestic criminal cases in Scotland.

IMPACT OF THE CASE

The Abolition of 'Slopping Out' and Improvement of Prison Conditions in Scotland

Napier was described as "hugely significant" in prompting the abolition of 'slopping out' in Scottish prisons. With a few exceptions, 'slopping out' ended by 2007. The case also drew wider attention to prison conditions and the need for significant investment in sanitation systems within prisons.

The Scottish Prison Service issued a statement, acknowledging that keeping prisoners in small cells for large periods of the day and requiring them to perform bodily functions in chamber pots or similar in shared cells breached Article 3 and generally entitled prisoners to compensation. In the years following the decision, the Scottish Government undertook modernisation and installation of in-cell sanitation. By 2013, the last Scottish prison facility associated with 'slopping out' closed.

However, 'slopping out' has persisted in a small number of prisons elsewhere in the UK. As recently as 2023, reports indicated that almost 7,000 prison cells in 50 jails in England and Wales lacked in-cell toilets, potentially exposing prisoners to 'slopping out' practices.

Compensation to Other Prisoners

Following *Napier*, the Scottish Government allocated more than £65 million for compensation and legal costs relating to prisoners' claims. Under Scottish Law at the time, claims under the ECHR could be brought up to five years after the alleged violation. Consequently, thousands of prisoners subjected to 'slopping out' in Scottish prisons sought compensation. Significant sums were paid out by Scottish prison authorities, and concerns arose regarding the sheer volume of claims being brought, prompting calls for further reform to limit the timeframes within which ECHR claims could be made. A similar increase in claims was seen in Ireland, where 'slopping out' was still permitted, leading to renewed calls for its abolition.

Wider Impact on Jurisprudence

Napier established that the practice of 'slopping out', when combined with other conditions of detention, such as overcrowding, unsanitary conditions, time spent in cells, and lack of access to daily activities, particularly where prisoners have medical or psychological conditions, may amount to an ECHR violation, but not in every case on its own. In fact, 'slopping out' has been found not to amount to a violation of the ECHR in various cases in the UK, even after *Napier*. For instance, in *Desmond Grant and Roger Charles Gleaves v. Ministry of Justice High Court* (2011), the High Court of England and Wales held that 'slopping out' practices at HMP Albany on the Isle of Wight did not violate Articles 3 nor 8 ECHR. That case distinguished from Napier on the grounds that the claimants were exposed to the practice rarely, and that no serious medical or psychological condition had arisen.

Civil Standard of Proof

By affirming that the civil standard of proof applies in Article 3 claims, the Court reinforced that individuals alleging breaches of their Convention rights before the Scottish Courts should not face an unduly high evidentiary hurdle. This approach helped preserve meaningful access to justice. Had the Court adopted a higher standard of proof – such as 'beyond reasonable doubt' – it could have significantly raised the bar for individuals to bring a case for breach of ECHR on the part of public authorities in proceedings before the Scottish Courts and made successful challenges far more difficult.

The Legal Representatives for the 2004 judicial review were O'Neill KC, Collins and Carmichael for Napier (Petitioner); and Brailsford KC, Dewar KC, and Wolffe for the Scottish Ministers (Respondents); and for the 2005 petition were O'Neill KC and Collins for Napier (Petitioner and Respondent); and Brailsford KC, and Howie KC for the Scottish Ministers (Respondents and Reclaimers).

ADDITIONAL RESOURCES

- Council of Europe, 'Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom and the Isle of Man from 12 to 23 May 2003' (4 March 2005).
- Dr Mary Rogan BL, 'Prison Conditions Under Irish Law and the European Convention on Human Rights' (paper commissioned by Irish Research Counsel, Irish Penal Reform Trust, and Dublin Institute of Technology, June 2012).
- Helen Pidd, 'Jail cells without toilets persist in England despite 'slopping out' law' (The Guardian online, 25 October 2023).
- Helen Pidd, 'No toilets in 6,900 prison cells in England and Wales, minister reveals' (The Guardian online, 30 November 2023).
- Her Majesty's Inspectorate of Prisons 'HM Inspectorate of Prisons: Report on HMP Peterhead' (HMIPS inspection report, July 2006).
- Irish Penal Reform Trust, 'Sanitation and Slopping Out in the Irish Prison System' (IPRT briefing, 20 January 2011).
- Liam Herrick, 'Prisoner's Rights in The ECHR and Irish Law' (ed. U. Kilkelly) (Jordans, 2009).
- Rosalind English, 'Slopping out regime in prison not in breach of human rights, judge rules' (UK Human Rights Blog, 20 December 2011).
- Steve Brockenhurst, 'HMP Grampian: Transforming Scotland's hate factory' BBC News Scotland, 16 November 2014).
- Scottish Human Rights Commission, Independent Review of the Human Rights Act, Call for Evidence (SCHR submission, March 2021).
- Taylor & Kelly 'Slopping Out in Scottish Prisons' (Taylor & Kelly post, undated).

N V. UNITED KINGDOM (2008)

Link to the judgment

European Court of Human Rights

ADEQUATE MEDICAL TREATMENT • ASYLUM • DEPORTATION • EXCEPTIONAL CIRCUMSTANCES • POSITIVE HUMAN RIGHTS OBLIGATIONS • EXPERT EVIDENCE

CASE SUMMARY

N was an asylum seeker who challenged her removal to Uganda due to her health condition as she suffered from AIDS and would not have access to adequate medical care in her country of origin.

N brought an application before the ECtHR, which held that States are not generally obliged to prevent the removal of seriously ill individuals to countries with inadequate medical treatment unless compelling humanitarian grounds exist. In this case, the Court found that the comparatively poor medical care in the receiving country would not violate the prohibition of inhuman and degrading treatment or punishment under Article 3 ECHR. It stressed that for ill-treatment to qualify, it must meet a minimum level of severity considering various factors such as the duration of treatment and in some cases sex, age, and state of health. A dissenting opinion argued the present case met the "exceptional circumstances" test established in *D v. UK*, suggesting a violation of Article 3.

N v. UK is significant as it reaffirmed the high threshold for Article 3 ECHR claims relating to removal on medical grounds.

THE FACTS AND PROCEDURAL HISTORY

N was an asylum seeker from Uganda who entered the UK in 1998. While in the UK, N was diagnosed with two AIDS-defining illnesses and began receiving antiretroviral treatment. A medical report issued in 2001 stated that, without regular treatment, her life expectancy would be less than a year. Although HIV treatment was available in Uganda, it would be expensive and in limited supply. The UK's Secretary of State rejected N's asylum claim on the basis that it lacked credibility and also rejected her claim that expulsion would constitute inhuman treatment contrary to Article 3 ECHR, noting that AIDS treatment in Uganda was broadly comparable to that available in other African countries.

While N's initial appeal to an adjudicator was successful on Article 3 grounds, this was overturned by the Immigration Appeal Tribunal and her appeals to the Court of Appeal and the House of Lords were also dismissed.

N brought an application before the ECtHR on the basis that her rights to freedom from inhuman or degrading treatment or punishment (Article 3 ECHR) and to respect for private life (Article 8) would be violated if she was deported to Uganda. N provided expert evidence that if she discontinued the medical treatment for HIV/AIDS and related illnesses which she had been receiving in the UK, her life expectancy would be less than one year.

The issue for the ECtHR was whether a lack of adequate medical care in the receiving country could violate Article 3 ECHR in deportation cases.

THE DECISION AND ITS SIGNIFICANCE

No Violations

In its judgment of 27 May 2008, the ECtHR held, by 14 votes to three, that N's deportation from the UK would not violate the prohibition of inhuman or degrading treatment or punishment under Article 3 ECHR. The Court did not consider it necessary to assess a separate violation of the right to respect for private life under Article 8 ECHR.

The Court held that although its judgment in *D v. UK* established that an Article 3 claim could be premised on the medical condition of an alien subject to deportation, the threshold for establishing such a claim was high. A violation of Article 3 would only occur "in a very exceptional case, where the humanitarian grounds against the removal are compelling" [42]. While the Court accepted that N's life expectancy and quality of life would deteriorate upon return, this fact alone did not attract a violation of Article 3. Since at the time of judgment N was not critically ill, the Court found there were no "exceptional circumstances" and concluded that N's removal did not breach Article 3 [50].

IMPACT OF THE CASE

Domestic Impact

After its ruling in *D v. UK*, the ECtHR had found on several occasions that an applicant's removal based on their medical condition did not constitute a violation of Article 3. However, the reasoning in this case restricts the protection of Article 3 to situations where the individual is facing immediate or near-immediate death, and more generally suggested that the protection provided by Article 3 in respect of the suffering caused by medical conditions is extremely limited.

The *N* decision has led UK immigration tribunals to deny most human rights claims against removal on medical grounds, even when serious illnesses like kidney disease require continued treatment. For example, in *GS and others v Secretary of State for the Home Department* (2011), removal was deemed lawful despite the applicant's

need for dialysis, as the individual was not dying. This extended the precedent set by *N*, permitting removal even where the individual was suffering from serious medical conditions. The decision means that non-nationals with serious medical conditions who have no legal right to remain in the UK can be deported, even if adequate medical care is unavailable in their home country. This has made it easier for the UK to remove seriously ill individuals, raising concerns about the impact on their health and life expectancy.

Similarly, in *EA and others v. Secretary of State for the Home Department* (2017), the Upper Tribunal upheld that "exceptional cases" where removal would be prohibited under Article 3, were limited to "deathbed" cases [30-31]. The Upper Tribunal held that instances where a person's return to another country would expose them to "a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy" (which was the standard in *Paposhvili v. Belgium* (2016), see [183] of the ECtHR's decision) did not rise to the level of the "deathbed" cases. Therefore, the inclusion of such cases under Article 3 was inconsistent with *N* and UK domestic law which laid down a higher standard; as such, protection from removal for such cases was not available.

Impact on Domestic and International Jurisprudence

N has been repeatedly reaffirmed in the UK and the ECtHR as the leading authority for Article 3 cases where the suffering caused by an applicant's medical condition is relied on to challenge their expulsion. It has been emphasised that, accordingly, the ECHR does not impose any obligation on the contracting States to provide those liable to removal with medical treatment lacking in their "home countries", even where the consequence of return is a deterioration in their life expectancy. Based on the findings in *N*, a distinction is thus drawn between the threshold applicable for a risk of harm that arises from intentional acts of public authorities or non-state actors, and the more stringent test for harm arising from other sources, such as that faced by applicants in connection with a physical or mental illness.

However, the Courts have recognised that certain characteristics of the applicant, such as asylum seeker status or young age, may mean that the threshold in *N* is satisfied. More broadly, *N's* principles have been applied in cases other than expulsion which require consideration of the applicant's medical condition, and it has been suggested these same principles may apply to *non-refoulement* cases based on economic deprivation (see, for example *GS and others v Secretary of State for the Home Department* (2011).

Policy Influence and Case Reception

N has been influential on policy governing *non-refoulement* obligations owed to refugees and asylum seekers suffering medical conditions and repeatedly implemented in expulsion decisions, both in the UK and internationally. However, its restrictive effect on the protection of Article 3 ECHR in medical cases has been criticised by civil society organisations, particularly charities advocating for the rights of persons living with HIV-AIDS.

Several academics and ECtHR judges have called for *N* to be revisited because it is not compatible with the letter and spirit of Article 3 ECHR. In *Paposhvili*, the ECtHR did not overturn *N* but modified its approach such that "exceptional circumstances" could cover seriously ill persons who would, by reason of absent or deficient medical treatment in their country of origin, experience "intense suffering or a significant reduction in life expectancy" upon return. In the UK there have been some differences in interpreting the effect of *Paposhvili*, but the Court of Appeal has concluded that it slightly widened Article 3 protection beyond "deathbed" cases. In light of existing precedent in the UK, however, the Court of Appeal considers that the narrower *N* test will remain binding in

domestic law until reconsidered by the Supreme Court. Yet, applications for such an appeal to reconsider *N* have been repeatedly denied because the applicant has not met the threshold in *Paposhvili*.

The Legal Representatives were D. Pannick KC and R. Scannell for the Applicant; and M. Carss-Frisk KC and T. Eicke for the UK Government.

ADDITIONAL RESOURCES

- 'Case of N. v. The United Kingdom: European Court of Human Rights, Grand Chamber', International Journal of Refugee Law, Volume 20, Issue 4, December 2008, pages 637–666.
- Earth Refuge, 'N v United Kingdom, Application no. 26565/05' (Earth Refuge article, 27 May 2008).
- Electronic Immigration Network, 'The protection of seriously ill migrants and the "unfortunate principle" of N. v. the United Kingdom' (EIN guest blog, 19 March 2015).
- Eva Brems, 'Moving away from N. v UK – Interesting Tracks in a Dissenting Opinion (Tatar v Switzerland)' (Strasbourg Observers article, 4 May 2015).
- International Network for Economic, Social & Cultural Rights 'Case of N v. the United Kingdom' (ECSR-Net article, 6 June 2012).
- Strasbourg Observers, 'Thank you, Justice Tulkens: L A comment on the dissent in N v UK' (Strasbourg Observers submission, 14 August 2012).

GS (INDIA) & OTHERS V. SECRETARY OF STATE FOR THE HOME DEPARTMENT (2015)

Link to the judgment

Court of Appeal (Civil Division)

MEDICAL EXPULSION • HUMANITARIAN EXCEPTION • DEATHBED SITUATIONS • DISPARITY IN HEALTHCARE • JURISPRUDENTIAL THRESHOLD • DEPORTATION

CASE SUMMARY

Six individuals who suffered from severe and chronic illnesses argued that they faced a real risk of rapid decline and death if returned to their countries of origin. In this case, the Court of Appeal was asked to address the issue of whether their removal from the UK to countries with inferior healthcare systems would breach the UK's obligations under the ECHR, particularly the prohibition of inhuman or degrading treatment or punishment under Article 3 and the right to respect for private and family life under Article 8.

The Court considered whether their grounds for challenge – centred on the grave consequences of lack of treatment – met the high threshold established by the ECtHR in *D v. UK* (1997), which recognised a narrow humanitarian exception to the general rule permitting removal. The Court of Appeal rejected the appellants' arguments and confirmed that the humanitarian exception remains extremely limited, applying only in exceptional "deathbed" situations, and it dismissed the claims under both Article 3 and Article 8 (except where there were discrete procedural errors).

THE FACTS AND PROCEDURAL HISTORY

The six appellants – GS and GM (India), EO and BA (Ghana), PL (Jamaica), and KK (Democratic Republic of Congo) – all suffered from serious, life-threatening medical conditions. Five of them had end-stage kidney disease (ESKD) and relied on regular dialysis to survive. Without timely dialysis or a kidney transplant, they risked dying within weeks of returning to their home countries, where such treatment was either prohibitively expensive, unavailable, or both. The sixth appellant, KK, was living with advanced HIV infection and required ongoing antiretroviral therapy and associated treatment, which he argued would be difficult or impossible to access in the Democratic Republic of Congo.

Each appellant had come to the UK to study, work, or claim asylum, and over time had become dependent on the UK's National Health Service for their treatment. After their limited leave to remain expired (or, for some, following criminal conviction or asylum refusal), the Secretary of State for the Home Department issued removal decisions against them. The Government maintained that immigration rules did not provide an automatic right to stay in the UK solely because of health needs or the disparity in healthcare standards between the UK and the receiving countries.

The appellants challenged their removal mainly on two legal grounds. First, they argued that removal would breach their right to be free from torture or inhuman or degrading treatment or punishment under Article 3. They argued that returning them to countries where they faced rapid death, pain, and suffering solely due to the lack of medical treatment – rather than for any criminality or fault of their own – met the high threshold for Article 3 ECHR protection. Second, they brought claims under Article 8, arguing that the removal would not only severely impact their health and life expectancy, but also unjustifiably disrupt their private lives, well-established routines, social relationships, and, in some cases, family ties in the UK.

After initially arguing their cases before the First-tier Tribunal and then the Upper Tribunal (Immigration and Asylum Chamber), all the appellants had their claims dismissed. The tribunals found that none of their cases fell within the 'exceptional case' threshold for Article 3 established in *D v. UK*, and that their Article 8 claims were insufficient unless there were additional compelling circumstances beyond the loss of medical treatment.

They appealed to the Court of Appeal. The Court's permission specifically flagged that the facts differed from previous leading cases, which mainly concerned 'health tourists'. The appellants contended that their length of residence, the certainty of imminent death without medical care, and the absence of any personal culpability should place them within a broader humanitarian exception to removal under the ECHR.

THE DECISION AND ITS SIGNIFICANCE

No Violations

In its decision of 30 January 2015, the Court of Appeal found the removal would not violate the prohibition on inhuman or degrading treatment under Article 3 ECHR or the right to respect for private and family life under Article 8.

Article 3 ECHR

The Court reiterated that the core of Article 3 concerns situations involving deliberate ill-treatment by a State or its authorities. However, in *D v. UK* the ECtHR recognised a very narrow exception, preventing expulsion in the case of a terminally ill individual about to die in conditions of acute squalor and suffering.

The Court considered whether subsequent caselaw, especially *N v. UK* (2008), had restricted the 'exceptional case' doctrine. The Court confirmed that only claimants on the verge of dying and deprived of palliative care, whose removal would result in immediate and profound indignity, would meet the Article 3 threshold. The Court stressed that positive immigration history, lawful residence, or the seriousness of illness alone did not meet this high threshold.

The Court rejected arguments that the standard established in *D v. UK* could be relaxed based on moral or factual differences between "health tourists" and those lawfully present in the country. The claimants' plight, while grave, simply did not reach the required level of exceptionality.

Article 8 ECHR

The Court recognised that while Article 8 is engaged when there is significant interference with a settled private or family life, the mere withdrawal of medical care due to removal would rarely, if ever, suffice. Article 8 guarantees the right to respect for private and family life, home and correspondence, but allows States to interfere when lawful and necessary for objectives such as public order or immigration control.

The Court held that to engage Article 8, claimants must demonstrate more than health consequences alone — there must be other strong personal ties, integration, or compelling circumstances. Even then, the impact on health is only a factor to be weighed in the proportionality assessment, not a free-standing ground for success. In all cases except for GM (where a fresh hearing was ordered for procedural reasons), the claimants failed to show other factors that could amount to a violation of Article 8.

IMPACT OF THE CASE

The judgment has affirmed and reinforced the restrictive approach taken by UK courts and the ECtHR in health-based removal cases. It underscored that the medical circumstances blocking deportation due to engagement of Articles 3 and 8 remain "exceptional"; there must be not only a grave prognosis, but an imminent, deathbed-type situation lacking any basic human dignity or care.

The Court rejected arguments that lawful presence, non-criminality, or distinctions between types of medical conditions could lower the threshold or expand the exception for removal. All such factors were held to have no bearing on the Article 3 analysis.

The judgment also highlighted the possibility that future claims with significantly different factual or systemic features, such as new jurisprudence or catastrophic changes in receiving States, could yield different results. However, in subsequent domestic cases such as *EA and others v. Secretary of State for the Home Department* (2017), the courts have confirmed that there has been no liberalisation of the strict threshold set out in *N v. UK*, despite some more expansive approaches in recent ECtHR caselaw. As of April 2026, the high bar for establishing an Article 3 violation in medical removal cases remains firmly in place.

The Legal Representatives were (i) Nathalie Lieven KC, Declan O'Callaghan, Jacqueline Lean, and Miriam Carrion Benitez for the First and Second Appellants; (ii) Raza Husain KC, Duran Seddon, Rebecca Chapman, and Gemma Loughran for the Third, Fourth, and Fifth Appellants; (iii) Manjit Gill KC and Shazia Khan for the Sixth Appellant; and (iv) Lisa Giovannetti KC and Lisa Busch for the Respondent.

ADDITIONAL RESOURCES

- Hannah Noyce, 'D. v UK exception remains exceptional in medical treatment cases under Article 3' (UK Human Rights Blog, 5 February 2015).
- Julia Lewis, Oxford Human Rights Hub Blog, Establishing a breach of Article 3 in medical cases: The 'applicability' of Strasbourg jurisprudence (EIN guest blog, 16 January 2018).
- UK Home Office, 'Medical claims under Articles 3 and 8 of the European Convention on Human Rights (ECHR)' (UK Government Home Office staff publication, version 8.0, 19 October 2020).

KV (SRI LANKA) V. SECRETARY OF STATE FOR THE HOME DEPARTMENT (2019)

Link to the judgment

UK Supreme Court

ASYLUM CLAIM • MEDICAL EVIDENCE • SIBP • SRI LANKA • ISTANBUL PROTOCOL • EXPERT EVIDENCE • EVIDENCE OF TORTURE

CASE SUMMARY

A Sri Lankan national of Tamil ethnicity, KV, claimed asylum in the UK on the basis that he had been detained and tortured by Sri Lankan authorities due to suspected links with the Liberation Tigers of Tamil Eelam (LTTE). A central aspect of his claim was the presence of distinctive scars on his body, which he asserted were caused by torture.

The case addressed the proper approach to assessing medical evidence in asylum claims involving allegations of torture, underscoring the critical importance of evaluating medical evidence in accordance with the Istanbul Protocol and of recognising the improbability of self-inflicted injuries by proxy (SIBP).

THE FACTS AND PROCEDURAL HISTORY

KV arrived in the UK in February 2011 and claimed asylum, stating he had been detained and tortured by Sri Lankan security forces because of a perceived connection to the LTTE. He presented scars on his arm and back as evidence, explaining that the blurred edges on his arm scars were caused while he was conscious and moved during the burns, while the sharper-edged scars on his back resulted from burns inflicted while he was unconscious from the pain.

The Secretary of State for the Home Department rejected his claim, finding his account not credible. In relation to his scars, the Secretary of State did not accept that they resulted from torture, citing the lack of supporting medical evidence. The First-tier Tribunal dismissed KV's appeal, suggesting that the scars were the result of SIBP – that is, that he had inflicted them on himself to fabricate evidence of torture to support his asylum application.

On appeal, the Upper Tribunal held that the First-tier Tribunal had made an error of law, but that the appeal was appropriate to address the issue of generic guidance to medical experts evaluating alleged torture injuries. The

Upper Tribunal concluded that based on the medical evidence provided there were only two real possibilities; either that KV was tortured as claimed, or that his scarring was SIBP. The Upper Tribunal rejected almost all KV's evidence and therefore concluded that the scars were SIBP [9-11].

Dr. Zapata-Bravo, a medical expert, examined KV's injuries and concluded that the scars were "highly consistent" with KV's account of torture, particularly with burns from a hot metal rod, with the arm scars indicating movement while conscious and the back scars indicating stillness consistent with unconsciousness. He deemed SIBP unlikely, given its rarity and inherent improbability, as the burn marks on KV's back would have required assistance [33].

The Upper Tribunal rejected KV's appeal, reasoning that the precision of the scars suggested that unconsciousness during the infliction would have required anaesthesia, which it considered implausible in the context of KV's account of torture. The Court of Appeal, by a majority (with one judge dissenting), upheld this decision. The majority also considered that Dr. Zapata-Bravo had gone beyond his remit of an expert medical witness by stating that his findings were "highly consistent" with KV's account.

KV appealed to the Supreme Court, arguing that the lower tribunals had erred in their treatment of the medical evidence and the improbability of SIBP. The interveners in the case were the Helen Bamber Foundation, Freedom from Torture, and Medical Justice.

THE DECISION AND ITS SIGNIFICANCE

Appeal Allowed

In its judgment of 6 March 2019, the Supreme Court unanimously allowed KV's appeal and remitted the case to the Upper Tribunal for a fresh determination. Lord Wilson delivered the sole judgment. The Supreme Court provided guidance on how to evaluate medical evidence in asylum cases involving torture allegations, particularly emphasising the standards established by the Istanbul Protocol on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).

The Role of the Istanbul Protocol

The Supreme Court affirmed that the Istanbul Protocol – an internationally recognised guide for documenting and investigating allegations of torture – provides the correct framework for assessing medical evidence in such cases. The Supreme Court found that Dr. Zapata-Bravo's approach, including his use of the term "highly consistent", was aligned with the guidance provided by the Istanbul Protocol.

Clarification on the Role of Medical Experts

The Court rejected the Court of Appeal's suggestion that Dr. Zapata-Bravo had overstepped his remit. It clarified that medical experts may formulate opinions on the possibility of torture and assess the level of consistency between their findings and the account given by the claimant, including the overall circumstances described. The Court noted that this was consistent with earlier domestic and international authority including in cases of torture such as *SA (Somalia) v. Secretary of State for the Home Department* (2006), and the ECtHR's decision in *Mehmet Eren v. Turkey* (2008).

Errors in the Tribunal's Analysis

The Supreme Court identified errors in the lower Tribunal's assessment, including a misinterpretation of the medical evidence. In particular, it wrongly stated that KV had claimed to be unconscious when the burns to his arms were inflicted – a point neither KV nor Dr. Zapata-Bravo had made. The Court endorsed Lord Justice Elias' dissent in the Court of Appeal, which had criticised this point.

Improbability of Self-Inflicted Injuries by Proxy (SIBP)

The Court found that the Tribunal did not adequately consider the inherent improbability of SIBP. While it ruled that the Tribunal was correct in addressing such a possibility, it concluded that it had failed to consider the strength of possibility. On this point, the Court highlighted that severe injuries like KV's back scars would require medical expertise and anaesthesia, making this explanation implausible, especially in contrast to the substantial evidence of widespread State-sponsored torture in Sri Lanka during the relevant period.

IMPACT OF THE CASE

Clarification of Legal Principles

The Supreme Court judgment in *KV (Sri Lanka)* provided crucial clarification to tribunals and practitioners on the correct approach to the assessment of medical evidence in asylum claims involving torture. It definitively ruled that medical experts may go beyond describing injuries to assess whether the overall clinical picture is consistent with the torture account, overturning the Court of Appeal's restrictive view. It underscored the importance of engaging seriously with expert opinions, giving weight to expert medical evidence prepared in accordance with the Istanbul Protocol. It also emphasised the need to carefully consider the inherent improbability of SIBP when determining torture claims from asylum seekers.

Affirmation of the Istanbul Protocol

The Court reaffirmed the Istanbul Protocol as an authoritative framework for investigating and documenting torture allegations and recognised that there is no inconsistency between the Istanbul Protocol and the relevant Practice Direction on expert evidence in immigration cases. By doing so, it strengthened the role of international standards in UK asylum proceedings and concluded that experts should recognise both instruments as equally authoritative.

Protection of Asylum Seekers and Human Rights Implications

The decision also reinforced procedural safeguards for torture survivors claiming asylum, ensuring fair and consistent assessments in line with international guidelines. It contributed to minimising the risk that genuine torture survivors' claims will be wrongly dismissed. It also reflected the UK's obligations under international human rights law, including the prohibition of *refoulement*, by promoting fairer and more consistent assessments of medical evidence in asylum claims.

According to Freedom from Torture, who had intervened in the case, the judgment not only "emphatically reasserts the role of the medical expert in assessing evidence of torture in asylum claims", but also sheds light on the "deplorable efforts by decision-makers to dismiss this evidence [which] are another symptom of the culture of disbelief that is the hallmark of the hostile environment". Indeed, the decision was described as a fresh blow to the Home Office's "compliant environment" policy on immigration (term introduced to substitute the 'hostile environment' after the Windrush scandal).

The Legal Representatives were Richard Drabble KC, Ronan Toal, Michelle Brewer, and Charlotte Bayati for the Appellants; and Neil Sheldon and Matthew Hill for the Respondent. Interveners: Helen Bamber Foundation, Freedom from Torture, Medical Justice.

ADDITIONAL RESOURCES

- Diane Taylor, 'UK court ruling raises hopes of asylum for torture survivors' (The Guardian online, 6 March 2019).
- Freedom from Torture, 'Supreme Court reasserts the role of medical experts in asylum claims by torture survivors' (Freedom from Torture news story, 6 March 2019).
- Landmark Chambers, 'Supreme Court gives judgment in Sri Lankan torture case' (Landmark Chambers, 6 March 2019).
- One Pump Court, 'KV (Sri Lanka) (Appellant) Secretary of State for the Home Department (Respondent) [2019] UKSC 10' (One Pump Court Chambers article, 17 May 2019).

REMEDIES AND REPARATIONS

Z AND OTHERS V. UNITED KINGDOM (2001)

Link to the judgment

European Court of Human Rights

DUTIES OF LOCAL AUTHORITIES • NON-STATE ACTORS • EFFECTIVE REMEDIES • CHILD PROTECTION • PUBLIC AUTHORITY IMMUNITY • LEGISLATIVE REFORM • HRA

CASE SUMMARY

Four children brought an application before the ECtHR after they suffered severe neglect and emotional abuse at the hands of their parents. The ECtHR found that the failure of the UK local authority to intervene and protect the children in this case violated their right to freedom from inhuman or degrading treatment or punishment under Article 3 ECHR. The applicants also argued that, under domestic law, public authorities had immunity for not intervening, mainly due to policy considerations (specifically, the common law of negligence). This interpretation, according to the ECtHR, did not breach the right to a fair trial under Article 6 ECHR. The Court found, however, that in practice this immunity denied access to an effective remedy, resulting in a violation of Article 13 ECHR.

Z and others is important as it determined the scope of the duty owed by the State and public bodies in protecting children from abuse. The judgment has also been specifically influential in developing the right to redress against public bodies in cases involving serious rights violations and enhancing protection for children. The impact of the Court's findings on Article 6 has since been mitigated by the HRA, which now allows individuals in the UK to bring claims for breaches of ECHR rights in domestic courts.

THE FACTS AND PROCEDURAL HISTORY

Social services received several reports of abusive behaviour of a family towards four children but only placed them in emergency care five years after the first complaint, by which point they had suffered physical and psychological injuries.

The children, through their representatives, brought legal action against the local authority, which was heard first in the High Court and then the Court of Appeal, eventually reaching the UK's highest court at the time, the House of Lords.

The House of Lords held that, for public policy reasons, local authorities did not owe a common law duty of care in negligence when carrying out their statutory child protection functions. It reasoned that recognising such a duty could lead to defensive practices by social workers out of fear of being sued, divert resources from direct services to litigation, and involve courts in decisions better left to the professional judgment of social workers. This decision meant that the children could not seek a remedy for the failures in their protection by bringing a negligence claim in the UK courts to obtain compensation or a finding of fault against the local authority.

The applicants lodged an application with the European Commission of Human Rights, which then referred the case to the Court.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision of 10 May 2001, the ECtHR found unanimously that the UK Government had violated the prohibition of inhuman or degrading treatment under Article 3 ECHR (unanimously); and the right to an effective remedy under Article 13 (by 15 votes to two). No violation was found of the right to a fair trial under Article 6 ECHR.

Failure to Take Reasonable Steps to Protect Children Under Article 3 ECHR

The ECtHR found that the local authority failed to take reasonable steps to prevent ill-treatment of which it had, or ought to have had, knowledge, resulting in a violation of Article 3 ECHR [70]. This positive obligation includes the State's duty to protect children and vulnerable persons from abuse, even when administered by private individuals such as parents. In this case, the Court considered that all four children had suffered significant psychological and physical harm directly linked to the prolonged abuse and neglect they suffered and found that this harm met the threshold of inhuman and degrading treatment [74]. The Court then held that because the local authority was fully aware of the risks and had statutory powers at its disposal, its failure to take effective action for over four years reflected a clear failure of the system to protect the children [74].

The ECtHR also concluded that each child should receive an award for pecuniary damages to address the harms they suffered: those most severely impacted required ongoing care, while others needed support for future psychological treatment, as the effects were likely to be long-lasting [119-127]. Further, it ruled that all four applicants were entitled to compensation for non-pecuniary damage as part of their redress, reflecting the fundamental nature of the right protected under Article 3 [130-131].

Absence of an Effective Remedy

The ECtHR found that, because the children could not sue the local authority in negligence for the failings in their protection, they lacked an effective remedy in the UK legal system for the breach of their Article 3 rights [111]. The existing domestic legal framework did not provide them with a means to obtain an enforceable award of compensation or a determination of liability for the suffering they endured. The Court also noted that the UK Government had conceded that the range of remedies at the disposal of the applicants was insufficiently effective [110].

The Court emphasised that, given the nature of Article 3, an effective remedy under Article 13 required more than access to general administrative or criminal injury compensation schemes. In cases where the State has failed to prevent ill-treatment of which it had, or ought to have had, knowledge, there must be a mechanism – preferably judicial in nature – that enables victims to establish liability and claim damages [110]. The ECtHR stressed that compensation for non-pecuniary harm should, in principle, be part of the remedies available. It also noted that, while HRA would later introduce such avenues of redress, they were not available to the applicants at the time of the violation. Accordingly, the absence of any legally enforceable route to redress or accountability for the harm suffered constituted a breach of Article 13 [111].

Decision by the House of Lords did not Violate Article 6 ECHR

The Court found that the applicants were able to bring their negligence claim against the local authority in domestic courts. It rejected the argument that the House of Lords' decision granted the local authority immunity, instead finding that the applicants' claim had failed on the merits, as no duty of care was owed in the circumstances [101]. The Court emphasised that Article 6 protects the right to a fair hearing, not a particular outcome. As the applicants had an opportunity to argue their claim before courts, Article 6 was not breached.

IMPACT OF THE CASE

The Human Rights Act

Crucially, the HRA came into force shortly before the ECtHR handed down its judgment in *Z and others*. Section 6 HRA makes it unlawful for public authorities to act in a way that is incompatible with Convention rights, except where, based on primary legislation, the relevant authority could not have acted differently, or where the authority was acting to give effect to that legislation. This change directly addressed the gap in the law identified by the ECtHR: it allowed individuals to sue public authorities in UK courts and empowered those courts to award damages for human rights violations. By providing a clear path to establish liability and claim compensation, the HRA introduced the effective remedy that the applicants in *Z and others* lacked, thereby resolving the issues that led to the violation of Article 13.

Shift in the Legal Landscape for Claims Against Public Authorities

With the new avenue for claims provided by the HRA, subsequent caselaw developed. In *JD (FC) v. East Berkshire Community Health NHS Trust* (2005), the House of Lords confirmed that while the common law position on negligence for local authorities in child protection remained largely unchanged (for public policy reasons), claims could be brought under the HRA for breaches of Convention rights [115]. This provides a route that ensures accountability and potential compensation for serious rights violations in child protection – an avenue that was previously unavailable.

However, this does not mean that courts will find local authorities to be liable in every case – in fact, in *AB v. Worcestershire County Council and another* (2023), a case concerning whether the local authority owed a duty of care in negligence to a child who suffered harm after social services decided not to take further protective action, the Court of Appeal confirmed that a duty of care did not arise on the facts once the authority had closed

the child's case. Similarly, in the ECtHR case of *DP and JC v. UK* (2002), which concerned continued severe and prolonged sexual abuse experienced by two siblings at the hands of their stepfather, the ECtHR held that there was no violation of Article 3 or Article 8 because social services had no knowledge of the abuse and no clear duty to intervene, nor of Article 6 since the applicants could pursue their claims in domestic courts. However, it found a breach of Article 13 because no adequate procedure existed for the applicants to address their complaints. The ECtHR emphasised that, in the absence of an unequivocal complaint or sufficiently convincing evidence, authorities' assessments must be respected, and no inferences should be drawn from incomplete records.

Policy and Legislative Reform in Relation to Child Protection

Z and others, alongside other highly publicised child abuse cases and inquiries around that time (most notably the Laming Inquiry into the death of Victoria Climbié, whose report was published in 2003), put immense pressure on the UK Government and child protection services. This contributed to significant reforms aimed at improving child protection, including:

- The Children Act 2004: A significant piece of legislation that, among other things, established the office of Children's Commissioner, placed a duty on local authorities and other agencies to make arrangements to safeguard and promote the welfare of children, and led to the creation of Local Safeguarding Children Boards (LSCBs) to improve inter-agency cooperation; and
- "Every Child Matters" Programme: A wide-ranging Government initiative launched in 2003, aimed at transforming children's services, with a strong emphasis on early intervention, integrated services, and improved outcomes for children.

The Legal Representatives were B. Emmerson KC for the Applicants; and D. Anderson KC and J. Stratford for the Respondent Government.

ADDITIONAL RESOURCES

- Equality and Human Rights Commission, 'Violence, abuse and neglect, and child sexual exploitation: UK government action' (Equality and Human Rights Commission website, 29 January 2025).
- Kirsten Sandberg, 'Children's Right to Protection Under the CRC' (Human Rights in Child Protection, 31 August 2018).
- National Institute for Health and Care Excellence, 'Child Abuse and Neglect' (NICE Guideline NG76, 9 October 2017).
- UK Government, Crime and Policing bill: Independent Inquiry into Child Sexual Abuse recommendations, (Home Office and Ministry of Justice policy paper, 25 February 2025).
- UK Government, 'Working together to safeguard children' (Department for Education statutory guidance, 26 March 2015).
- UK Parliament 'Children First: the child protection system in England' (Education Committee – Fourth Report, 30 October 2012).

MUTUA AND OTHERS V. THE FOREIGN AND COMMONWEALTH OFFICE (2012)

Link to the judgment

High Court (King's Bench Division)

BRITISH COLONIAL RULE • MAU MAU UPRISING – REPARATIONS • DAMAGES • CLASS ACTION • COLONIALISM • UNCAT • EXPERT EVIDENCE

CASE SUMMARY

This case addressed the mistreatment perpetrated by the British colonial authorities and their local auxiliaries against the local population during their occupation of Kenya in the 1950-60s. It demonstrated the UK courts' willingness to engage with claims of grave historic human rights abuses and illustrated the circumstances in which the nuance of the rules on limitation could be employed to facilitate justice in such historic claims.

The hearing dealt with preliminary issues – primarily, whether Section 33 of the Limitation Act 1980 (Limitation Act) allowed the Court to disapply the statutory time limit on the claim. The Court held that the period of limitation could be extended, due to the availability of evidence facilitating a fair trial and the difficulties in bringing a claim previously because of the earlier proscription of Mau Mau gatherings and limited research into the Emergency Period.

Mutua did not proceed to trial and ultimately settled in 2013. However, as part of the settlement, the UK Government agreed to pay compensation and to provide other forms of redress, including an official acknowledgement of the abuse and the construction of a memorial in Nairobi. A subsequent separate claim was brought in the UK by over 40,000 Kenyans. However, the first test case for this group was dismissed in 2018.

THE FACTS AND PROCEDURAL HISTORY

Much of the final decade of British colonial rule over Kenya was marked by the state of emergency which lasted from 1952 to 1960 (Emergency Period). During this period, British authorities undertook aggressive counter-insurgency measures in response to attacks by the Kenya Land and Freedom Army (Mau Mau), including the

establishment of detention camps, detaining an estimated 160,000 Kenyans and subjecting detainees to torture, rape, castration, and severe beatings. Many victims had little or nothing to do with the Mau Mau uprising.

In June 2009, five individuals brought a claim against the FCO for personal injuries caused by colonial officials during the Emergency Period. Given the conduct pre-dated UNCAT (and the subsequent incorporation of its Articles 4 and 5 into UK law under Section 134 of the Criminal Justice Act 1988) and the HRA, the claim was brought as a civil action in tort for personal injury inflicted on the claimants.

The FCO applied to strike out the claim on two procedural grounds: (i) that under public international law, liability rested with the Kenyan Government; and (ii) both that the claims were time barred under the Limitation Act and a fair trial would not be possible due to the passage of time.

The High Court rejected the first of the FCO's procedural arguments, finding that the British Government could be held liable for their tortious duties as they had been influential in dictating, and well-informed about, the Kenyan Colonial Government's policies (*Mutua and others v. Foreign and Commonwealth Office* (2011) [139-158]).

In 2012, the High Court ruled on the second procedural ground. The Court exercised its discretion under the Act to extend the limitation period and allowed for the three surviving claimants' cases to proceed to trial. The usual limitation period for personal injury claims is three years from the date of discovery of the injury, but the Court extended this because (i) there was a significant volume of documents and knowledge which would allow a trial to take place [32, 48, 108, 117]; and (ii) until 2002/2003, Kenyan law prohibited any collective organisation or meetings of Mau Mau activists or supporters, making it nearly impossible to begin legal proceedings before then [33].

Given the strength of these arguments and the sufficiency of the available evidence, McCombe J did not find it necessary to give as much weight in his summing up to the considerations of public interest and the prohibition of torture as *jus cogens* [15].

REDRESS intervened through written and oral submissions to the High Court, arguing that there is no statute of limitations on war crimes and other gross or serious violations of international law, including torture.

In December 2012, the FCO was granted leave to appeal by the Court of Appeal. The appeal was due to be heard in May 2012, but proceedings were to allow the parties to discuss a settlement.

A settlement was announced on 6 June 2013. The British Government agreed to pay £19.9 million in damages to 5,228 claimants. On the same day, the then UK Foreign Secretary, William Hague, made a statement to the House of Commons outlining the settlement terms and acknowledging the abuses. He did, however, highlight that the British Government's position continued to be that it did not have any liability for "the actions of the colonial administration in respect of the claims". In addition to the damages, as part of the settlement, the UK Government pledged to support the construction of a permanent memorial in Nairobi to victims of the torture and ill-treatment during the colonial era, which was subsequently unveiled in September 2015.

THE DECISION AND ITS SIGNIFICANCE

No Culpability Assessment

The claim was brought on the basis that assaults and batteries had been committed in breach of tort law. The claimants further contended that the British Government had breached its duty of care (established by the earlier, 2011 hearing) and committed tortious negligence in failing to prevent torture. As the case settled before trial, the claim on culpability was not assessed and the British Government retained the position that they were not liable for these torts.

IMPACT OF THE CASE

On Mau Mau Victim Claims

This was the first successful attempt at achieving reparations for the Mau Mau victims. It led to a formal political acknowledgment by the UK Government of the colonial administration's role in serious human rights violations during the Emergency Period in Kenya.

Nonetheless, the subsequent attempt to facilitate a Group Litigation claim (as defined in Part 19 of the Civil Procedure Rules), with over 40,000 claimants seeking redress, was unsuccessful (*Kimathi and others v. Foreign and Commonwealth Office* (2018)). Stewart J highlighted that there were various facts and legal arguments in this claim which differed from *Mutua*, including: (i) the reliance on Section 32 of the Act (contending that the FCO had deliberately concealed evidence; this was dismissed at the earlier preliminary hearing (*Kimathi and others v. Foreign and Commonwealth Office* (2018)) rather than Section 33; (ii) the fact that this was a Group Litigation claim (which Mutua was not); and (iii) that the claim was for a broader range of tortious behaviour.

Following *Kimathi*, several of the claimants brought a case against their legal representatives for professional negligence (*Murithi and others v. AVH Legal LLP (t/a Tandem Law)* (2023)). The legal representatives sought summary judgment because, amongst other reasons, the claimants had failed to produce the evidence which they argued should have been presented in the *Kimathi* Case. The representatives' application was successful, and the professional negligence claims were to be struck out.

Legal Impact

Kimathi highlighted the evidentiary and procedural limitations of bringing claims for historic human rights violations, and underscored the importance of presenting sufficiently strong evidence, regardless of the time elapsed.

Nonetheless, the Court's finding on limitation in *Mutua* demonstrates that even where witness evidence is limited due to the passage of time, it is possible to have a fair trial. The role of the historical studies published in 2005 on the case highlights both how expert evidence generally, and historical investigations, can assist in facilitating legal redress for State-sponsored human rights abuses where access to direct evidence for presentation at hearings is sparse.

Equally, the use of tort law in this case, rather than the public international law which has formed the bedrock of more modern transnational cases, served as a reminder of another route which strategic litigation might take to address human rights violations.

The Legal Representatives were Richard Hermer KC, Phillippa Kaufmann KC, Alex Gask, and Henry Witcomb for the Claimants; Guy Mansfield KC, Alex Ruck Keene, and Jack Holborn for the Defendant (Foreign and Commonwealth Office). Intervener: REDRESS.

ADDITIONAL RESOURCES

- Alexia Solomou, 'Case note on Ndiki Mutua, Paulo Nzili, Wambugu Wa Nyingi, Jane Muthoni Mara and Susan Ngondi v The Foreign and Commonwealth Office [2012] EWHC 2678 (QB)' (2013) 2(1) Cyprus Human Rights Law Review 83.
- Alvin Powell, 'Strong evidence: Elkins' research key in Kenya reparations case' (The Harvard Gazette, 3 August 2011).
- James Beeton, 'First judgment on the merits in the Kenya Emergency Group Litigation (TC34)' (12 King's Bench Walk International & Travel Law Blog, 16 August 2018).
- Tim Sayer, 'Law's empire? Mutua and Kimathi' (2020) 71(2) Northern Ireland Legal Quarterly 317.
- UK Parliament, HC Deb 6 June 2013, vol 563, cols 1692–1693 (Hansard, 6 June 2013).
- REDRESS, 'Historical legal victory for Kenyan victims of colonial torture' (5 October 2012).
- REDRESS, 'REDRESS intervenes in colonial torture case, says no limitation period on torture claims' (16 July 2012).

ALSERAN AND OTHERS V. MINISTRY OF DEFENCE (2017)

Link to the judgment

High Court (Queen's Bench Division)

UNLAWFUL DETENTION • INHUMANE TREATMENT • DAMAGES • RESPONSIBILITY FOR WARTIME CONDUCT • 'CROWN ACT OF STATE' DOCTRINE • JURISDICTION • GENEVA CONVENTIONS

CASE SUMMARY

Hundreds of Iraqi citizens brought claims against the UK Ministry of Defence, alleging that British forces, during and after the 2003 invasion of Iraq, had subjected them to unlawful imprisonment, ill-treatment, and in some cases, the unlawful killing of their next-of-kin. Four lead cases went to trial: (1) Alseran, (2) MRE, (3) KSU, and (4) Al-Waheed. The claimants argued that the Ministry of Defence was liable in tort under Iraqi law and liable under the HRA for breaches of the ECHR. The High Court ultimately held there were violations of the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 ECHR) and the right to liberty and security (Article 5) and awarded damages under the HRA.

The judgment addressed several significant legal questions, including the basis for the 'Crown Act of State' doctrine in military operations, and the territorial scope of applicability of both the HRA and the ECHR.

THE FACTS AND PROCEDURAL HISTORY

The invasion of Iraq began on 20 March 2003, led by US and British forces. Major combat operations officially ended on 1 May 2003, and occupying powers assumed administrative control until 28 June 2004. The UN mandate of the multi-national force including the British forces continued until the end of 2008, with the British forces completing their withdrawal in 2009.

Of the 967 claims issued on behalf of Iraqi citizens, 331 were settled and 632 were unresolved, including the four lead cases discussed here. Iraqi claimants alleged having been unlawfully imprisoned and ill-treated and, in a few cases, their next of kin was unlawfully killed by British armed forces. They claimed damages from the Ministry of Defence as a result. The second and third claimants, MRE and KSU, alleged mistreatment of a sexual nature, recognised by the Court as carrying heavy stigma in Iraq, and were therefore granted anonymity.

The Ministry of Defence disputed many of the allegations, including whether some of the alleged acts were carried out by US rather than British personnel and whether detention had been lawfully authorised under applicable international humanitarian law.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its judgment of 14 December 2017, the High Court found violations of the prohibition of inhuman and degrading treatment under Article 3 ECHR and the right to liberty and security under Article 5 ECHR in all four lead cases and awarded damages.

Claimant 1 – Alseran

Kamil Najim Alseran was captured and held by British forces from 30 March 2003 to 7 May 2003. While his initial capture in a battle zone was found to be lawful under international humanitarian law (Article 27 of Geneva Convention IV), his continued internment at Camp Bucca beyond 10 April 2003 lacked a legal basis, in breach of Article 5 ECHR and international humanitarian law. When reviewing the factual evidence, particularly the internment serial number issued to Alseran on his arrival – along with several other prisoners – at Camp Bucca, the Court found that UK forces were responsible for his detention.

Allegations that soldiers ran over his back after capture were deemed credible, constituting inhuman and degrading treatment in breach of Article 3 ECHR and giving rise to tort liability [233, 952]. Although the detention conditions at the temporary camp and Camp Bucca were harsh, they did not meet the threshold for inhuman treatment [517-518]. A flawed review process, based on a misinterpretation of the Geneva Conventions, contributed to his unlawful detention, as civilians were incorrectly treated as prisoners of war.

Alseran was awarded £10,000 for the inhuman treatment and £2,700 for 27 days of unlawful detention under the HRA [954, 957].

Claimants 2 and 3 – MRE and KSU

MRE and KSU were detained by coalition forces on 24 March 2003 and subjected to degrading treatment during transport and detention. Although unlawful under Iraqi law, the capture and initial detention of MRE and KSU were found in accordance with international humanitarian law [537]. Their allegations of mistreatment during their capture, including forced stripping and sexual humiliation, were substantiated but the Court concluded that the claimants failed to prove such acts were carried out by British forces [483].

Despite this, they were hooded with sandbags by British soldiers during transportation to Camp Bucca, constituting inhuman and degrading treatment under Article 3 ECHR [499]. MRE sustained an eye injury caused by the hooding, and he was later struck on the head and kicked, resulting in physical injuries and psychological disorders, both found to be Article 3 violations and tortious assaults [497-499]. Their detention conditions were harsh but were not found to be inhuman [519].

They were unlawfully detained between 4 to 10 April 2003, due to a failure to promptly review their cases, violating Article 5 ECHR [535]. Each complainant was awarded £10,000 for hooding, with MRE receiving an additional £1,000 for his eye injury and £15,000 for the head assault. Both received £600 for six days of unlawful detention [970-971].

Claimant 4 – Al-Waheed

Abd Ali Hameed Ali Al-Waheed was arrested by British forces on 11 February 2007. Initially suspected of bomb-making, his arrest was lawful under international law, but his detention became unlawful from 23 February to 28 March 2007, after a review committee found no security threat, violating Article 5 ECHR [703]. Al-Waheed was beaten with rifle butts, punched, and suffered a painful finger injury during his arrest, constituting inhuman and degrading treatment under Article 3. Additionally, he was subjected to systemic inhumane practices, including harsh interrogation, sleep deprivation, and sensory deprivation through blacked-out goggles and ear defenders, compounding the Article 3 breach [719]. His claims of further mistreatment from the time of his arrest to his release were found to be "false or exaggerated in many respects" [634].

He was awarded £15,000 for the beating, £15,000 for inhumane treatment, and £3,300 for 33 days of unlawful detention [975-978].

IMPACT OF THE CASE

Applicability of 'Crown Act of State' Doctrine

The case traces and lays out in detail the basis for the 'Crown Act of State' doctrine in the nature of military operations. In essence, this doctrine recognises that, in wartime, the State may commit acts that would ordinarily be unlawful, and courts assess the conduct of armed forces within this context [42-46].

The claimants argued that the 'Crown Act of State' doctrine is limited to the conduct of military operations which are themselves lawful in international law. This was rejected by the Court on the grounds that the UK Supreme Court's starting position in *Rahmatullah (No. 2) and others v. Ministry of Defence* (2017) was that the decision of the UK Government to engage in a military operation abroad is not reviewable in the Courts. As such, the Court held that treating the 'Crown Act of State' doctrine as limited to the conduct of military operations which are themselves lawful in international law would render the doctrine incoherent as it would require the Court to decide questions of the very kind which the doctrine requires it to abstain from deciding [59-60].

The claimants, however, succeeded on their argument that in principle, an act can only be a 'Crown Act of State' if it has been authorised (or ratified) by a Government policy or decision which is a lawful exercise of the Crown's powers as a matter of English domestic law [76]. In arriving at this holding, the Court considered that this was an undecided point by the UK Supreme Court, on the basis that a policy of the UK Government which is unlawful as a matter of English domestic law and therefore *ultra vires* (i.e. outside of their powers) cannot be a 'Crown Act of State' [69]. On the facts of this case, the Court held that the Crown, during the invasion and military occupation of Iraq, authorised detention only when and to the extent that it was permitted by international humanitarian law [327].

Territorial Scope of the HRA and the ECHR

As regards the territorial scope of applicability of the HRA and the ECHR, the Court determined that they both applied in this case to the extent that the individuals were detained by UK forces [80]. In arriving at this conclusion, the Court referred to *Al-Skeini v. UK* (2011), where the ECtHR had found that the ECHR applied to acts committed by a State party in a foreign territory over which it exercised control, as well as where the State exercises physical power and control over an individual who is situated in foreign territory. Whilst it considered the precise jurisdictional scope established by *Al-Skeini* as controversial, the Court held that there was no issue about the applicability in the present case – here, the Ministry of Defence had accepted that any individual detained by the British forces in Iraq was, while so detained, within the UK's jurisdiction for the purpose of Article 1 ECHR [78-80].

Interaction Between International Humanitarian Law and the ECHR

Another aspect of significant discussion in the case is on the issue of when and to what extent human rights guaranteed by the ECHR are "displaced" or "modified" by rules of international humanitarian law [81, 84]. The case noted (relying on the UK Supreme Court's previous ruling) that in the context of non-international and international armed conflicts, the minimum standards are derived from Articles 43 and 78 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), namely, that there should be an initial review of the lawfulness of detention, followed by regular reviews thereafter, and that the reviews should be conducted by an impartial body in accordance with a fair procedure [91].

Geneva Conventions are not Part of Iraqi Domestic Law

The Ministry of Defence argued that the detention was lawful under Iraqi law as the Geneva Conventions (which authorise detention during an armed conflict) not only bind Iraq as a matter of international law but also form part of its domestic legal framework. In assessing whether the Geneva Conventions were part of Iraqi law, the Court considered expert evidence and concluded that Iraqi's dualist legal system does not incorporate the Geneva Conventions into domestic law without specific legislation and recalled that not every provision of the Geneva Conventions has the status of *jus cogens* [114-115]. Ultimately, the Court held that the Geneva Conventions did not provide a legal basis for the detention of Iraqi civilians by British armed forces under Iraqi law [116].

Obligations under the Geneva Conventions and the 'Pictet Theory'

The case also analysed the obligations under the Geneva Conventions and the 'Pictet theory' named after Jean S Pictet, who first expounded the theory in the International Red Cross commentary on the Geneva Conventions published in 1958. The 'Pictet theory' essentially interprets the rules of Geneva IV to ensure continuous protection of civilians and avoid legal gaps during transitions between invasion and occupation [254]. Specifically, it recognises that invasion and occupation are not distinct phases of an international armed conflict and that the Geneva IV rules of occupation apply as soon as troops invade foreign territory and are in contact with the civilian population [253]. The Court disagreed with this interpretation. It held that the 'Pictet theory' gives an expanded meaning to the term "occupation" that it considers inconsistent with established international law [262]. In the Court's view, the legal threshold for an "occupation" is not met merely by presence in foreign territory; rather, it only exists when a foreign power exercises actual authority over the territory [264]. In conclusion, the Court found that the Geneva IV's rules on occupation do not automatically apply during the invasion phase, unless the factual conditions of "occupation" are satisfied [272].

Limitation Period

The Court analysed the time limits for bringing a claim in detail. It recognised that the claimants had not and could not have contemplated the possibility of bringing a claim for compensation in the English courts earlier, nor did they know it was possible to do so. However, it concluded that this does not amount to a lawful excuse which would suspend the limitation period under Article 435 of the Iraqi Civil Code [833, 855]. The Court did, nonetheless, accept that the limitation period was suspended for the period of the claimants' detention and the period following release from detention until January 2006 when their solicitors began to accept instructions from Iraqi claimants [785]. Nonetheless, despite the suspension of the limitation period for such time, the claims were time-barred [785-786, 813]. The Court also assessed the limitation period under English law, and its difference from Iraqi law; ultimately finding that the limitation period under Iraqi law did not cause "undue hardship" and therefore, should not be disapplied on public policy grounds [848].

Quantification of Damages in Tort

The Court noted that damages awarded for personal injury claims are not capable of arithmetical computation and that no sum of money is comparable to loss of liberty or to physical or psychiatric injury or mental distress [885]. The UK Ministry of Defence argued that damages should be reduced because the claimants live in Iraq and have a lower cost of living. The quantification exercise was governed by English law and the Court held that under English law, there is no scope for such reduction based on a claimant's economic or social circumstances [896]. The Court also assessed the practice of damages under the ECHR and the HRA. Ultimately, the Court undertook a balancing exercise and considered it equitable to award a figure that was around half the amount that would have been recoverable on a similar claim in tort if they were living in the UK [947].

The Legal Representatives were Richard Hermer KC, Helen Law, Alison Pickup, Edward Craven, Maria Roche, and Melina Padron for the Claimants Alseran and Al-Waheed; Richard Hermer KC, Harry Steinberg KC, Rachel Barnes, Maria Roche and Nina Ross for the Claimants MRE and KSU; and Derek Sweeting KC, James Purnell, and Saara Idelbi for the Defendant.

ADDITIONAL RESOURCES

- International Committee of the Red Cross 'The Geneva Conventions and their Commentaries' (ICRC website, undated).
- Leigh Day, 'The Alseran case one year on: International human rights law, international humanitarian law, and future military operations' (1 March 2019).
- Rosalind English, 'MOD to compensate Iraqis for "ill treatment"' (UK Human Rights Blog, 18 December 2017).
- Stuart Wallace, 'Military Operations and Withdrawal from the European Convention on Human Rights' (The European Convention on Human Rights Law Review, 23 February 2024).

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