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Case No: CO/5608/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 19th December 2008

Before :

LORD JUSTICE RICHARDS
MR JUSTICE SILBER

- -

Between :

The Queen, on the application of
(1) Faisal Attiyah Nassar Al-Saadoon
(2) Khalaf Hussain Mufdhi **Claimants**

- and -

Secretary of State for Defence **Defendant**

- -

(Transcript of the Handed Down Judgment of
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Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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Karon Monaghan QC, Raza Husain, Guy S Goodwin-Gill and **Helen Law** (instructed by **Public Interest Lawyers**) for the **Claimants**
Clive Lewis QC, Tim Eicke and **Sam Wordsworth** (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 18-20 November 2008

- -

Judgement
As Approved by the Court

Lord Justice Richards :

1. This is the judgment of the court, to which both members of the court have contributed. The claimants are Iraqi nationals who have been detained by British forces in Basra since their arrest in 2003. They are suspected of involvement in the murder of two British servicemen in Iraq. They have been produced before the Iraqi court, which has issued arrest warrants against them and has made orders authorising their continued detention. The Iraqi High Tribunal ("the IHT") has assumed jurisdiction over the case and has requested that the claimants be transferred into its custody with a view to a trial. The defendant Secretary of State proposes to transfer them as requested. The central issue in the present proceedings is whether such a transfer would be lawful.

2. The claimants' case, in outline, is that (i) they are within the jurisdiction of the United Kingdom for the purposes of article 1 of the European Convention on Human Rights ("the Convention") and the Human Rights Act 1998 ("the HRA 1998"), so that they enjoy the full range of Convention rights; (ii) transfer to the IHT would violate their Convention rights, and therefore be in breach of s.6 of the HRA 1998, because there are substantial grounds for believing that they would be at real risk of a flagrantly unfair trial, of the death penalty, and of torture or inhuman or degrading treatment while in custody pending trial and while serving any custodial sentence, contrary to articles 2, 3 and 6 of the Convention and article 1 of protocol no. 13; (iii) the transfer would be in breach of rules of customary international law, in particular the prohibition on torture; and (iv) the transfer would also be in breach of a legitimate expectation created by what is said to be the settled policy of Her Majesty's Government not to expose individuals to a real risk of the death penalty.

3. The Secretary of State's case, in outline, is that (i) on the particular facts, the claimants are not persons within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention and the HRA 1998, but are criminal detainees pursuant to an order of the Iraqi court and held by the United Kingdom at the request of Iraq as a sovereign state exercising authority over its own nationals; (ii) even if the claimants are within the jurisdiction of the United Kingdom, the content of the United Kingdom's obligations under the Convention is qualified by its obligations under international law, which (subject to exceptions that are not made out on the evidence) require it to transfer the claimants to the IHT; (iii) even if the claimants are within the jurisdiction of the United Kingdom and the United Kingdom's obligations are not qualified as in (ii) above, the evidence does not establish that transfer of the claimants to the IHT would give rise in fact to a breach of their Convention rights; and (iv) such transfer would not be in breach of customary international law or of any legitimate expectation arising out of the policy of Her Majesty's Government in relation to the death sentence.

4. The claims also have historic elements to them, in that it is alleged that the claimants' detention has been unlawful and that in the course of it they have been subjected to violations of articles 3, 8 and 9 of the Convention. But the effect of directions given in the course of the proceedings is that we are concerned at present only with the issues arising out of the proposed transfer, as outlined above.

5. The resolution of the legal dispute concerning the proposed transfer is a matter of considerable urgency, since the UN mandate for the presence of British forces in Iraq

is due to expire at the end of this year and the legal position thereafter is uncertain. The Secretary of State has given an undertaking not to transfer the claimants until the decision of this court on the substantive merits of the transfer issue; but he has not given, and says that he cannot give, any undertakings that go beyond 31 December 2008. We have therefore had less opportunity for deliberation than we would have wished in producing our judgment since the hearing and the receipt of further written evidence and written submissions in the two weeks after the hearing.

6. The need for such further evidence and submissions arose out of the last-minute service of certain evidence by the Secretary of State. In view of the urgency of the case, we refused the claimants' request for an adjournment but, in order to ensure that the claimants were not prejudiced, we made provision for the service of additional material after the hearing if necessary and left open the possibility of a further hearing. In the event, we are satisfied that the case can be dealt with properly without a further hearing but we have of course taken the additional written material into account in reaching our conclusions.

7. The late service of evidence by the Secretary of State was a matter of concern to Owen J when he dealt with certain case management issues at a pre-trial hearing on 6 November 2008. In addition to laying down a timetable for the service of further evidence, he directed the Secretary of State to provide the court with a full written explanation of the delay that had occurred in serving a letter dated 21 October 2008 from the President of the IHT which was highly relevant to the death penalty issue (see paras 153-154 below). We have considered the Secretary of State's written response; and, whilst the existence of the President's letter was not revealed to the court or the claimants with the speed and frankness that ought to have applied, we are satisfied that there was no deliberate concealment or dragging of feet. Moreover the Secretary of State has not been alone in serving evidence late. The conduct of the parties in that regard can be taken into account in any order for costs but does not call for further consideration in this judgment.

The factual and legal background

The overall constitutional position

8. The invasion of Iraq by coalition forces began on 20 March 2003. Major combat operations ceased at the beginning of May 2003, and the United States of America and the United Kingdom thereafter became occupying powers. The British forces deployed in Iraq formed part of the Multi-National Force there ("the MNF"). The Coalition Provisional Authority ("the CPA") was established to exercise most of the powers of government during the occupation.

9. On 22 May 2003 the UN Security Council adopted Resolution 1483 ("UNSCR 1483"), which *inter alia* affirmed the sovereignty and territorial integrity of Iraq, called upon the CPA to promote the welfare of the Iraqi people through the effective administration of the territory, and supported the formation of an Iraqi interim administration. The resolution, in common with the later resolutions referred to below, was adopted by the Security Council acting under Chapter VII of the Charter of the United Nations and was based on a decision that the security situation in Iraq constituted a threat to international peace and security.

10. July 2003 saw the establishment of a Governing Council of Iraq ("the IGC"). UNSCR 1511, adopted on 16 October 2003, underscored the temporary nature of the CPA's role; determined that the IGC and its ministers were the principal bodies of the Iraqi interim administration which embodied the sovereignty of the State of Iraq during the transitional period until an internationally recognised, representative government was established and assumed the responsibilities of the CPA; called upon the CPA to return governing responsibilities and authorities to the people of Iraq as soon as practicable; and invited the IGC to produce a timetable and programme for the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution. It authorised the MNF to take all necessary measures to contribute to the maintenance of security and stability in Iraq, and provided that the requirements and mission of the MNF would be reviewed within one year of the date of the resolution and that in any case the mandate of the MNF was to expire upon the completion of the political process to which the resolution had previously referred.

11. On 8 March 2004 the IGC promulgated the Law of Administration for the State of Iraq for the Transitional Period (known as the Transitional Administrative Law or "the TAL"). This provided a temporary legal framework for the government of Iraq for the transitional period which was due to commence by 30 June 2004 with the establishment of an interim Iraqi government ("the Interim Government") and the dissolution of the CPA. Article 26 of the TAL made provision for the laws in force in Iraq at the time of that change to continue in effect unless rescinded or amended by the Interim Government, and specifically for the laws, regulations, orders and directives issued by the CPA to remain in force until rescinded or amended by legislation duly enacted and having the force of law.

12. Further provision for the new regime was made in UNSCR 1546, adopted on 8 June 2004. The resolution endorsed "the formation of a sovereign Interim Government of Iraq … which will assume full responsibility and authority by 30 June 2004 for governing Iraq" (article 1) and welcomed "that, also by 30 June 2004, the occupation will end and [the CPA] will cease to exist, and that Iraq will reassert its full sovereignty" (article 2). It noted that the presence of the MNF was at the request of the incoming Interim Government (as set out in correspondence between the Iraqi Prime Minister and the US Secretary of State annexed to the resolution) and reaffirmed the authorisation for the MNF, with authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq. Provision was again made for the mandate for the MNF to be reviewed within 12 months and to expire upon completion of the political process previously referred to.

13. The transfer of full authority from the CPA to the Interim Government, and the dissolution of the CPA, in fact took place on 28 June 2004. This marked the end of the period of occupation. Since that date the MNF, and therefore the British forces forming part of the MNF, have remained in Iraq pursuant to requests by the Iraqi Government and continued authorisations from the UN Security Council as set out in a series of further resolutions: see UNSCR 1637 of 8 November 2005, UNSCR 1723 of 28 November 2006, UNSCR 1790 of 18 December 2007.

14. In April 2005 the Interim Government was replaced by the Iraqi Transitional Government, which was established following elections that took place in January 2005.

15. On 20 May 2006 the Transitional Government was replaced by a Government of National Unity, which is still in place. On the same date there came into force the Iraqi Constitution, which superseded the TAL.

Arrangements relating to arrest, detention and trial

16. At all material times the MNF has had a mandate under the relevant UN Security Council resolutions to take all necessary measures to contribute to the maintenance of security and stability in Iraq.

17. During the period of occupation, provision was made by CPA Regulation No.1 for the Administrator to issue binding regulations and orders, and also to issue memoranda in relation to the interpretation and application of any regulation and order. CPA Order No.7 related to the Penal Code. CPA Memorandum No.3, of 18 June 2003, implemented it by establishing procedures for applying criminal law in Iraq. It made provision *inter alia* for the standards that were to apply, consistently with the Fourth Geneva Convention, to (a) "all persons who are detained by Coalition Forces when necessary for imperative reasons of security" (a category referred to as "security internees"), and (b) "all persons who are detained by Coalition Forces solely in relation to allegations of criminal acts and who are not security internees" (a category referred to as "criminal detainees").

18. A revised version of the memorandum was issued on 27 June 2004, so as to reflect the change in constitutional position due to come into effect on 28 June (see paras 11-12 above). CPA Memorandum No.3 (Revised) made provision in sections 5 and 6 for criminal detainees and security detainees, including the following:

> "Section 5: Criminal Detentions
>
> (1) A national continent of the MNF shall have the right to apprehend persons who are suspected of having committed criminal acts and are not considered security internees (hereinafter 'criminal detainees') who shall be handed over to Iraqi authorities as soon as reasonably practicable. A national contingent of the MNF may retain criminal detainees in facilities that it maintains at the request of the appropriate Iraqi authorities based on security or capacity considerations. Where such criminal detainees are retained in the detention facilities of a national contingent of the MNF the following standards will apply ….
>
> (2) Where any criminal detainee held by a national contingent of the MNF is subsequently transferred to an Iraqi Court, a failure to comply with these procedures shall not constitute grounds for any legal remedy or negation of process, but any period spent in detention awaiting trial or punishment shall be deducted from any period of imprisonment imposed.
>
> Section 6: MNF Security Internee Process

(1) Any person who is detained by a national contingent of the MNF for imperative reasons of security in accordance with the mandate set out in UNSCR 1546 (hereinafter 'security internees') shall, if he is held for a period longer than 72 hours, be entitled to have a review of the decision to intern him.

…

(9) If a person is subsequently determined to be a criminal detainee following a review of his or her status, or following the commission of a crime while in internment, the period that person has spent in internment will not count with respect to the period set out in Section 5(2) herein …."

19. CPA Memorandum No.3 (Revised) was evidently envisaged as continuing in force after 28 July 2004 by virtue of article 26 of the TAL (see para 11 above). In our view that was a correct assessment of the effect of article 26. There is an issue between the parties as to whether the memorandum continued to remain in force once the TAL was superseded by the Iraqi Constitution on 20 May 2006: the claimants contend that the memorandum does not meet the requirements of the Constitution and is invalid. Although the evidence before the court includes a body of material directed to that issue, we think it unnecessary to resolve the issue in order to reach a conclusion on the lawfulness of the proposed transfer of the claimants into the custody of the IHT.

20. On 8 November 2004 a Memorandum of Understanding regarding criminal suspects ("the MoU") was entered into between the UK contingent of the MNF and the Ministries of Justice and Interior of Iraq (collectively referred to as the Participants). The preamble to the MoU recited the authority of the UK national contingent of the MNF, in accordance with the mandate conferred by UNSCR 1546, to intern persons for imperative reasons of security, and the power of national contingents of the MNF, in accordance with CPA Memorandum No.3 (Revised), to apprehend persons who were suspected of committing criminal acts. It also stated that "[w]hereas Iraq is developing its own custodial capacity with the aim of being able to confine all criminal suspects in its own facilities, it may, in the meantime, request the MNF-I to confine persons who are suspected of having committed criminal acts in safe and secure detention facilities, subject to security and capacity considerations". The substantive provisions of the MoU included the following:

"Section 1: Purpose and Scope

This Memorandum of Understanding (MOU) sets out the authorities and responsibilities in relation to criminal suspects. For the purpose of this MOU, 'criminal suspects' are:

…

(c) individuals who are suspected of having committed criminal acts who are held at the request of the Iraqi authorities.

Section 2: Authorities and Responsibilities Generally

1. The Interim Iraqi Government (and any successor) has legal authority over all criminal suspects who have been ordered to stand trial and who are waiting trial in the physical custody of UK MNF-I in accordance with the terms of this Memorandum of Understanding (MOU).

2. The UK MNF-I has a discretion whether to accept any particular criminal suspect into its physical custody and whether to continue to provide custody for a suspect who is in its physical custody at the time this MOU comes into operation or who, at any time in the future, comes into its custody.

…

Section 3: Authorities and Responsibilities in relation to individual criminal suspects

1. In relation to any criminal suspect being held in the physical custody of the UK MNF-I, the MOJ will:

(a) provide UK MNF-I with a written request for his delivery up to attend a court appearance or for any other purpose connected with the criminal process and will give as much advance notice of the proposed date when the presence of the suspect is required as is practicable.

…

4. In relation to any criminal suspect transferred to the MOI or the MOJ by UK MNF-I from its detention facilities, the MOJ and the MOI, as the case may be, will:

(a) inform UK MNF-I before releasing any individual and will comply with any request by UK MNF-I that UK MNF-I should reassume custody if,

(i) the individual is wanted for prosecution by any state that has contributed forces to the MNF for breaches of the laws and customs of war, or

(ii) the internment of the individual is necessary for imperative reasons of security,

in which case UK MNF-I will assume custody of that individual after consultation between the Participants to reach an agreed solution.

…

(c) provide an assurance that during any temporary periods when a suspect is in the hands of the Iraqi authorities whether at the UK MNF-I's detention facility or elsewhere

> and at any time following the transfer of a suspect to Iraqi facilities,
>
> > (i) the suspect will be treated humanely and will not be subject to torture or to cruel, inhuman or degrading treatment or punishment; and
> >
> > (ii) the requirements of CPA Orders with respect to co-operation with and reasonable access to be provided to the Iraqi Ombudsman for Penal and Detention Matters and the International Committee of the Red Cross will be adhered to.
>
> 5. If UK MNF-I decides that it is no longer prepared to provide custody facilities for a particular suspect, it shall give notice of this decision to the MOJ as soon as possible to enable the MOJ to make other arrangements for the custody of that suspect if it so wishes. The MOJ will then notify the UK MNF-I of the arrangements it has made or alternatively will indicate that the suspect should be released. UK MNF-I will then use its best endeavours to enable any such alternative arrangements to be put in place."

21. It is also relevant to note that UNSCR 1790, which contains the current mandate for the MNF in Iraq, has annexed to it a letter from the Prime Minister of Iraq to the President of the Security Council which *inter alia* refers to the importance for Iraq of being treated as an independent and fully sovereign state, and identifies as a relevant objective that "the Government of Iraq will be responsible for arrest, detention and imprisonment tasks" and that when those tasks are carried out by the MNF "there will be maximum levels of coordination, cooperation and understanding with the Government of Iraq".

The arrest and detention of the claimants

22. The claimants are Sunni Arabs who held full-time posts in the Ba'ath Party under the regime of Saddam Hussein. The party had eight ranks: president (Saddam Hussein), leadership member, office member, general secretary, branch member, division member, comradeship member, and normal member. The first claimant's evidence is that he joined the party in 1969, at the age of 17. He became a normal member in 1981, a comradeship member in 1988 and a division member in 1991. In 1996 he became the branch member of the Al-Zubair branch, reporting to the general secretary of the branch. This was a full-time post, so he gave up his previous employment as an educational supervisor.

23. The second claimant's evidence is that he joined the party in 1968, at the age of 18. He became a normal member in 1976 and was also the chairman of the Basra Iraqi Youth Union (a branch of the national party). He became a comradeship member in 1986, a division member in 1991 and a branch member in 1995. In 2001 he became the general secretary of the Al-Zubair branch. This was the highest rank in the province of Al-Zubair and was a full-time post, so he gave up his previous employment as a head teacher.

24. Neither claimant asserts any involvement in the military activities of the party, but they both say that they were comradeship members of the party at the time of the suppression of the 1991 Shia uprising in Basra.

25. The claimants were arrested on 30 April 2003 and 21 November 2003 respectively by British forces in Basra. They were each taken to a detention facility where they remained until 15 December 2003: we are told that there is a dispute as to whether that facility was run by US forces. They were then transferred to a British-run facility known as the Divisional Temporary Detention Facility. On 20 April 2007 they were moved to the Divisional Internment Facility at Basra International Airport, where they remain today.

26. They were detained originally as security internees. Their notices of internment stated that they were suspected of being senior members of the Ba'ath Party under the former regime and of orchestrating anti-MNF violence by former regime elements, and that it was believed that if they were released they would represent an imperative threat to security.

27. The position changed, however, as a result of an investigation carried out by the Special Investigations Branch ("the SIB") of the Royal Military Police into the deaths of two British servicemen, SSgt Cullingworth and Spr Allsopp, both of 33 Engineer Regiment EOD, who were ambushed in southern Iraq by Iraqi militia forces on or around 23 March 2003, were seriously injured, taken captive, and subsequently murdered while in the custody of the regime then in power in Iraq. Following completion of the SIB's initial investigations, the case was referred to the Central Criminal Court of Iraq ("the CCCI") in September 2004. A case conference took place at which an investigative judge accepted that there were sufficient prospects of a successful prosecution to warrant a trial of the two claimants, but there was doubt as to the appropriate court for the hearing of the case. Further investigations were carried out by the SIB, which included interviewing the claimants in October 2004, when they were informed that they were suspected of involvement in the murder of the two British servicemen.

28. On 16 December 2005 the case was formally referred by the British liaison officer to the chief investigative judge of the CCCI. He took the view that the case was within the jurisdiction of the Basra criminal court, to which the case file was forwarded. On 12 April 2006 a British officer appeared before the special investigative panel of the Basra criminal court to make a statement of complaint in respect of the deaths of the two British servicemen. On 18 May 2006, pursuant to a request from the judges, the two claimants were produced before the special investigative panel to give evidence in response to the complaint. They had not retained lawyers despite having been given an opportunity to do so, but a court-appointed lawyer was located for them at their request. They were presented with the gist of the evidence against them, but they denied the allegations. An arrest warrant was issued against each of them pursuant to Article 406 of the Iraqi Penal Code, and an order was made authorising their continued detention by the UK contingent of the MNF.

29. In the light of the court hearing and orders made, the decision was taken by the British forces on 21 May 2006 to reclassify the claimants with effect from 18 May as criminal detainees, held on the authority of the court, rather than as security internees;

though it does not appear to have been until August 2006 that the claimants were informed by letter of this reclassification.

30. The Basra criminal court, having begun its own investigation into the case, subsequently decided that the case should be transferred to the IHT because the alleged offences constituted war crimes falling within the jurisdiction of the IHT. The claimants challenged the decision to transfer the case but were unsuccessful. That the case falls within the jurisdiction of the IHT has since been determined by the IHT itself and is no longer in issue in the present proceedings.

31. On 27 December 2007 the IHT formally requested that the British forces transfer the claimants into the custody of the court. That request has been repeated on a number of occasions. The Secretary of State has made clear that the only reason why the request has not been complied with to date is the existence of the proceedings in this court.

Jurisdiction and the application of the Convention and the HRA 1998

The legal framework under the Convention and the HRA 1998

Introduction

32. It was established by the decision of the House of Lords in *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 that s.6 of the HRA 1998 applies to a public authority acting outside the territory of the United Kingdom but within the jurisdiction of the United Kingdom within the meaning of article 1 of the Convention. Article 1 provides that contracting states shall secure to everyone "within their jurisdiction" the rights and freedoms defined in the Convention.

33. The House of Lords also made clear in *Al-Skeini* that in determining whether a situation falls within the jurisdiction of a state for the purposes of article 1, the national court should be guided by the decision of the Strasbourg court in *Bankovic v Belgium* (2001) 11 BHRC 435.

Bankovic v Belgium

34. The applicants in *Bankovic* were citizens of the Federal Republic of Yugoslavia who were injured, or whose relatives were killed, when a building was hit by a missile during air strikes by NATO forces on the territory of Yugoslavia. The issue was whether the applicants and their deceased relatives were within the article 1 jurisdiction of the respondent NATO states. At para 54 of the judgment of the Grand Chamber the court noted that the real connection between the applicants and the respondent states was the impugned act which, wherever decided, was performed or had effects outside the territory of those states. It considered that the essential question to be examined was whether the applicants and their deceased relatives were, as a result of that extra-territorial act, capable of falling within the jurisdiction of the respondent states.

35. The court emphasised the role of the rules of international law in the interpretation of the Convention, stating *inter alia* that "[t]he court must also take into account any relevant rules of international law when examining questions concerning its

jurisdiction and, consequently, determine state responsibility in conformity with the governing principles of international law, although it must remain mindful of the convention's special character as a human rights treaty" (para 57): it should be interpreted as far as possible in conformity with other principles of international law of which it formed part. The judgment continued:

> "59. As to the 'ordinary meaning' of the relevant term in art 1 of the convention, the court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a state is primarily territorial. While international law does not exclude a state's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant states ….
>
> 60. Accordingly, for example, a state's competence to exercise jurisdiction over its own nationals abroad is subordinate to that state's and other states' territorial competence …. In addition, a state may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying state in which case it can be found to exercise jurisdiction in that territory, at least in certain respects ….
>
> 61. The court is of the view, therefore, that art 1 of the convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case …."

36. As to the circumstances in which extra-territorial acts are recognised as constituting an exercise of jurisdiction, the court said this:

> "67. In keeping with the essentially territorial notion of jurisdiction, the court has accepted only in exceptional cases that acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of art 1 of the convention.
>
> 68. Reference has been made in the court's case law, as an example of jurisdiction 'not restricted to the national territory' of the respondent state …, to situations where the extradition or expulsion of a person by a contracting state may give rise to an issue under arts 2 and/or 3 (or, exceptionally, under arts 5 and/or 6) and hence engage the responsibility of that state under the convention (*Soering v UK* [1989] ECHR 14038/88 at para 91 …).

However, the court notes that liability is incurred in such cases by an action of the respondent state concerning a person while he or she is on its territory, clearly within its jurisdiction, and that such cases do not concern the actual exercise of a state's competence or jurisdiction abroad ….

69. In addition, a further example noted in *Loizidou v Turkey* (preliminary objections) (1995) 20 EHRR 99 at para 62 was *Drozd v France* (1992) 14 EHRR 745 where, citing a number of admissibility decisions by the Commission, the court accepted that the responsibility of the contracting parties (France and Spain) could, in principle, be engaged because of acts of their authorities (judges) which produced effects or were performed outside their own territory …. In that case, the impugned acts could not, in the circumstances, be attributed to the respondent states because the judges in question were not acting in their capacity as French or Spanish judges and as the Andorran courts functioned independently of the respondent states.

70. Moreover, in *Loizidou v Turkey* … the court found that, bearing in mind the object and purpose of the convention, the responsibility of a contracting party was capable of being engaged when, as a consequence of military action (lawful or unlawful) it exercised effective control of an area outside its national territory. The obligation to secure, in such an area, the convention rights and freedoms was found to derive from the fact of such control whether it was exercised directly, through the respondent state's armed forces, or through a subordinate local administration. The court concluded that the acts of which the applicant complained were capable of falling within Turkish jurisdiction within the meaning of art 1 of the convention ….

71. In sum, the case law of the court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a contracting state is exceptional: it has done so when the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government.

…

73. Additionally, the court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a state include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state. In these specific situations, customary international law and treaty provisions

> have recognised the extra-territorial exercise of jurisdiction by the relevant state."

37. Applying those principles, the court in *Bankovic* was not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent states on account of the extra-territorial act in question.

R (Al-Skeini) v Secretary of State for Defence

38. In *Al-Skeini* (cited above) the claimants were relatives of Iraqi civilians who had been killed by, or in the course of action taken by, British forces during the period of occupation of Iraq prior to the assumption of authority by the Interim Government. The relatives of the first five claimants had been shot in armed incidents involving British forces. The sixth claimant's son, Mr Baha Mousa, had been arrested by British forces but had died, as a result of beatings at the hands of British soldiers, while in detention following his arrest. It was held by the Divisional Court and confirmed on appeal that the relatives of the first five claimants had not been within the jurisdiction of the United Kingdom for the purposes of article 1. The finding in relation to them, which turned essentially on whether the British forces had effective control of the territory at the time of the deaths, is not material to the present case. Mr Mousa, on the other hand, was found to have been within the jurisdiction of the United Kingdom at the time of his death. His position is highly material to the present case and is considered further below.

39. The judgment of the Divisional Court, [2007] QB 140, states at paras 286-287 that Mr Mousa met his death while in custody at a British military base. We were given more precise information by counsel for the present claimants, on the basis of the transcript of the later court-martial proceedings. We were told that Mr Mousa was in fact detained at a Temporary Detention Facility in a disused toilet block in a partly destroyed hotel (formerly the Ba'ath Party headquarters) requisitioned by British forces.

40. The basis on which the Divisional Court found Mr Mousa to have been within the jurisdiction of the United Kingdom was that "it is not at all straining the examples of extraterritorial jurisdiction discussed in the jurisprudence considered above to hold that a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities, and containing arrested suspects, falls within even a narrowly limited exception exemplified by embassies, consulates, vessels and aircraft, and in *Hess v United Kingdom* 2 DR 72, a prison" and that "[w]e can see no reason in international law considerations, nor in principle, why in such circumstances the United Kingdom should not be answerable to a complaint, otherwise admissible, brought under articles 2 and/or 3 of the Convention" (para 287). The reference to the British military prison operating "with the consent of the Iraqi sovereign authorities" was in fact mistaken, since at the material time Iraq was under occupation and did not have any sovereign authorities of its own. But following the Divisional Court's decision, the Secretary of State conceded in the Court of Appeal and the House of Lords that Mr Mousa had been within the jurisdiction of the United Kingdom for the purposes of article 1, on the basis that he had been killed by British troops when held as a prisoner in a British military detention unit. The concession was also endorsed by the House of Lords, as appears most clearly in the opinion of Lord Brown of Eaton-under-Heywood, who said at para 132:

> "… I for my part would recognise the UK's jurisdiction over Mr Mousa only on the narrow basis found established by the Divisional Court, essentially by analogy with the extraterritorial exception made for embassies (an analogy recognised too in *Hess v United Kingdom* (1975) 2 DR 72, a commission decision in the context of a foreign prison which had itself referred to the embassy *X v Federal Republic of Germany*)."

41. Lord Brown's reference to the exception for embassies picks up earlier passages in his opinion. At para 109(4)(ii) he had referred to the exception identified in para 73 of the judgment in *Bankovic* (quoted above). At para 122 he expanded on that exception as follows:

> "The cases involving the activities of embassies and consulates … themselves subdivide into essentially two sub-categories, those concerning nationals of the respondent state and those concerning foreign nationals. The former includes cases like *X v Federal Republic of Germany* (1965) 8 Yearbook of the European Convention on Human Rights 158 and *X v United Kingdom* (1977) 12 DR 73; the latter cases like *M v Denmark* (1992) 73 DR 193 and *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643 …."

That last reference, to *R (B) v Secretary of State for Foreign and Commonwealth Affairs*, is one of some importance, and we will consider that case in a moment.

R (Al-Jedda) v Secretary of State for Defence

42. *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332 was another case concerning detention of a person by British forces in Iraq. The claimant had dual Iraqi and British nationality. He was arrested by US forces in Iraq in October 2004, was handed over to British forces and was then detained at a Divisional Temporary Detention Facility operated by British forces in Basra. He was detained as a security internee and had not been charged with any offence. It was conceded by the Secretary of State, on the same basis as in *Al-Skeini*, that the claimant, as a person detained in a British military detention centre, fell within the jurisdiction of the United Kingdom (see the judgment of the Divisional Court at [2005] EWHC 1809 (Admin), para 25). The claimant contended that his detention was in breach of article 5.

43. By the time the case reached the House of Lords, there were two main issues, both of which arose out of the mandate conferred on the MNF by UNSCR 1546 and later resolutions. The first issue was whether the actions of the UK contingent of the MNF were attributable to the United Nations rather than to the United Kingdom. The House of Lords held that they were attributable to the United Kingdom. The second issue arose out of article 103 of the UN Charter, which provides that in the event of a conflict between the obligations of members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. The Secretary of State's argument was that the UN Security Council resolutions obliged the United Kingdom to exercise its power of detention thereunder where necessary for imperative reasons of security in Iraq, and that that obligation prevailed over the United Kingdom's obligations under article 5. The

House of Lords, in common with the courts below, accepted that argument. Lord Bingham of Cornhill expressed his conclusion on the issue in this way:

> "Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent that is inherent in such detention."

Non-refoulement: the principle in Soering v United Kingdom

44. Before returning to *R (B) v Secretary of State for Foreign and Commonwealth Affairs* we should explain the general position that applies under the Convention where a person resists removal from a contracting state on the ground that he will be treated in the receiving state in a manner proscribed by the Convention.

45. The issue in *Soering v United Kingdom* (1989) 11 EHRR 439 was whether the applicant could rely on article 3 to resist extradition from the United Kingdom to the United States of America to face trial on a charge of murder which would give rise to a real risk of the death sentence and hence of exposure to the "death row phenomenon". The Strasbourg court held that article 1 of the Convention "cannot be read as justifying a general obligation to the effect that notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are fully in accord with each of the safeguards of the Convention" (para 86). But the court had regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms, and to the fact that article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe and is to be found in similar terms in other international instruments and is generally recognised as an internationally accepted standard. It referred to the abhorrence of torture and said that it would hardly be compatible with the underlying values of the Convention for a contracting state knowingly to surrender a fugitive to another state where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances would plainly be contrary to the spirit and intendment of article 3; and that inherent obligation not to extradite also extended to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by article 3. Thus the court stated at para 91:

> "In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that

> the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."

46. The principle in *Soering* has also been held to apply, with appropriate modifications, in respect of other articles of the Convention. Thus in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 the House of Lords held that articles other than article 3 could in principle be engaged in relation to removal of an individual from the United Kingdom, but that the threshold of success in such a case was a very high one. Lord Bingham of Cornhill summarised the position as follows at para 24:

> "While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment: *Soering*, para 91 …. In *Dehwari* [29 EHRR CD 74], para 61 … the Commission doubted whether a real risk was enough to resist removal under article 2, suggesting that the loss of life must be shown to be a 'near certainty'. Where reliance is placed on article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state: *Soering*, para 113 …. Successful reliance on article 5 would have to meet no less exacting a test. The lack of success of applicants relying on articles 2, 5 and 6 before the Strasbourg court highlights the difficulty of meeting the stringent test which the court imposes. This difficulty will not be less where reliance is placed on articles such as 8 or 9, which provide for the striking of a balance between the right of the individual and the wider interests of the community even in a case where a serious interference is shown …."

This approach was followed and further explained in *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, [2008] 3 WLR 931 (see, further, para 100 below, where we discuss what is required in order to establish a "flagrant" breach of the principles guaranteed by article 6).

R (B) v Secretary of State for Foreign and Commonwealth Affairs

47. With that introduction we can return to *R (B) v Secretary of State for Foreign and Commonwealth Affairs* (cited above). The case is important because of the qualification it appears to place on the application of the *Soering* principle where other obligations of public international law are in play. The applicants in the case were children who had arrived with other members of their family in Australia and claimed asylum. They were held in a detention centre where conditions gave rise to serious concern. They escaped and subsequently presented themselves at the British consulate in Melbourne and requested asylum. The Australian authorities informed the consular officials that they wanted the applicants returned to their care. The officials made clear to the applicants that they would not be permitted to remain in the

consulate and that the United Kingdom would not intervene in the consideration of their case by the Australian authorities. They were told that unless they left voluntarily some other way would be found to return them to the Australian authorities. They then left of their own accord, but brought an application for judicial review of the decision not to permit them to remain in the consulate, on the ground that the decision exposed them to the risk of treatment contrary to articles 3 and 5 of the Convention by reason of their return to the detention centre.

48. The judgment of the Court of Appeal, given by Lord Phillips of Worth Matravers MR, examined the Strasbourg case-law and identified the exceptional jurisdiction recognised in *Bankovic* in relation to "the activities of its diplomatic or consular agents abroad" as the relevant category of extra-territorial jurisdiction. Whether the activities of the consular officials brought the applicants within the jurisdiction of the United Kingdom for the purposes of article 1 required consideration of the nature of the jurisdiction that diplomatic and consular agents of the sending state can exercise in the receiving state. Having examined that issue, the court stated, at para 66:

> "We are content to assume (without reaching a positive conclusion on the point) that while in the consulate the applicants were sufficiently within the authority of the consular staff to be subject to the jurisdiction of the United Kingdom for the purpose of article 1 …."

49. The court then held, in a ruling subsequently confirmed by the House of Lords in *Al-Skeini*, that the HRA 1998 applied to the extent of the United Kingdom's jurisdiction for the purposes of article 1. It then turned to consider whether the actions of the consular officials infringed the applicants' Convention rights. The judgment noted that the court was concerned with "a claim that the consular officials were required by the Convention to permit the applicants to remain within the protection of the consulate because requiring them to leave would expose them to the risk that the Australian authorities would treat them in a manner inconsistent with the rights recognised by the Convention" (para 80). It referred to the *Soering* principle and continued:

> "83. … Does the principle in *Soering* apply to the act of expelling fugitives from consular premises and, if so, what is the extent of the risk that the fugitives must be facing before the principle comes into play?
>
> 84. In a case such as *Soering* the contracting state commits no breach of international law by permitting an individual to remain within its territorial jurisdiction rather than removing him to another state. The same is not necessarily true where a state permits an individual to remain within the shelter of consular premises rather than requiring him to leave. It does not seem to us that the Convention can require states to give refuge to fugitives within consular premises if to do so would violate international law. So to hold would be in fundamental conflict with the importance that the Grand Chamber attached in *Bankovic's* case … to principles of international law. Furthermore, there must be an implication that obligations

> under a Convention are to be interpreted, so far as possible, in a manner that accords with international law …."

50. The court considered what public international law had to say about the right to afford "diplomatic asylum". Its conclusion was expressed as follows:

> "88. We have concluded that, if the *Soering* approach is to be applied to diplomatic asylum, the duty to provide refuge can only arise under the Convention where this is compatible with public international law. Where a fugitive is facing the risk of death or injury as the result of lawless disorder, no breach of international law will be occasioned by affording him refuge. Where, however, the receiving state requests that the fugitive be handed over the situation is very different. The basic principle is that the authorities of the receiving state can require surrender of a fugitive in respect of whom they wish to exercise the authority that arises from territorial jurisdiction: see article 55 of the 1963 Vienna Convention on Consular Relations. Where such a request is made the Convention cannot normally require the diplomatic authorities of the sending state to permit the fugitive to remain within the diplomatic premises in defiance of the receiving state. Should it be clear, however, that the receiving state intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity, international law must surely permit the officials of the sending state to do all that is reasonably possible, including allowing the fugitive to take refuge in the diplomatic premises, in order to protect him against such treatment. In such circumstances the Convention may well impose a duty on a contracting state to afford diplomatic asylum.
>
> 89. It may be that there is a lesser level of threatened harm that will justify the assertion of an entitlement under international law to grant diplomatic asylum. This is an area where the law is ill-defined. So far as Australian law was concerned, the applicants had escaped from lawful detention under the provisions of the Migration Act 1958. On the face of it international law entitled the Australian authorities to demand their return. We do not consider that the United Kingdom officials could be required by the Convention and the Human Rights Act 1998 to decline to hand over the applicants unless this was clearly necessary in order to protect them from the immediate likelihood of experiencing serious injury."

51. The court went on to hold that the applicants were not subject to the type and degree of threat that, under international law, would have justified granting them diplomatic asylum, and that to have given them refuge from the demands of the Australian authorities for their return would have been an abuse of the privileged inviolability afforded to consular premises and would have infringed the obligations of the United Kingdom under public international law. Thus, the facts disclosed no infringement of the Convention.

The indivisibility of the Convention

52. A final point to note in this part of our judgment is that one of the elements of the reasoning of the Strasbourg court in *Bankovic* was that the positive obligation in article 1 to secure the Convention rights and freedoms cannot be "divided and tailored in accordance with the particular circumstances of the extra-territorial act in question" (para 75 of the *Bankovic* judgment). In other words, where a contracting state has jurisdiction the whole package of rights applies and must be secured; and it follows that if a state does not have such effective control of the territory of another state that it could secure the full package of rights to everyone in the territory, that is a reason against a finding that the state does have article 1 jurisdiction in relation to the territory: see per Lord Rodger in *Al-Skeini* at para 79. On the other hand, whilst that consideration undoubtedly applies to the "effective control" exception, it does not appear to apply to other exceptional cases of extra-territorial jurisdiction such as that relating to embassies and consulates (as in *R (B) v Secretary of State for Foreign and Commonwealth Affairs*) or the analogous category of the detention of Mr Mousa in *Al-Skeini* and of the claimant in *Al-Jedda*. As Lord Brown put it in *Al-Skeini*, at para 130, "[r]ealistically the concept of indivisibility of the Convention presents no problem in relation to [such] categories of cases …: these concern highly specific situations raising only a limited range of Convention rights".

53. It is within the framework of those authorities concerning the Convention and the HRA 1998 that we turn to consider the submissions in the present case.

The rival submissions

The claimants' case

54. The claimants' case on jurisdiction and the application of the Convention and the HRA 1998 is that, as persons held in detention facilities under the control of British forces in Iraq, they are in materially the same position as was Mr Mousa in *Al-Skeini* and the claimant in *Al-Jedda* and are therefore within the jurisdiction of the United Kingdom for the purposes of article 1 in the same way as those individuals were. The criminal proceedings in the Iraqi courts and the fact that the IHT has requested the claimants' transfer into the custody of the court are irrelevant to the issue of jurisdiction. The British forces are present in Iraq pursuant to the mandate granted by the series of UN Security Council resolutions and have an autonomous status there. They are not subject to Iraqi jurisdiction or to any duty to comply with the requests of the Iraqi authorities. The MoU regarding criminal suspects is a non-binding understanding between the British forces and the Iraqi authorities as to the parties' respective roles, but it has no legal effect on the status of those held in accordance with the MoU.

55. On the basis that the claimants are within the article 1 jurisdiction of the United Kingdom, it is submitted that the United Kingdom is bound to secure them all the rights and freedoms defined in the Convention, including the rights under articles 2, 3 and 6, and article 1 of protocol no. 13, which they say would be violated by their transfer to the Iraqi authorities. The principle of "non-refoulement" established in *Soering*, that a contracting state must not extradite or return a person to a state if there are substantial grounds for believing that he would be at real risk of treatment contrary to the standards of article 3 in the requesting state, applies in relation to any

person within the jurisdiction of the United Kingdom irrespective of whether he is within the geographical territory of the United Kingdom. The principle also applies in the same way in respect of other articles of the Convention, albeit the threshold for a breach is sometimes higher in the non-refoulement context than in the purely domestic context (so that, for example, the issue under article 6 is whether there would be a real risk of the person suffering a flagrant denial of a fair trial in the requesting state).

The Secretary of State's case

56. The primary case for the Secretary of State on those issues is that, notwithstanding that the claimants are in the physical custody of British forces, they are not within the jurisdiction of the United Kingdom for the purposes of article 1. They have been transferred to the legal jurisdiction of the Iraqi courts and are being held as criminal suspects at the order of the Iraqi court, a judicial organ of the sovereign state of Iraq. The legal authority being exercised over them is that of Iraq, exercising sovereignty on its own territory in relation to its own nationals. It is for the Iraqi court to decide whether the claimants are to be detained or released. The United Kingdom has simply agreed to a request by Iraq to allow its detention facilities to be used, in accordance with CPA Memorandum No.3 (Revised) and the MoU. It is obliged as a matter of international law to transfer the claimants to the custody of the Iraqi court as requested by that court. The situation is not one which engages the responsibility of the United Kingdom under the Convention at all.

57. The alternative submission for the Secretary of State is that, if the claimants are within the article 1 jurisdiction of the United Kingdom, the content of the United Kingdom's obligations under the Convention is qualified by its obligations under public international law. The United Kingdom must respect the sovereignty of Iraq, which is pursuing criminal proceedings against Iraqi nationals who are on its own territory and are suspected of war crimes committed on that territory. The principle in *Soering* concerns the removal of persons within the territory of a contracting state and does not apply in this situation. If it does apply, then by analogy with *R (B) v Secretary of State for Foreign and Commonwealth Affairs* the United Kingdom must comply with its obligation under international law to hand the claimants over to the Iraqi authorities unless it is clear that Iraq intends to subject them to treatment so harsh as to amount to a crime against humanity, or at least unless a refusal to hand them over is necessary in order to protect them from the immediate likelihood of experiencing serious injury.

58. In any event it is submitted that the Secretary of State has no power under international law to remove the claimants from the territory of Iraq to the United Kingdom or a third country. Although relevant primarily to remedy, this is also relied upon as part of the substantive argument against the applicability of the Convention to the claimants' situation.

Discussion

Our starting-point: the similarities with Al-Skeini and Al-Jedda

59. In terms of physical custody the position of the claimants is indistinguishable from that of Mr Mousa in *Al-Skeini* and the claimant in *Al-Jedda*. All were detained at the

material time in facilities under the control of British forces in Iraq. Those facilities are described briefly in paras 25, 39 and 42 above. There is no material difference between them. If anything, the facilities in which the claimants are detained appear to have a greater degree of permanence than those in which Mr Mousa was held, but nothing turns on the point.

60. The findings and concessions that Mr Mousa and Mr Al-Jedda were within the article 1 jurisdiction of the United Kingdom were based on the fact that they were held in British military detention units rather than being made by reference to the specific legal basis on which British forces were present in Iraq at the material time or held the individuals concerned. Thus, article 1 jurisdiction was established by analogy with the extra-territorial exception for embassies and the like, including the prison example of *Hess v United Kingdom*. It was not stated to depend in Mr Mousa's case on the fact that the British forces were an occupying force at the relevant time (indeed, the Divisional Court stated erroneously that the British forces were operating in Iraq at that time "with the consent of the Iraqi sovereign authorities": see para 40 above); and the issue of effective control of the territory concerned a different basis on which extra-territorial jurisdiction could arise and was considered only in relation to the position of the other *Al-Skeini* claimants. In *Al-Jedda* the concession as to jurisdiction was expressed to be on the same basis as in *Al-Skeini* (see para 42 above).

61. On the face of it, applying the same approach to the claimants' case would seem to lead to the conclusion that they, too, are within the article 1 jurisdiction of the United Kingdom.

The basis on which the claimants are held in custody

62. It is necessary, however, to look deeper, because there are potentially important underlying differences in the circumstances of the relevant detentions. Since Mr Mousa was held by British forces at a time when they were in occupation of Iraq as part of the MNF and there was no sovereign Iraqi government, there could be no question of his detention being the responsibility of any state other than the United Kingdom or of his being under the authority of any state other than the United Kingdom. As to Mr Al-Jedda, he was held as a security internee by British forces acting solely pursuant to the authorisation conferred by the UN Security Council resolutions to exercise a power of detention where necessary for imperative reasons of security in Iraq. He had not been handed over to the Iraqi authorities and he was not charged with any offence or subject to any criminal proceedings. Again, therefore, his detention was clearly the responsibility of the United Kingdom and he was unquestionably under the authority of the United Kingdom while in detention (the House of Lords having rejected the argument that his detention was attributable to the United Nations).

63. The claimants, by contrast, have been subject to the jurisdiction and legal authority of the Iraqi courts since no later than 18 May 2006, when they appeared before the Basra criminal court and the court issued arrest warrants against them under Iraqi law and made orders authorising their continued detention. What happened was done in accordance with Iraqi law as set out in CPA Memorandum No.3 (Revised), which was on any view still in force at the time of their appearance before the court (see para 19 above as to the dispute concerning the effect of the coming into force of the Iraqi Constitution on 20 May 2006). By section 5(1) of that memorandum the British

forces were required to hand over criminal detainees (that is, persons suspected of having committed criminal acts and not considered security internees) to the Iraqi authorities as soon as reasonably practicable. In this case the claimants were originally classified as security internees but were handed over to the Iraqi authorities by their production before the Iraqi court. Since that time their further detention in facilities maintained by the British forces has been pursuant to the orders of the Iraqi court and at the request of the court, as also provided for by section 5(1) of the memorandum. The reclassification of the claimants as criminal detainees following their court appearance and the orders of the court on 18 May 2006 was a true reflection of their changed legal status. We reject a submission by Ms Monaghan that it was simply an internal, bureaucratic decision by the British forces which had no legal significance.

64. The way the claimants have been dealt with is also in accordance with the MoU regarding criminal suspects, which, although not a legally binding document, plainly gives effect to the participants' understanding of the underlying legal position. The claimants, as individuals who are suspected of having committed criminal acts and who are held at the request of the Iraqi authorities, are "criminal suspects" as defined in section 1 of the memorandum. Section 2(1) states that the Iraqi government has legal authority over all criminal suspects who have been ordered to stand trial and who are waiting trial in the physical custody of the UK contingent of the MNF in accordance with the terms of the memorandum. The reference to the "Iraqi government" is plainly to be understood as encompassing the organs of the Iraqi state, the relevant organ in this case being the court; and although the claimants have not yet been ordered to stand trial and are still awaiting a decision on whether there should be a trial, we think that section 2 is plainly intended to apply to persons in their position in just the same way as if their trial had been ordered. Section 3(1), in laying down procedures for the delivery up of criminal suspects to attend court or for any other purpose connected with the criminal process, is premised on the existence of an obligation on the part of the British forces to deliver up a criminal suspect on request.

65. One strand in Ms Monaghan's submissions was that the British forces acquired lawful custody and control of the claimants in 2003, in accordance with the law of armed conflict, and that intervening events have not had any effect on the legal position or on the United Kingdom's responsibilities towards them. Moreover the decision of the Iraqi court which the Secretary of State relies on was, it is submitted, actively canvassed by the British authorities. It will be clear from what we have said above that we take a different view of the matter: a complaint was properly made to the Iraqi court, the claimants were produced before the Iraqi court in accordance with Iraqi law, and the involvement of the Iraqi court and the subsequent detention of the claimants as criminal detainees at the request of that court marked an important change from the original basis on which the claimants were detained.

Iraq's exercise of sovereign authority in relation to the claimants

66. The actions taken by the Iraqi court in relation to the claimants constitute the exercise of power by an organ of the sovereign state of Iraq. As Mr Lewis submitted, Iraq is exercising sovereignty on its own territory in relation to its own nationals who are present on that territory and are suspected of having committed war crimes on that territory. The sovereignty and territorial integrity of Iraq are not in dispute and have been repeatedly reaffirmed in the UN Security Council resolutions to which we have

referred. Nor do we understand there to be any dispute as to the general principle that a sovereign state has jurisdiction within its own territory and in particular over its own nationals within its territory. That jurisdiction is *prima facie* exclusive. The position is complicated here by the presence of the MNF on the territory of Iraq under the authority of the UN Security Council resolutions, albeit resolutions adopted pursuant to requests by the government of Iraq itself. The national contingents of the MNF are themselves sovereign forces on Iraqi territory. In recognition of this, section 2 of CPA Order No.17 (Revised) provides that MNF personnel shall be immune from Iraqi process, though they must respect relevant Iraqi laws, and that they shall be subject to the exclusive jurisdiction of their sending states. But that does not affect the jurisdiction of Iraq to try Iraqi nationals present in its territory for crimes allegedly committed within that territory. In the exercise of that jurisdiction the Iraqi court has ordered the claimants' detention. The role of the British forces in relation to their detention is that of physical custodian at the request of the Iraqi court and, in effect, for the state of Iraq.

67. The subsequent formal requests by the IHT that the British forces transfer the claimants into the custody of the court have been made in the context of the criminal proceedings and are as much an exercise of Iraqi sovereign authority as the earlier orders for the claimants' arrest and detention. It is true that compliance cannot be enforced under Iraqi law against individual members of the British forces. On the plane of international law, however, we think it would be very surprising if the United Kingdom were not under an obligation to transfer the claimants into the custody of the court as requested. Failure to do so would be fundamentally at odds with the basis on which it was agreed to hold the claimants in detention and would amount to an interference with Iraq's sovereign authority in relation to criminal proceedings against its own nationals. The point is underlined by consideration of the remedies sought by the claimants in these proceedings, which are not limited to preventing their transfer to the custody of the Iraqi authorities but extend to "a mandatory order requiring the Claimants' immediate release with safe passage to an agreed location", it being made clear by the second claimant, at least, that safe passage is sought to a location outside Iraq. To allow suspected war criminals to escape the jurisdiction of the Iraqi courts would be an obvious and serious interference in the Iraqi criminal process and violation of Iraqi sovereignty.

The UK's obligation under international law to hand over the claimants

68. Since it is strongly submitted for the claimants that the United Kingdom is under *no* obligation, as a matter of international law, to comply with the Iraqi request to hand over the claimants, we need to examine the issue more closely. The existence of a duty of respect for territorial sovereignty and of non-intervention in the area of exclusive jurisdiction of other states is well established: see, for example, Oppenheim's *International Law*, 9th ed., para 119; Brownlie, *Principles of International Law*, 7th ed., pp.289-291; Shaw, *International Law*, 6th ed., pp.487-8; the *Corfu Channel* case, ICJ Rep. 1949, p.4 at p.35. Beyond that, however, the international law materials we have been shown give us only limited assistance in determining whether the circumstances to which we have referred are sufficient to give rise to an international law obligation on the United Kingdom to comply with the request of the Iraqi court.

69. There is an obvious analogy with *R (B) v Secretary of State for Foreign and Commonwealth Affairs*, where reference was made to "[t]he basic principle … that the authorities of the receiving state can require surrender of a fugitive in respect of whom they wish to exercise the authority that arises from territorial jurisdiction" (see para 50 above). It is true that the case was concerned specifically with fugitives and diplomatic asylum and that, in stating the basic principle, the court referred specifically to article 55 of the 1963 Vienna Convention on Consular Relations. On the other hand, article 55 can be seen as an expression, in its particular context, of the general principles already mentioned. It provides in paragraph 1 that, without prejudice to the privileges and immunities of the persons to whom the convention applies, "it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of the State". If, in the light of that provision, the consular officials in *R (B) v Secretary of State for Foreign and Commonwealth Affairs* were under an international law obligation to hand over the fugitives to the Australian authorities, it is difficult to see why the British forces in this case are not under an international law obligation to hand over the claimants to the Iraqi court which has asserted jurisdiction over them and at whose order and request the claimants are being held in custody.

70. A point of distinction put forward by Ms Monaghan was that the claimants have been in the physical custody of the British forces for over five years whereas the fugitives in *R (B) v Secretary of State for Foreign and Commonwealth Affairs* were simply "present" in the British consulate; but in our view that factual difference is not material to the international law question here under consideration. We have dealt already with the important change in the status of the claimants' custody following their appearance before the Iraqi court on 18 May 2006.

71. A further suggested point of distinction was based on the submission that in this case the United Kingdom has a duty or entitlement to exercise criminal jurisdiction over the claimants in the United Kingdom, by reason of the principle of universal jurisdiction set out in s.1(1) of the Geneva Conventions Act 1957 and the fact that the offences are alleged to have been committed against British citizens; and it was submitted that there is no *a priori* reason to prefer Iraq's claim to jurisdiction over that of the United Kingdom. Section 1(1) of the 1957 Act provides that "[a]ny person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach of any of the scheduled conventions or the first protocol shall be guilty of an offence". One of the scheduled conventions is the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. By article 50, grave breaches of that convention include wilful killing and torture or inhuman treatment committed against persons protected by the convention. Article 49 provides:

> "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed … such grave breaches, and shall bring such persons, regardless of their own nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party

> concerned, provided such High Contracting Party has made out a *prima facie* case."

There are materially identical provisions in articles 129 and 130 of the Third Geneva Convention relative to the Treatment of Prisoners of War, which is also scheduled to the 1957 Act.

72. In our judgment, however, none of those provisions assists the claimants' case. First, it seems likely that the obligation to search persons out and bring them before a state's own courts relates to persons on the territory of that state. That appears to be the premise of Pictet's *Commentary* to which we were referred by Mr Lewis; and although Ms Monaghan drew our attention to a Ministry of Defence publication, *The Manual of Armed Conflict*, which says at para 1.30.5 that states are obliged under the conventions to bring before their courts "persons in their jurisdiction", we do not read this as a considered statement that the conventions extend to exceptional cases of extra-territorial jurisdiction where the persons concerned are on the territory of another state. Secondly and in any event, since the claimants have already been handed over to the Iraqi court and their continued detention is at the order and request of the Iraqi court, we do not think that there could be a continuing obligation on the United Kingdom to bring the claimants back to this country for trial or that the taking of such action at this stage would be consonant with the relevant provisions of the conventions.

73. A closer and more interesting parallel than that provided by *R (B) v Secretary of State for Foreign and Commonwealth Affairs* is to be found in *Munaf v Green*, a decision of the US Supreme Court dated 12 June 2008. The case concerned two American citizens, Munaf and Omar, who travelled voluntarily to Iraq and allegedly committed crimes there. Each was arrested and detained as a security internee by US forces forming part of the MNF. Munaf's case was referred to an Iraqi court (the CCCI) for criminal investigation and prosecution. He was found guilty of kidnapping but his conviction was vacated by the Iraqi Court of Cassation and the case remitted to the CCCI for further investigation: the Court of Cassation directed that he was to remain in custody pending the outcome of further criminal proceedings. A decision was taken to refer Omar's case to the CCCI, but the referral had been prevented by US legal proceedings. Habeas corpus petitions were filed in the US on behalf of both men but were ultimately refused by the Supreme Court. The judgment of the Supreme Court has to be approached with caution because of the very different jurisdictional context in which it was given, but it contains helpful observations about the international legal position and the relationship between the Iraqi courts and the national contingents of the MNF providing physical detention facilities for individuals being proceeded against in the Iraqi courts. We quote a few passages from pp.17-21 of the judgment:

> "Given these facts, our cases make clear that Iraq has a sovereign right to prosecute Omar and Munaf for crimes committed on its soil. As Chief Justice Marshall explained nearly two centuries ago '[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute' …
>
> In the present cases, the habeas petitioners concede that Iraq has the sovereign authority to prosecute them for alleged

> violations of its law, yet nonetheless request an injunction prohibiting the United States from transferring them to Iraqi custody. But as the foregoing cases make clear, habeas is not a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them.
>
> Petitioners' 'release' claim adds nothing to their 'transfer' claim. That claim fails for the same reasons the transfer claim fails, given that the release petitioners seek is release in a form that would avoid transfer …. Such 'release' would impermissibly interfere with Iraq's 'exclusive jurisdiction to punish offenses against its laws committed within its borders' …; the 'release' petitioners seek is nothing less than an order commanding our forces to smuggle them out of Iraq ….
>
> Moreover, because Omar and Munaf are being held by United States Armed Forces at the behest of the Iraqi Government pending their prosecution in Iraqi courts, … release of *any* kind would interfere with the sovereign authority of Iraq 'to punish offenses against its laws committed within its borders' …. This point becomes clear given that MNF-I, pursuant to its UN mandate, is authorised to 'take all necessary measures to contribute to the maintenance of security and stability in Iraq' … and specifically to provide for the 'internment [of individuals in Iraq] where this is necessary for imperative reasons of security' ….
>
> While the Iraqi Government is ultimately 'responsible for [the] arrest, detention and imprisonment' of individuals who violate its laws …, the MNF-I maintains physical custody of individuals like Munaf and Omar while their cases are being heard by the CCCI …. Indeed, Munaf is currently held … pursuant to the express order of the Iraqi Courts …. As that court order makes clear, MNF-I detention is an integral part of the Iraqi system of criminal justice MNF-I forces augment the Iraqi Government's peacekeeping efforts by functioning, in essence, as its jailor. Any requirement that the MNF-I release a detainee would, in effect, impose a release order on the Iraqi Government".

74. In the light of those various materials and the submissions made in relation to them, we accept the Secretary of State's contention that the United Kingdom is under an international law obligation to comply with the request of the IHT to transfer the claimants into the custody of that court.

Article 1 jurisdiction: the arguments as to attribution

75. Where does all this take one as regards the application of the Convention and the HRA 1998? The primary conclusion that the Secretary of State seeks to draw is that the claimants fall outside the article 1 jurisdiction of the United Kingdom, because the

requirements of the Iraqi authorities made pursuant to Iraqi law, and with which the United Kingdom is obliged to comply as a matter of international law, are *not attributable* to the United Kingdom.

76. By way of example, reliance is placed on *Drozd and Janousek v France and Spain* (1992) 14 EHHR 745, in which the applicants complained that their convictions for criminal offences by courts in Andorra violated articles 5(1) and 6 of the Convention. The case was brought against France and Spain on the basis that judges from those countries sat as members of Andorran courts and the acts complained of could therefore be attributed to France or Spain. The Strasbourg court rejected that line of argument, on the ground that the judges did not sit in Andorran courts in their capacity as French or Spanish judges; the courts exercised their functions in an autonomous manner, not subject to supervision by the authorities of France or Spain; and there had been no attempt by the French or Spanish authorities to interfere with the applicants' trial (see para 96 of the judgment). Similarly, it is submitted by Mr Lewis, the Iraqi courts are independent and are not subject to supervision by or interference from the United Kingdom, and their actions cannot therefore be attributed to the United Kingdom.

77. Reliance is also placed on the judgment of the Strasbourg court dated 14 May 2002 in *Gentilhomme v France* (Applications nos. 48205/99, 48207/99 and 48209/99). The official version of the judgment is available only in French, but we have been provided with a translation by the Foreign and Commonwealth Office which, subject to one small point, is not the subject of material disagreement. In 1962 France and Algeria had signed a statement of principle on cultural co-operation which provided *inter alia* for French children residing in Algeria, including those having dual French and Algerian nationality under French law, to receive formal education in French state schools, a number of which were thus established in Algerian territory. Subsequently the Algerian government informed the French authorities that children of Algerian nationality (including those with dual French and Algerian nationality, since Algerian law did not recognise their dual nationality) would no longer be able to enrol in such schools. The applicants complained as against France that this constituted a breach of their children's rights under the Convention. The court held, however, that the children did not fall under the jurisdiction of France within the meaning of article 1 of the Convention. The court referred to paras 59-61 of the judgment in *Bankovic* (set out at para 35 above) and concluded as follows:

> "The facts complained of in this case, which the applicants contend constitute a violation of Article 2 of Protocol No.1 to the Convention and of Articles 8 and 14 of the Convention, are thus the result of a decision taken unilaterally by Algeria. [Notwithstanding / whatever] the legality of that decision in the light of international law, it in effect constitutes a refusal on the part of Algeria to comply with the agreement of 19 March 1962. The French authorities, who exercised 'jurisdiction' in Algerian territory in this case solely on the basis of that agreement, could only draw conclusions from that refusal as regards the provision of formal education to children in the same situation as the applicants' children.

> In short, the facts complained of were caused by a decision attributable to Algeria, adopted by it with no possibility of appeal on its own territory and not open to any review by France. In other words, in the particular circumstances at issue here, France cannot be held responsible for those facts …."

78. Again, the corresponding submission made here by Mr Lewis is that the claimants are detained in Iraq because of a unilateral decision of the Iraqi courts for which the United Kingdom cannot be held responsible, and that they are therefore not within the jurisdiction of the United Kingdom for the purposes of article 1.

79. Mr Lewis's submissions on attribution and responsibility, in putting their entire focus on the jurisdiction and legal authority of the Iraqi courts over the claimants, suggest that the British forces have no autonomous role in the matter of the claimants' detention or transfer into the custody of the IHT. But plainly they do. They are lawfully present in Iraq as a contingent of the MNF pursuant to a UN mandate, subject to the exclusive jurisdiction of the United Kingdom and independent of the Iraqi state. The Iraqi Prime Minister's letter annexed to UNSCR 1790 (para 12 above) refers to an objective that the government of Iraq will be responsible for arrest, detention and imprisonment tasks, but that letter acknowledges the role of the MNF in carrying out such tasks and it can have no effect on the autonomous status of the national contingents of the MNF in so acting. The British forces have physical custody and control of the claimants. They have it in their power to refuse to transfer the claimants to the custody of the IHT or indeed to release them, even though to act in such ways would be in breach of the United Kingdom's obligations under international law. Thus the transfer of the claimants into the custody of the IHT would in our view be an action properly attributable in law to the United Kingdom. The case is distinguishable from *Drozd* and *Gentilhomme*, in each of which the actions complained of lay altogether outside the control of the contracting state or states against which the proceedings were brought. There is a closer analogy with *Munaf v Green*, even allowing for the very different legal context. In holding that there was jurisdiction to consider the habeas corpus petitions in that case, the Supreme Court relied on the fact that Munaf and Omar were in the physical custody of US soldiers who answered only to a US chain of command, and observed that "it is unsurprising that the United States has never argued that it lacks the authority to release Munaf or Omar, or that it requires the consent of other countries to do so" (page 8).

80. Reference was made to article 6 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (2001). Article 6 provides that "[t]he conduct of an organ placed at the disposal of a State by another State shall be considered as an act of the former State under international law if the organ is acting in the exercise of the governmental authority of the State at whose disposal it is placed". In our judgment, supported by the commentary in Crawford, *The International Law Commission's Articles on State Responsibility*, the article deals with a limited situation in which the organ is acting under the exclusive direction and control of the state at whose disposal it is placed. That is not the position of the British forces in Iraq, which have not been placed at the disposal of the state of Iraq in the sense envisaged by article 6 and which remain under British direction and control. We take the view that the article does not assist the Secretary of State's case.

81. We have also borne in mind the decision of the House of Lords in *Al-Jedda* (cited above) that the actions of the UK contingent of the MNF in Iraq were attributable to the United Kingdom; but as we have already said, the legal context of that case was materially different, and their Lordships were concerned with the materially different question of whether the detention of the claimant was attributable to the United Nations rather than to the United Kingdom (see paras 43 and 62 above).

Conclusion on article 1 jurisdiction

82. The conclusion we have reached is that the claimants do fall within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention. Notwithstanding that the Iraqi courts have asserted and exercised jurisdiction and legal authority over the claimants, and that the United Kingdom is obliged as a matter of international law to comply with the request of the Iraqi court for the claimants to be handed over, the fact remains that the claimants are at present in the physical custody of the British forces and that their transfer to the custody of the Iraqi court would be an act attributable to the United Kingdom, not to Iraq. The very real differences in legal context, important though they are, are not sufficient in the final analysis to distinguish the position of the claimants from that of Mr Mousa in *Al-Skeini* and of the claimant in *Al-Jedda* with regard to article 1 jurisdiction. The analogy with the extra-territorial exception for embassies and the like still holds good. The situation is one in which it may not be possible to secure the full range of Convention rights and freedoms to the claimants, but *Al-Skeini* shows that this does not matter (see para 52 above). One area of Convention rights which it is possible to secure relates to protection against ill-treatment while in the physical custody of the British forces. On the Secretary of State's case the Convention would not be engaged even if the claimants were to suffer violence of the kind that allegedly caused the death of Mr Mousa. That would be a cause of concern despite the existence of other possible sanctions, both disciplinary and criminal. Our conclusion on article 1 jurisdiction, however, meets the concern.

The application of the Soering principle

83. The claimants' concern in these proceedings, however, relates to the treatment to which they say they may be subject if they are handed over to the Iraqi authorities, and they contend that, once they are found to be within the article 1 jurisdiction of the United Kingdom, they can rely on the *Soering* principle to resist any such transfer. We have already set out the normal way in which that principle applies when it is sought to resist removal from a host state to a receiving state (paras 45-46 above). The claimants' case is that the principle applies with full force in the present case.

84. As we understood the submissions advanced by Mr Lewis on behalf of the Secretary of State, he contended that the *Soering* principle applies only where a person *within the territory* of a contracting state is to be returned to another state, and that it has no application where, as here, a person is already within the territory of the receiving state. He noted that in *R (B) v Secretary of State for Foreign and Commonwealth Affairs* this point was left open and the court decided the case on the basis of an assumption: see para 88 of the judgment, where the court stated "if the *Soering* approach is to be applied to diplomatic asylum …". For our part, we see no justification for limiting the application of the *Soering* principle in the way suggested by Mr Lewis. The rights and freedoms under the Convention are to be secured, by

virtue of article 1, to persons *within the jurisdiction* of a contracting state. That encompasses the exceptional cases of extra-territorial jurisdiction as much as the normal situation of territorial jurisdiction. If a person is within the jurisdiction of a contracting state, he is entitled in principle to the protection of the Convention irrespective of whether he is present on the territory of the contracting state or elsewhere, including the territory of the receiving state.

85. Moreover the essential justification for the principle adopted in *Soering* does not depend on territorial boundaries. For example, the objection to surrendering a person in circumstances that would expose him to the risk of torture is equally valid if the surrender takes place within the territory of the receiving state as if it takes place across state borders. The point is underlined by observations at para 33 of Lord Bingham's opinion in *A and Others v Secretary of State for the Home Department (No.2)* [2006] 2 AC 221. Lord Bingham referred to the fact that it was common ground that the international prohibition of the use of torture enjoyed the enhanced status of a *jus cogens* or peremptory norm of general international law; and he said that the implications of the *jus cogens* nature of the international crime of torture were fully and authoritatively explained by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furundzija* (10 December 1998, Case No. IT-95-17/T 10). The passage he quoted from that judgment stated *inter alia* that "states are obliged not only to prohibit and punish torture, but also to forestall its occurrence" and referred to the decision in *Soering* in support of the proposition that "international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman or degrading treatment)".

86. Our rejection of Mr Lewis's contention that the *Soering* principle applies only to transfers across territorial (as opposed to jurisdictional) boundaries is also supported by materials emanating from the UN Committee against Torture and other commentaries which Ms Monaghan drew to our attention but to which we think it unnecessary to make detailed reference.

87. We accept that the application of the *Soering* principle in a situation such as the present is capable of producing serious difficulties in relation to remedies. As Mr Lewis pointed out, in the ordinary course where the *Soering* principle is successfully invoked the applicant can simply remain on the territory of the host state. In the present case, however, if the claimants are able successfully to rely on the *Soering* principle to resist their transfer into the custody of the IHT, there is no obvious alternative available. It may not be possible for them to remain in the custody of the British forces in Iraq, since the UN Security Council's authorisation for the presence of the MNF in Iraq expires at the end of 2008 and any Iraqi permission for the continued presence of the British forces in Iraq thereafter may not include permission to retain the claimants in custody. The claimants say that to release them onto the streets of Basra would expose them to serious risk and would itself be contrary to the Convention. For the British forces to provide the claimants with safe passage to the United Kingdom or a third country or another location in Iraq would be a violation of Iraqi sovereignty and a further breach of the United Kingdom's international obligations, as well as having other legal and diplomatic implications. Those considerations may reinforce the argument, considered below, for holding that the United Kingdom's obligations under the Convention are qualified by its other

obligations under international law, but we do not think that they provide a proper basis for holding that the *Soering* principle has no potential application at all.

88. We therefore approach the matter on the basis that the *Soering* principle is capable of applying to the transfer from UK jurisdiction to Iraqi jurisdiction even though the claimants are already on the territory of Iraq and their transfer would take place within the territory of Iraq.

The effect of the UK's international law obligation to transfer the claimants

89. A much more difficult question is whether, as Mr Lewis further contends, the application of the *Soering* principle is qualified in this case by the international law obligations of the United Kingdom to comply with the request of the Iraqi court and not to interfere in the Iraqi criminal process or violate Iraqi sovereignty. In *R (B) v Secretary of State for Foreign and Commonwealth Affairs* the court held in effect that the *Soering* principle, if it applied at all to diplomatic asylum, was qualified in its application by the requirements of public international law (see paras 49-51 above). The basic principle of international law relevant to that case was that the authorities of the receiving state could require surrender of a fugitive in respect of whom they wished to exercise the authority that arose from territorial jurisdiction; and the court held that where such a request was made the Convention could not normally require the diplomatic authorities of the sending state to permit the fugitive to remain within the diplomatic premises in defiance of the receiving state. This was subject to an exception where it was clear that the receiving state intended to subject the fugitive to treatment so harsh as to constitute a crime against humanity, or possibly if a refusal was clearly necessary in order to protect the fugitive from the immediate likelihood of experiencing serious injury. That exception, apparently drawn from the norms of public international law, was regarded as imposing a different test, with a higher threshold, than the test normally applicable in accordance with the *Soering* principle under article 3 of the Convention. Thus, when it came to examining whether the conditions at the detention centre from which the applicants had escaped were such that to hand them over to the Australian authorities for return to that centre would be an infringement of the Convention, the court said that the critical question was not whether they would be subject to treatment contrary to article 3, but "whether the perceived threat to the physical safety of the applicants when they sought refuge in the Melbourne consulate was so immediate and severe that the officials could have refused to return them to the Australian authorities without violating their duties under international law" (para 93 of the judgment). The court concluded that the applicants would not be subject to the type and degree of threat that, under international law, would have justified granting them diplomatic asylum and that a refusal to return them to the Australian authorities as requested would therefore have infringed the obligations of the United Kingdom under public international law. That was the basis on which the court held that the facts gave rise to no infringement of the Convention.

90. Ms Monaghan submitted that, given the weight of other authorities concerning the *Soering* principle, the decision in *R (B) v Secretary of State for Foreign and Commonwealth Affairs* should not be read as laying down general principles. Further, the case concerned the institution of diplomatic asylum and was based upon very limited (and old) authority, in the context of a denial by most states of the institution itself and where the law itself is ill-defined.

91. We accept, of course, that the court's focus was on the law relating to diplomatic asylum, which is an area with its own difficulties. But as we have indicated, the decision depended on a deeper principle which, on the face of it, is capable of general application. The court proceeded on the basis that other international law obligations of the United Kingdom prevailed over or qualified its obligations under the Convention. In adopting that approach, the court relied heavily on the importance attached in *Bankovic* to principles of international law, but did not explain the precise basis on which the relevant principles of international law displaced the obligations otherwise arising under the Convention. That other international obligations may prevail over the Convention has since been confirmed by the decision of the House of Lords in *Al-Jedda*, but that was a special case in which the decision turned on an express provision in article 103 of the UN Charter that in the event of a conflict between the obligations of member states under the Charter and their obligations under any other international agreement, their obligations under the Charter were to prevail (see para 43 above). There was nothing like that in *R (B) v Secretary of State for Foreign and Commonwealth Affairs*. And notwithstanding the importance attached in *Bankovic* to achieving, so far as possible, conformity between the Convention and other principles of international law, we think that the Strasbourg court would be very slow to allow the protection conferred by the Convention to be displaced by other international law obligations of contracting states. *Soering* itself was an extradition case, but there was no suggestion that obligations arising under the relevant extradition treaty might qualify the application of article 3.

92. In short, we have real doubts as to the approach in *R (B) v Secretary of State for Foreign and Commonwealth Affairs*. We take the view, however, that we ought to follow it, both because the decision is binding upon us and because it would in any event be of strong persuasive authority, especially given the parallels between the situation with which that case was concerned and the situation in the present case: each involves persons in the jurisdiction of the United Kingdom but on the territory of the requesting state, in circumstances where the United Kingdom has an obligation under international law to comply with the request. Indeed the circumstances of the present case, in particular the fact that the British forces have accepted the role of physical custodian of the claimants at the request of the Iraqi court and, in effect, for the state of Iraq may be thought to provide a stronger reason why effect should be given to such an international law obligation of the United Kingdom over the obligations that would otherwise arise under the Convention. The point is given even greater weight by the problems we have mentioned in relation to remedies and the further violations of international law to which the further steps sought by the claimants would appear to give rise (para 87 above).

93. If the approach in *R (B) v Secretary of State for Foreign and Commonwealth Affairs* is adopted, it is still necessary to consider the possibility of an exception to the international law obligation to hand over the claimants. As we have said, the court in that case said that international law would not require a fugitive to be handed over "[s]hould it be clear … that the receiving state intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity" (para 88 of the court's judgment); but it also thought that there might be a lesser test, such that it would be permissible to decline to hand over the applicants if "this was clearly necessary in order to protect them from the immediate likelihood of experiencing serious injury" (para 89). The source of those tests was not given, and the court's thinking was

undoubtedly conditioned to some extent by the particular context of diplomatic asylum.

94. It seems to us that, in considering the parties' respective cases as to the risks faced by the claimants if transferred into the custody of the Iraqi court, we should consider both of the tests applied in *R (B) v Secretary of State for Foreign and Commonwealth Affairs* and should also look more generally at whether the claimants would be exposed to treatment contrary to internationally accepted norms. If the treatment to which the claimants would be exposed would provide a justification in international law for declining to transfer them into the custody of the Iraqi court, then in our view the international law obligations of the United Kingdom fall away and the Convention can be relied on in the normal way to resist the transfer. If, however, there is no such justification for declining to transfer them, the United Kingdom's compliance with its international law obligation to transfer them cannot be prevented by the Convention.

Summary

95. To summarise, we find that: (1) the claimants are within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention and therefore of the HRA 1998; (2) in accordance with the approach in *R (B) v Secretary of State for Foreign and Commonwealth Affairs*, the Convention is qualified in its application by the United Kingdom's obligation under public international law to comply with the request of the Iraqi court to transfer the claimants into the custody of the court; (3) if, however, the claimants would be exposed to such ill-treatment on transfer as to provide a justification in international law for declining to transfer them, the United Kingdom cannot then rely on its international law obligation as qualifying the application of the Convention, and the claimants can invoke the Convention and in particular the *Soering* principle in the normal way to resist their transfer.

96. As we explain below, our adoption of that approach rather than the unqualified application of the Convention leads in practice, on the facts of this case, to a different outcome in only one, though very important, respect, concerning the risk of the death penalty being imposed and carried out if the claimants are convicted.

The issues of risk

Introduction

97. The claimants resist their transfer into the custody of the Iraqi court by reference to three areas of risk, namely (i) unfair trial, (ii) the death penalty and (iii) torture or inhuman or degrading treatment or punishment. We will consider each area in turn. In each case we will examine the position both under the Convention and, where necessary, by reference to the general position under international law.

98. There is a large body of evidence before the court by way of background materials, expert evidence and other witness and documentary evidence. The judgment of the Grand Chamber of the Strasbourg Court in *Saadi v Italy* (Application no. 37201/06, judgment of 28 February 2008) gives helpful guidance on the general approach to be adopted towards such evidence when assessing risk. Although the court's observations are directed specifically at article 3 of the Convention, they can be applied with appropriate modifications to the other issues we have to consider:

> "128. In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis all the material placed before it or, if necessary, material obtained proprio motu .... In cases such as the present the Court's examination of the existence of a real risk must necessarily be a *rigorous one*.
>
> 129. It is in principle for the applicant to adduce evidence proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 …. Where such evidence is adduced, it is for the Government to dispel any doubts about it.
>
> 130. In order to determine whether there is risk of ill treatment, the Court must examine the *foreseeable consequences* of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances ….
>
> 131. To that end, as regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or government sources, including the US State Department …. At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 … and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence" (emphasis added).

99. Although we have endeavoured to refer to the main features of the evidence below, our coverage of it is inevitably far from exhaustive. But we have taken the entirety of the evidence into account in reaching our conclusions.

Unfair trial

Introduction

100. The claimants contend that if they are transferred into the custody of the Iraqi court to stand trial before the IHT, there will be an infringement of their rights under article 6 of the Convention. The principle of non-refoulement applies to article 6 rights, but the threshold of success is a high one, namely the risk of "a flagrant denial of a fair trial" in the receiving state (see e.g. *Soering* para 113, *R (Ullah) v Special Adjudicator*, para 24). The word "flagrant" is intended to convey a breach of the principles of the fair trial guaranteed by article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article: see *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, in particular per Lord Hope at para 3, Lord Bingham at paras 34-35,

Baroness Hale at para 45, and Lord Carswell at paras 53-57; see also *Othman (Jordan) v Secretary of State for the Home Department* [2008] EWCA Civ 290, in particular at paras 15-19.

101. Ms Monaghan contends that there will be a flagrant denial of the claimants' rights to a fair trial because of: (i) the risk that evidence will be obtained from the claimants by torture; (ii) the risks to the safety of IHT staff and defence lawyers; (iii) an absence of effective arrangements for protecting witnesses; (iv) regular changes of the membership of the IHT; (v) a lack of independence from the Iraqi government on the part of the IHT; and (vi) defence counsel's inability properly to represent their clients.

102. Mr Lewis disputes each of these allegations and he also relies on the procedural and substantive rights given to defendants before the IHT to ensure that they have a fair trial.

103. In response, Ms Monaghan refers to the circumstances of the trial and the appellate judgments of the IHT in its first two cases, entitled the *Dujayl* and *Anfal* cases. The background to the *Dujayl* case is that seven of the accused were convicted in November 2006, four of whom (including Saddam Hussein) were given capital sentences which were carried out in late 2006 and early 2007. There were seven defendants at the start of the *Anfal* case but the number was reduced to six after the execution of Saddam Hussein. Of the remaining six, five were convicted of various crimes including the crime of genocide. Three of them were sentenced to death by hanging. Thus seven out of the twelve individuals convicted by the IHT have received death sentences. The capital sentences given by the *Anfal* trial chamber were confirmed by the IHT appellate chamber but they have not yet been carried out despite provisions in Iraqi law which require executions to be carried out within thirty days of the end of the appellate process. (We should add that since the hearing before us a trial judgment has been delivered in the *1991 Uprising* trial.)

104. Both sides have adduced expert evidence. The claimants rely on the evidence of Mr William Wiley who in September 2005 became the Human Rights Officer in the United Nations Assistance Mission for Iraq, where he was employed in Baghdad until March 2006. He was then employed by the Regional Crimes Liaison Office ("the RCLO") of the US Embassy in Baghdad but seconded as International Law Advisor to the IHT, which assigned him in turn to the Defence Office for the length of his tenure with the tribunal. Mr. Wiley held that job until 31 March 2008 when he left Iraq in order to become one of the directors of a consultancy that specialises in, among other things, "the delivery of rule-of-law capacity-building projects to the justice and security-sectors in developing and post-conflict states".

105. The Secretary of State relies in reply on the evidence of Mr Charles Spillers who has been the Rule of Law Liaison to the IHT since July 2008, originally with the RCLO and more recently as part of the Rule of Law Coordinator's Office of the US Embassy in Baghdad. Previously he worked as an attorney advisor with the RCLO, and then as acting head of that office, from May to November 2007. During his assignments with the RCLO he worked with the IHT on a daily basis, particularly with its president, investigative judges and prosecutors, and he continues to do so in his role as Rule of Law Liaison to the IHT.

106. We attach considerable significance to the fact that Mr. Wiley left Iraq at the end of March 2008 and so, unlike Mr. Spillers, his first-hand knowledge of the judicial system in Iraq and the IHT ended at that time. We bear in mind, however, that Mr Wiley does not believe that matters could have improved radically since he left; and we also bear in mind that, as stressed by Ms Monaghan in her submissions, Mr Spillers's present stint at the IHT has been a relatively short one.

Evidence obtained by torture

107. The original claims made by the claimants were that "there is strong evidence that the detainees held by the Iraqi authorities are subjected to torture in order to extract confessions" and that "there are substantial grounds for believing there to be a real risk of such evidence being used against the claimants in any criminal proceedings they may face" (claimants' grounds, para 27 (iii)).

108. No cogent evidence has been adduced to support those contentions, notwithstanding that there have been four witness statements made by each of the claimants. They have been in a British-run detention facility since December 2003, having been held initially at a temporary facility and then, since 20 April 2007, at the Divisional Internment Facility at Basra International Airport. Further, Mr Spillers has explained that all IHT interrogations must be videotaped and so there would be a video record of whether there has been any coercion. It is also noteworthy that Mr Ibrahim Kamal, who acted as the Iraqi lawyer for the claimants from February 2005 until December 2006, has contended in a witness statement that the evidence against the claimants comes from unreliable sources, but he has not made any allegation that any evidence obtained by the prosecution has been obtained as a result of torture.

109. There are many allegations made by the claimants (and in particular by the second claimant in his second witness statement) that evidence will be given against them which will be untruthful because of personal vendettas and bias against them by reason of their membership of, and activities within, the Ba'ath party. It is neither necessary nor possible for us to reach any conclusions on those allegations because they are matters for the Iraqi courts to consider. More significantly, we are quite satisfied that even if the allegations about this evidence are true, they do not establish or get anywhere close to establishing that the claimants would face a real risk of a flagrant denial of a fair trial on the basis of evidence obtained by torture.

Safety risks to IHT staff and defence counsel

110. In Mr Wiley's opinion, IHT staff and defence counsel cannot perform their work in an adequate manner because of fear. He bases this conclusion on the fact that "numerous IHT staff and defence counsel, as well as several family members of IHT staff and defence counsel have been assassinated since the establishment of the IHT owing to the connections of the victims, however tenuous, in some instances, to the tribunal".

111. In support, he points out that one IHT judge and a number of court staff were shot and killed prior to the first IHT trial, and during the *Dujayl* trial four defence counsel were shot and a fifth disappeared. In addition, the *Anfal* trial started several months prior to the handing down of the judgment in *Dujayl* and the brother of the lead *Anfal* prosecutor was shot and killed, as were the brother of the presiding judge and the brother and young nephew of one of the accused. In addition, the wife of the court-

appointed lawyer who had presented the closing arguments in the defence of Saddam Hussein was kidnapped and shot. Court staff ranging from maintenance workers to bailiffs were also shot.

112. On the basis of this information, Mr Wiley considers that IHT staff and defence counsel in cases before the IHT cannot reasonably be expected to focus entirely or even sufficiently upon their professional responsibilities in the administration of justice when their lives and those of their family members are constantly under direct threat. He also makes the point that the claimants' defence witnesses would be vulnerable while in transit to and from Baghdad and the International Zone. He explains that although witnesses can be hidden behind a curtain, the identities of even those witnesses protected in this way were widely known in Iraq.

113. Mr Spillers explains that although some of Mr Wiley's criticism is warranted, the matters relied on by Mr Wiley occurred when the IHT was a new institution functioning in a politically and generally unstable environment. Mr Spillers does not consider the *Dujayl* and *Anfal* trials to be useful precedents for assessing the prospects of the claimants now receiving a fair trial before the IHT. He stresses that the unique circumstances under which the *Dujayl* trial was conducted, with Saddam as a defendant, contrast starkly with the current conditions under which the IHT operates.

114. In support of this conclusion Mr Spillers points out first that no defence attorneys have been killed, kidnapped or been the subject of violent attacks in 2008, and second that no IHT staff or trial witnesses have been kidnapped or killed in 2008. He also states that both the International Zone and the IHT courthouse are amongst the safest places in Iraq and he does not consider that any defence counsel would now feel physically threatened in the IHT courthouse.

115. The evidence we have received concerning the early trials is obviously very troubling, but we are conscious that security and other conditions in Iraq have improved and we consider that the best indication of how safe life would be for IHT staff and defence counsel during the trial of the claimants is provided by the up-to-date position as described by Mr Spillers rather than by what went on in earlier times. The evidence of Mr. Spillers satisfies us that IHT staff and counsel would not be so concerned about their safety and the safety of their families as to prevent the claimants from having a fair trial.

Witness security

116. Mr Wiley contends that there are no effective arrangements for protecting witnesses. Mr Spillers considers these criticisms to be unjustified. On the basis of discussions with two of the IHT judges, namely President Aref and Judge Mohammed, he gives the following information:

    i) The IHT provides security and transportation for prosecution and defence witnesses to and from their home locations. They are brought to the International Zone, where they are provided with comfortable and secure housing inside the heavily guarded IHT compound. Much of this was as a result of criticisms made of the *Dujayl* case.

ii) In the *1991 Uprising* case, defence witnesses located in Iraq who were hesitant to go to Baghdad for security reasons or who were unable to go to Baghdad for any reason were permitted to give witness statements before local magistrates.

iii) The IHT is currently working with the Iraqi Ministry of Foreign Affairs to arrange for witnesses living outside Iraq, in for example Jordan or Syria, to provide statements to a local consulate.

117. Mr Spillers also explains that in the *Anfal* case all the relevant witnesses were former senior Iraqi military officers who faced assassination or imprisonment, but this would not be the position in a trial of the claimants.

118. If the claimants wished to call witnesses, we have no reason to believe that the measures set out above would not give adequate security to those witnesses.

Judicial stability

119. In his witness statement, Mr Wiley says that IHT judges were routinely and frequently replaced in the trials held throughout his period at the IHT, to the extent that he had difficulty knowing at any time which judges were actually hearing a particular case. Mr Spillers accepts that this complaint was justified in relation to the *Dujayl* trial but his view is that it does not represent the current state of affairs: first, there was only one substitution in the *Anfal* case; and, second, there have been no permanent replacements of judges in the cases now before the IHT, namely the *1991 Uprising* case, the *Merchants* case and the *Friday Prayers* case. There may have been a temporary substitution when a judge was ill, such as when Judge Raouf missed a couple of sessions in the *Merchants* case in August 2008 due to illness, but he then returned to the court.

120. Mr Wiley points out that the Iraqi political officials who have in the past demanded changes of judges and the IHT officials who facilitated them still occupy the same positions of authority. Even so, we regard it as of crucial importance that, irrespective of what happened in the past, there have been no permanent replacements in the current trials, and we cannot accept that there is a sufficient risk of replacement of the judiciary as to operate as a factor prejudicing the ability of the claimants to receive a fair trial.

The independence of the IHT

121. It is accepted by the claimants, first, that the independence of the judiciary is guaranteed by Article 19(1) of the Iraqi Constitution and, second, that Article 1 of the IHT's statute guarantees the "complete independence" of the tribunal. There are also other provisions in the IHT rules which impose on the judges an obligation to act independently and not to be subject to, or to respond to, any instructions or directions issued by the executive, the government or any other party. The thrust of the complaint, however, is that irrespective of what is set out in the Iraqi statutes the claimants' trial will be conducted before members of the IHT who are not in practice independent of the Iraqi government.

122. Mr Wiley does not think that any person brought before the IHT can be assured of a fair trial in front of judges who are independent because, in spite of the efforts of

certain IHT judges to maintain their independence as against the executive and the office of the Prime Minister, there is evidence that successive Iraqi Prime Ministers and their staff have succeeded at numerous critical junctures in the life of the IHT in perverting or otherwise undermining the administration or course of justice. Thus Mr Wiley believes that the IHT judges "are rarely if ever free to execute their professional obligations without the burden of political oversight and interference".

123. In response, Mr Spillers puts forward a convincing case. He points out that Judge Raouf, who was the presiding judge of the *Dujayl* trial chamber, regularly and steadfastly refused to take calls during the trial of Sadaam Hussein from the Prime Minister of Iraq. What is of great importance is that in spite of this clear manifestation of his independence, Judge Raouf was not replaced and indeed he remained as the presiding judge in the *Merchants* trial, in which the defendants include Tariq Aziz, who was former Deputy Prime Minister and the Foreign Minister in the Saddam regime.

124. Mr Spillers also points out that even during the Saddam regime the judiciary tried to remain independent, with the result that Saddam could not rely on the traditional judicial mechanisms to achieve his political aims. Instead he resorted to Special Revolutionary Courts, which conducted political trials and which led to the execution of 148 citizens (including 39 minors) as a result of which the Chief Judge has now been found guilty of crimes against humanity.

125. We attach some significance to the lack of interference with the way in which Mr Wiley himself performed his duties in Iraq. From September 2005 until March 2006 he was the Human Rights Officer whose task it was to monitor IHT proceedings and to produce reports which were included in the human rights reports released to the public and to United Nations bodies. From then until March 2008 he was employed as International Law Advisor to the Defence Office within the IHT and his superior was the President of the IHT. He has explained that at no time did the President of the IHT interfere with his work advising the defence counsel associated with the IHT or in his monitoring role. We infer that that no efforts were made to undermine his independence in this important role.

126. Mr Wiley states that "the strongest weapon in the arsenal of Iraqi politicians trying to seek to intimidate IHT judges" was the process known as de-Ba'athification, which involves punishing those who were involved in supporting or acting for the Ba'ath Party while Saddam was in power. He gives examples of three cases in which IHT Judges were compelled on the orders of Iraqi political authorities to recuse themselves from sitting on panels in the face of threats that a failure to step down would lead to the individuals concerned being subjected to de-Ba'athification proceedings.

127. In response, Mr Spillers points out that the de-Ba'athification process is no longer likely to have any impact on the present members of the IHT. All the judges now sitting in the IHT are likely to have gone through the vetting processes associated with de-Ba'athification, with the result that the threat of removal due to past Ba'ath Party membership is a matter of historical interest and is no longer a relevant factor.

128. We have also been reassured by Mr Spillers's evidence that the turmoil associated with the replacement of trial judges in the trial of Saddam Hussein no longer exists

and that there have been no judicial changes taking place over the last two years in the current trials before the IHT.

129. By the same token, we have noted that Mr Wiley's examples of concerns expressed by third parties relating to the independence of the IHT all relate to matters which occurred in the *Dujayl* trial and in the *Anfal* trial in early 2007 and that, significantly, there have been no examples of such concerns being expressed since that time.

130. Taking everything together, we are satisfied that the IHT is sufficiently independent to meet the requirements of a fair trial. We are fortified in coming to that conclusion by the evidence of Mr Spillers that President Aref satisfied him, first, that those who in the past tried to influence the IHT judges have given up and, second, that they no longer make such attempts especially as the IHT judges would not now be influenced in spite of any external pressures which might be applied. We have no reason to disbelieve the opinion expressed by President Aref on this point.

The ability of IHT defence counsel properly to represent their clients' interests

131. Mr Wiley's view is that the accused brought before the IHT were to all intents and purposes denied effective representation because, first, the privately-retained defence counsel frequently represented more than one accused in the same case; second, the Iraqi lawyers who were retained were not sufficiently versed in substantive international criminal law to meet the minimum standards of representation required of them; and third, the foreign defence lawyers tended to focus upon questions and issues unrelated to the criminal culpability of their clients.

132. As to multiple representation, the problem with this arises only if and when there is a conflict of interests. In Mr Wiley's evidence there is an absence of any detail showing that multiple representation has actually caused unfairness or that it has actually led to a conflict of interests in any particular case.

133. Mr Spillers points out that Mr Wiley underestimates the impact of his own two years of work in the IHT with defence counsel, which has led to improvements in their skills. Mr Spillers quotes a comment by the Executive Director of the International Bar Association concerning the court-appointed lawyers appointed in the *Anfal* trial following the boycott of the proceedings by defence counsel: "On each occasion, the standby counsel did a superb job, particularly cross-examining witnesses and on closing arguments" (Case Western Reserve Journal of International Law, volume 39 numbers 1 and 2 2006-2007).

134. Mr Spillers attaches importance to the right given to defendants to cross-examine witnesses, which is a right they exercise in the IHT. He has been struck by the fact that "defendants often ask penetrating, insightful questions of the complainants or witnesses". He gives an example of one defendant conducting a cross-examination of a witness by using the witness's prior inconsistent statement. He points out that Judge Mohammed confirmed during a recent meeting that defendants now exercise their right more frequently than previously, even though on occasions exculpatory statements are made by the defendant to the court. Mr Spillers also notes that since summer 2008 Judge Mohammed has become more skilled and aggressive in his own cross-examination of witnesses, consistent with the role of the IHT in seeking the truth, and that this can occasionally leave little for the defence counsel to do.

135. Mr Wiley mentions an incident during the *Anfal* trial in which Judge Mohammed Ruaibi ordered that one of the defence counsel (namely Mr Badie Arif Ezaat) be arrested for contempt of court and be detained. Mr Spillers explains the circumstances in some detail. According to him, Mr Ezaat wanted to introduce into evidence a CD indicating that the Iranians had used chemical weapons during the Anfal campaigns. When Judge Mohammed dismissed this as untrue, Mr Ezaat replied that it appeared that the judge had already decided the case, and an argument followed in which reference was made to media comments made by Mr Ezaat comparing the IHT with a "slaughterhouse". Mr Spillers points out that under the relevant Iraqi codes publicly insulting a court is punishable by imprisonment, detention or a fine.

136. Mr Ezaat remained in US custody until he left the country several days later and went to Jordan, where he continued to criticise the IHT publicly. Mr Spillers says that when he looked into the matter in July 2008, he found that the arrest warrant against Mr. Ezaat had been withdrawn. He has since spoken to Mr Ezaat who stated that before returning to Iraq he would want assurances that another arrest warrant would not be issued. It seems, however, that Mr Ezaat is not pursuing the matter because, unfortunately, he is undergoing treatment for cancer.

137. Having regard to these and other matters set out in the evidence, we are not satisfied that there is a real risk of defence counsel being prevented from doing a proper job for the claimants in the event of a trial.

The rights given to defendants in the IHT

138. The IHT statute and its rules have been modelled after the International Criminal Tribunals for Yugoslavia and for Rwanda and the International Criminal Court. The protection afforded to a defendant who is tried before the IHT include the following: (a) the presumption of innocence; (b) the right to be informed of charges; (c) the right to defence counsel; (d) the right to be tried without undue delay; (e) the right to be present during the trial; (f) the right to examine or confront witnesses; (g) the right against self incrimination; (h) the right not to have silence taken into account in determining guilt; (i) the right to disclosure of exculpatory evidence and witness statements; (j) the exclusion of coerced evidence; (k) the right to ensure that interrogations are videotaped; (l) the right to pose questions directly to the witness; and (m) the right to appellate review.

139. In addition, every part of all IHT trial proceedings is broadcast on television while the verdicts are issued in a detailed written document providing explanations of findings of facts and of conclusions of law.

Conclusions on fair trial

140. The overall picture which emerges is that, although initially there were deeply unsatisfactory aspects of the IHT and trial environment, which cast doubt on the ability to provide defendants with a fair trial at that time, there have been many significant improvements since then. We see no reason to reject the evidence of Mr Spillers who, unlike Mr Wiley, is able to give up-to-date information on the IHT and its proceedings and whose witness statements we have found convincing. It is noteworthy, for example, that the IHT has in recent months ordered the release of people whom Mr Spillers describes as "high value internees". Another example,

albeit small in itself, is that in the *1991 Uprising* trial, at the end of the prosecution closing arguments, the defence asked for 30 days in which to prepare closing submissions but the IHT allowed 45 days for the purpose.

141. To date the claimants have appeared before the Iraqi courts and have denied the allegations made against them; and there can be no complaint about the way in which the courts have dealt with them. As to the future, looking at the various points individually and cumulatively, the evidence before us falls a long way short of establishing substantial grounds for believing there to be a real risk that a trial of the claimants would involve a flagrant breach of the principles guaranteed by article 6. Thus, even if the Convention were to apply in the normal way, we would reject the claim that transfer of the claimants into the custody of the IHT would be contrary to article 6.

142. In view of that finding, we think it unnecessary to give separate consideration to the general principles of international law concerning the fairness of a trial. It suffices to state the obvious point that, in the light of our findings above, the claimants' allegations in respect of the trial process can provide no sustainable reason under international law for the United Kingdom to decline to comply with its obligation to transfer the claimants into the custody of the IHT.

Death penalty

Introduction

143. On this issue, the case for the claimants is that their transfer from the custody of the British Forces to the Iraqi court in order to stand trial would be a breach of their rights under the Convention and the HRA 1998 because of the risk of the imposition of the death penalty. It is not in dispute that Iraqi law permits capital punishment or that the death penalty is a sentence open to the IHT if it finds a defendant guilty of war crimes such as those with which the claimants are charged.

144. Article 2 of the Convention provides:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law".

145. In *Soering* it was held that, as matters stood at that time, the fact that a person faced the risk of the death penalty in the receiving state did not of itself provide a ground for resisting extradition, either under article 2 or under article 3. The position has since changed by reason of the adoption of protocol no. 13, which has been ratified by all the contracting states save Russia and Azerbaijan. It replaces protocol no. 6, which also concerned the death penalty but which it is now unnecessary to consider. Article 1 of protocol no. 13 provides that:

> "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."

This effectively displaces the second sentence of article 2 of the Convention. Article 1 of protocol no. 13 has also been added to the list of "Convention rights" referred to in s.1 of the HRA 1998 and set out in schedule 1 to that Act.

146. The case for the Secretary of State is that (a) there are no substantial grounds for believing that the claimants would, if convicted, be at risk of the death penalty, so that their transfer into the custody of the Iraqi court will not infringe the rights conferred by protocol no. 13 even if the Convention applies; and (b) neither the availability of the death penalty in Iraqi law nor its imposition by the Iraqi court would be contrary to international law, so that the death penalty cannot provide a valid reason for non-compliance with the United Kingdom's obligation to transfer the claimants.

147. We should mention for completeness that the imposition of the death penalty after a flagrantly unfair trial could also be a breach of articles 2 and 3 (see *Ocalan v Turkey* (2005) 18 BHRC 293). But in view of our conclusions on the issue of fair trial, this is an aspect of the death penalty case to which we do not need to give separate consideration.

The position under the Convention

148. Our starting point is that the death penalty is a punishment available under Iraqi law for the offences with which the claimants have been charged. This means that, *prima facie*, there are substantial grounds for believing there to be a real risk that the claimants would be subject to the death penalty if tried and convicted by the IHT. In those circumstances in the light of the approach set out in *Saadi*, it is for the Secretary to State to dispel any doubts about the point (see the passage quoted at para 98 above).

149. Mr. Lewis contends that the claimants will not be subjected to the death penalty. He relies first on communications between representatives of the United Kingdom government and the Iraqi authorities, including President Aref (the President of the IHT). Ms Abda Sharif, who is Legal Adviser and Head of the Justice and Human Rights Section at the British Embassy in Baghdad, has explained that on 17 June 2008 she called on President Aref with whom the British Embassy in Baghdad has a "productive working relationship" and about whom Ms Sharif says that she has every confidence in his ability to deliver what he promises. Ms Sharif explains that at the meeting she discussed the claimants' cases and she explained the opposition of the United Kingdom government to the death penalty. She states that President Aref was sympathetic and that he invited letters from the families of the victims and the British Embassy in Baghdad opposing the imposition of the death penalty in this case. According to Ms Sharif, he stated that it would be helpful if the Embassy in its letter could waive its rights to civil compensation, and that he would then pass these letters to the trial chamber for their consideration.

150. According to Ms Sharif, the family of one of the victims has written to President Aref to seek clemency for the claimants if they are found guilty of the war crimes. This letter was sent to President Aref under cover of a letter from the British Embassy explaining the opposition of the United Kingdom government to the death penalty, seeking clemency and waiving the right of the United Kingdom government to civil compensation. Ms Sharif says that the Ministry of Defence has been unable to make contact with the family of the other victim but that its efforts to do so are continuing.

151. There was a further meeting on 29 July 2008, between President Aref and Mr Gordon Ross, who is the Second Secretary Human Rights Officer at the British Embassy in Baghdad, to consider the position if only one of the two victims' families wrote a letter seeking clemency. President Aref took the view that "this would not significantly affect the situation".

152. Ms Sharif says that she has been advised by the Honorary Legal Adviser to the British Embassy in Baghdad, who is an Iraqi lawyer, that the impact of a plea of clemency by the families of the victim in Iraq is likely to be that the Iraqi court "will not impose the death penalty in any particular case". Ms Sharif says that President Aref has confirmed that a plea for clemency by the families of the victim in Iraq is likely to be an important factor for any court in assessing what sentence would be imposed on the claimants.

153. Ms Sharif also states that a further meeting took place on 18 August 2008 between her and President Aref, in which she handed over to him the letters referred to above from the British Ambassador and the family of one of the victims (with an Arabic translation). President Aref confirmed that he would pass the letters to the investigative judge who would then provide copies to the trial chamber judges.

154. In her witness statement dated 20 August 2008 Ms Sharif states "I expect to receive a written reply from President Aref within the next 6-8 days". No letter was supplied within that period. Ms Sharif met President Aref again on 21 October 2008, on which occasion he gave her a letter containing the following:

> "With regard to the sentence, capital punishment is in the Iraqi law as well as the law of this tribunal. If the evidence obtained is sufficient to convict, then the members of this tribunal, consisting of 5 judges who have sufficient experience in voting and in the judiciary, will retreat to discuss among themselves whether to convict or not and a decision is issued either unanimously or by majority if it is 3 to 2. The dissenting member will be recorded and registered in the case papers. The sentence itself will then be discussed in terms of the nature and length. If the defendant apologises publicly for the crimes he committed against the victims, the tribunal will take this into account according to the law and is able to amend the capital punishment to a lesser punishment. Also if the victim's family drops its charges, in some cases it may affect the sentence. After the decision is issued, the decision is subject to a mandatory appeal (automatic). If it is appealed or not by one of the parties, it is put to the appeal panel consisting of 9 judges including a chairman. A decision will then be issued to either confirm or to reject."

155. That letter represents President Aref's considered written position. It is striking that the letter gives no indication whatsoever that the death penalty would not be or even probably would not be imposed. The case for the claimants is that this is not surprising in the light of the evidence of Mr Wiley, whose credentials we have already considered (para 104 above). Mr Wiley explains that during his two years of service with the IHT he did not find any evidence to indicate that there is a presumption

against the imposition of the death penalty on a person convicted of a capital offence before the IHT. Indeed his evidence is that the imposition of the death penalty in the event of conviction for a criminal offence "is deeply ingrained in the Iraqi legal profession" as "there is a presumption in favour of the imposition of the death penalty where a person is convicted of a capital offence". He points out that of the twelve prisoners sentenced to death by the IHT trial and appellate chambers as of October 2008, seven have already been executed.

156. The only contrary evidence is contained in a witness statement from Mr Spillers, whose credentials we have also considered (see para 105 above). Mr Spillers explains that he had a meeting with President Aref on 27 October 2008 in which he pursued previous enquiries about the effect of a plea for clemency on the imposition of the death sentence by the IHT. President Aref then explained the factors which would influence the IHT against imposing a death sentence in the current case, which were an admission of the crime by the claimants, a request for forgiveness from the family of the victims, a request for forgiveness of the court for the acts, and a request for leniency from the family of a victim. Mr Spillers says that President Aref explained that "the presence of just one of these factors would be enough to militate against the imposition of the death sentence".

157. According to Mr Spillers, when President Aref was asked about an assurance that the death penalty would not be imposed if the claimants were tried and convicted, he stated in English "this assurance is implicit" in his statements about the factors which would influence the courts not to impose the death penalty. Mr Spillers expresses the opinion that the claimants would not be sentenced to death even if they were tried and convicted of crimes punishable by death sentences. In his view the likely sentence would be in the region of 15 years' imprisonment.

158. Taking the evidence as a whole, we are satisfied that substantial grounds have been shown for believing there to be a real risk of the claimants being condemned to the death penalty and executed, contrary to protocol no.13, if they are transferred into the custody of the IHT. In particular: (a) the penalties for the offences with which the claimants are charged include the death penalty; (b) there is clear evidence that persons convicted of such offences are liable in practice to be sentenced to death; (c) the matters relied on as militating against the imposition of the death penalty are not sufficiently cogent or certain to negative the real risk; (d) in spite of the efforts made on behalf of the Secretary of State, no assurance has been given that the death penalty will not be imposed in this case; and (e) in any event, even if President Aref had given such an assurance, we are not satisfied it would necessarily be effective, because he does not have the authority to bind the appeal chamber which would automatically have to consider the appropriate sentence, whatever decision the trial chamber had reached.

159. In those circumstances, if the claimants were entitled to rely on the Convention in the normal way to resist their transfer, we take the view that the transfer would be in breach of their rights under protocol no. 13 and would therefore be contrary to s.6 of the HRA 1998.

The position under international law

160. Although the death penalty is prohibited by the Convention, it is not yet, in our judgment, contrary to internationally accepted norms, at least where it is imposed for serious crimes and follows on from conviction at a trial that meets the minimum standards of fairness. As to the tests in *R (B) v Secretary of State for Foreign and Commonwealth Affairs*, the imposition of the death penalty is not a crime against humanity, nor is it what the court can have had in mind when referring to the immediate likelihood of serious injury. More generally, we agree with the submissions on behalf of the Secretary of State that the availability of the death penalty in Iraqi law and its imposition by the Iraqi courts are not, as such, contrary to international law: there is no cogent evidence to suggest that they are, and much evidence to show that they are not.

161. It is true that protocol no. 13 represents a near consensus among contracting states of the Council of Europe, though two contracting states have not signed or ratified it. The same consensus can be seen in European Council Directive 2004/83/EC "on minimum standards for the qualification and status of third country nationals as refugees or as persons who otherwise need international protection and the content of the protection granted". In that directive, "serious harm" for the purposes of the test of persecution is defined in article 15 as including "death penalty or execution".

162. There are, however, many other countries, of which the United States of America is an obvious example, where the death penalty is still imposed for serious crimes. Furthermore the UN Human Rights Committee, in its General Comment No. 6, on article 6 of the International Covenant on Civil and Political Rights 1966 (the right to life), states:

> "While it follows ... that States parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the 'most serious crimes' ….
>
> The Committee is of the opinion that the expression 'most serious crimes' must be read restrictively to mean the death penalty should be a quite exceptional measure."

The charges against the claimants fall within the category of the "most serious crimes" which would justify, in the terms of the Committee's comment, the exceptional measure of the death penalty.

163. It follows that, however repugnant the death penalty may be within our domestic legal system and under the Convention, its imposition would not be contrary to international law. The risk that the claimants may be subject to the death penalty does not, therefore, operate to relieve the United Kingdom of its obligation to transfer the claimants into the custody of the Iraqi court.

Torture and inhuman or degrading treatment

Introduction

164. The case initially advanced by the claimants was that the evidence of systematic torture of detainees in the custody of the Iraqi Ministry of the Interior ("MOI") and of security internees in the custody of the Iraqi Ministry of Defence ("MOD") meant that the claimants' article 3 rights would be infringed by handing them over to the Iraqi authorities; and much evidence was adduced from organisations such as Human Rights Watch which related in the main to MOI and MOD prisons. This evidence has become of limited relevance, however, in the light of more specific information provided by the Secretary of State as to the prison to which the claimants are likely to be sent while awaiting trial and to which they would subsequently be sent if convicted. As we will explain, the evidence shows that both before and after conviction they would almost certainly be held in prisons controlled by the Iraqi Ministry of Justice ("MOJ"). So we can focus our attention on conditions in MOJ-run prisons.

165. We do not need to repeat what we have said in the context of fair trial about the use of torture to extract confessions or the use of such evidence in court (see paras 107-108 above).

166. The issue under article 3 of the Convention is whether there are substantial grounds for believing that the claimants would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment if they were transferred into the custody of the Iraqi court (so as to be detained thereafter in an Iraqi prison). How the various elements of article 3 are to be understood and applied in the context of extradition, but in relation to a very different issue, is the subject of some discussion by the House of Lords in a judgment just handed down in *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72. There has been no time to obtain submissions from the parties on the judgment, but we do not read it as having any material impact on the matters examined below.

167. The judgment in *R (B) v Secretary of State for Foreign and Commonwealth Affairs* suggests that a higher threshold applies under international law than under article 3. Whether we need to consider that question depends, however, on the conclusion we reach in relation to article 3.

The prisons in which the claimants would be held if transferred

168. Ms Abda Sharif (who, as already mentioned, is Legal Adviser and Head of the Justice and Human Rights Section at the British Embassy in Baghdad) states that the United Kingdom government is anxious to ensure that any criminal detainees who are to be transferred to the Iraqi authorities will be treated with respect for their human rights. The MoU between the UK contingent of the MNF and the MOJ and MOI (see para 20 above) states in para 4(c) of section 3 that the Iraqi authorities will provide an assurance that, following transfer to Iraqi facilities, a suspect will be treated humanely and will not be subject to torture or to cruel, inhuman or degrading treatment or punishment. Ms Sharif says that such assurances have been obtained from Mr Posho Ibrahim Ali Daza'ayee, the Iraqi Deputy Minister of Justice, and that Mr Daza'ayee is trustworthy and reliable and has a long history of fulfilling his promises.

169. Mr Gordon Ross (the Second Secretary Human Rights Officer at the British Embassy in Baghdad) met Mr Daza'ayee on 22 June 2008 in order to discuss the assurances in respect of the treatment of the claimants and their conditions of detention that were being sought before their transfer to the Iraqi authorities. It was explained that the request was being made pursuant to the MoU and Mr Ross took the opportunity to present a *note verbale* dated 18 June 2008 requesting the assurances.

170. The IHT has requested that prior to their trial the claimants are sent to Rusafa prison, which significantly is controlled by the MOJ. The British Embassy was concerned to determine first in which compound the claimants would be placed in that prison and, second, if they would remain there if they were later convicted. Mr Ross asked Mr Daza'ayee for assurances that the claimants would be (a) kept in Compound 4 of Rusafa prison; (b) humanely treated when in Iraqi custody and would not be subject to torture or ill-treatment; (c) granted free and unfettered access to legal representation and medical treatment; (d) allowed frequent family visits; and (e) permitted during their detention to receive visits at any time by the British forces or staff of the British Embassy in Baghdad.

171. According to Ms Sharif's witness statement, the Deputy Minister stated that all those assurances could be given save that should the claimants be found guilty it would not be possible to undertake that they would be kept in Compound 4 of Rusafa prison: if they received a sentence in excess of ten years, they could not be kept there but would most likely be sent to Fort Suse, which is also a MOJ-run prison, or possibly to an alternative MOJ-run prison.

172. Subsequently, on 9 July 2008, the Deputy Minister informed the British Embassy that the acting Minister of Justice had agreed in principle to all the assurances sought save for the one to which we have just referred, relating to what would happen to the claimants if they received sentences in excess of ten years. On 11 August 2008 written assurances to the same effect were received by the British Embassy from the Deputy Minister.

The significance of the assurances

173. It is appropriate at this stage to consider the claimants' contention that assurances given by the Iraqi government do nothing to reduce the risk that they would be subject to treatment contrary to article 3. They rely on the approach of the Strasbourg court, which has recently refused to regard assurances by requesting states in extradition cases as valid and effective safeguards against the risk of torture. So it is contended that we should not regard as determinative the assurances given by the Iraqi authorities about the way in which the claimants would be treated and where they would be imprisoned if they were handed over to the Iraqi authorities.

174. The approach of the Strasbourg court to the issue of assurances can be seen from this passage in *Ismoilov v Russia* (Application no. 2947/06, judgment of 28 April 2008):

> "127. Finally, the Court will examine the Government's argument that the assurances of humane treatment from the Uzbek authorities provided the applicants with an adequate guarantee of safety. In its judgment in the *Chahal* case the Court cautioned against reliance on diplomatic assurances

> against torture from a State where torture is endemic or persistent …. In the recent case of *Saadi v. Italy* the Court also found that diplomatic assurances were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources had reported practices resorted to or tolerated by the authorities which were manifestly contrary to the principles of the Convention …. Given that the practice of torture in Uzbekistan is described by reputable international experts as systematic …, the Court is not persuaded that the assurances from the Uzbek authorities offered a reliable guarantee against the risk of ill-treatment"

175. A similar approach is to be seen in *Ryabikin v Russia* (Application no. 8320/04, judgment of 19 June 2008), an extradition case in which the court held that assurances by the requesting state that the applicant would not be subjected to ill-treatment were not sufficient to ensure adequate protection against the risk of such ill-treatment, in circumstances where the government had systematically refused access to international observers, and reliable sources reported practices resorted to or tolerated by the authorities which were manifestly contrary to the Convention.

176. We have considered those authorities with care, but it seems to us that the significance to be attached to assurances must depend on all the circumstances of the particular case, a view which is supported by the judgment of the Court of Appeal in *MT (Algeria) v Secretary of State for the Home Department* [2008] QB 533, in particular at paras 125-133. In this case we have concluded that we should attach importance to the assurances from the Iraqi authorities, having regard to (i) the fact that they have permitted international observers access to Iraqi prisons, (ii) Ms Sharif's evidence that Mr Daza'yee has a long history of fulfilling his promises (even though this history is not particularised), and (iii) the specific evidence, referred to below, about conditions in Rusafa and Fort Suse Prisons and other MOJ facilities.

Conditions in Compound 4 in Rusafa Prison

177. A report on conditions in Compound 4 of Rusafa Prison has been produced by the Provost Marshall (Army) ("the PM(A)"), the British Army's expert on custody and detention. The present incumbent of that post is Brigadier Colin Findley CBE, whose job includes conducting regular inspections of UK detention facilities in places such as Iraq. When it was suggested that the claimants might be moved to Rusafa Prison, an inspection was conducted in April 2008 by the PM(A)'s team for the purpose of assessing its suitability for housing the claimants. The standards applied on the inspection were those stipulated in the Fourth Geneva Convention, which, in the absence of any cogent argument to the contrary, we consider to provide an appropriate benchmark.

178. The report of the PM(A) noted that the compounds at Rusafa Prison were each "seemingly independent". It was found that Compound 4 "satisfied the requirements" for the claimants, providing "relative segregation, protection from elements and reasonable living conditions", commensurate with the conditions found in the facility where the claimants are currently held by the British forces. Although the report considered other parts of Rusafa to be unsuitable for the claimants, it is of great relevance in considering whether the claimants' article 3 rights would be infringed

that although the PM(A)'s inspectors received complaints from some inmates at the prison about the lack of visits and the quality of the food supplied, "no person complained of mistreatment".

179. Further information about conditions in Compound 4 is contained in a report of an inspection of Rusafa conducted by the US International Criminal Investigative Training Assistance Programme ("ICITAP"), a body which works with foreign governments to develop professional and transparent law-enforcement institutions that protect human rights, combat corruption and reduce the threat of trans-national crime and terrorism. The ICITAP report relates to Compounds 1-6A at Rusafa. It states that "the Audit team found no indication that prisoners are subject to intentional or overt acts of mistreatment, neither through our observations nor through interviews with personnel and prisoners." Compound 4 was found to comply with basic human rights standards for the treatment of prisoners. It was also established that prisoners in Compound 4 are allowed regular visits from legal representatives and relatives; force is used only as a last resort when necessary to prevent prisoners from harming themselves or others; corporal punishment is forbidden and prisoners interviewed stated they had never known it to be used; and there is a robust system for the reporting of any mistreatment.

180. Ms Akiwumi (Assistant Director, Legal Policy, in the Directorate of Joint Commitments in the Ministry of Defence) points out in a witness statement that the Iraqi Ministry of Human Rights inspects prisons in Iraq and compiles an annual report. Its report for 2007 concludes that the prisons run by the MOJ are generally of a good standard and it does not record any instances of abuse in those prisons.

181. The case for the Secretary of State is that these investigations show that Compound 4 of Rusafa is of an acceptable standard and that it would not be contrary to article 3 for the claimants to be transferred for detention there.

182. The claimants rely principally on witness statements of Mr John Tirman, Executive Director and Principal Research Scientist of the Center for International Studies at the Massachusetts Institute of Technology, who is heading a major effort at empirical data research and analysis of violence in Iraq. In his first witness statement he refers to concerns about overcrowding at Rusafa and quotes a 2005 report which found evidence of torture there, and refers also to certain other adverse comments about the prison; but he points out very fairly that other reports maintain that the prison is properly operated.

183. As we have mentioned, the claimants were given permission to adduce evidence after the hearing in order to respond to some late evidence of the Secretary of State. Mr Tirman duly produced a detailed second witness statement in which he carefully scrutinises the evidence on which the Secretary of State relies as regards conditions in both Rusafa and Fort Suse prisons. Amongst other things, Mr Tirman draws attention to various shortcomings in the ICITAP report, including its reliance in large part on accounts of wardens and prison documents, which in his view introduces obvious possibilities for bias or concealing of problems. He refers to a passage in the report which states that holding staff accountable for their actions, coupled with making sure that staff understand how their actions are part of the 'big picture' of the Iraqi criminal justice system, seem to be the most pressing needs of Rusafa; and that "[u]ntil these basic management concepts are established and maintained, these units'

ability to fully operate within the rule of law to ensure prisoners are afforded human rights protections will be hampered, if not attainable". Mr Tirman places particular stress on the sentence we have just quoted.

184. Mr Tirman also expresses concern that the majority of prisoners in Compound 4 are being held for terrorist offences, but there is no segregation on religious or ethnic grounds. Thus it is said that there is a very strong likelihood of the claimants being regularly exposed to sectarian militia members and that such people would be particularly threatening to former Ba'ath officers.

185. Whilst Mr Tirman points to passages in the reports relied on by the Secretary of State which cast doubt on some of the assertions made in the Secretary of State's evidence, it is significant that he does not give or point to any evidence of actual mistreatment of prisoners or any particular instances of violence in Compound 4. His observations do not seem to us to get close to establishing a real risk that the claimants would suffer any form of torture or article 3 ill-treatment, whether at the hands of the authorities or of other prisoners, if they were detained in Compound 4 at Rusafa Prison.

186. If there were allegations of abuses in Rusafa, we think it likely that they would have come into the public domain in the same way as allegations of abuse in MOI and MOD facilities have done. We also note that, even if the ICITAP report has to be treated with a degree of caution, it contained clear findings that all prisoners were treated fairly and it was based in part on interviews with prisoners themselves. Overall we do not think that the claimants' evidence undermines the clear picture that emerges from the Secretary of State's evidence as to the existence of satisfactory conditions in Compound 4.

(iv) Fort Suse Prison

187. As we have explained, Mr Daza'ayee has said that if the claimants received sentences in excess of ten years imprisonment they would most likely be sent to Fort Suse, which is also an MOJ-run prison, or to an alternative MOJ-run prison. The PM(A) was asked if he would be able to assess the suitability of Ford Suse prison but because of its geographical location and the associated security risks it has not been possible for his staff to carry out that inspection. However, information acquired by his staff from telephone and other investigations shows that as at July 2008 it was a modern, well-run prison at which the prisoners had access to medical advice and received family visits.

188. Similar conclusions are set out in a US Department of Defence report dated 4 August 2008, which relates to an assessment carried out on 26 July 2008. Fort Suse was considered to have a number of strengths such as, first, that it had a detailed abuse reporting procedure which was believed to work; second, adequate medical care; third, a facility for family visits twice a week, with recreational and educational facilities; and fourth, a detailed disciplinary procedure. The report noted that there had not been any instances of abuse in that prison for over a year. It also pointed out a number of weaknesses, in that there was a limited number of staff and some of the cells were overcrowded. The overall conclusion was that Ford Suse met the minimum requirements for a prison.

189. In addition, an ICITAP report found that Fort Suse prison was "an efficient, effective, well organised facility under the leadership and guidance of a warden who is committed to operating the facility within the rule of law and with the utmost regard for protecting the prisoners' basic human rights." That report, too, said that there were no instances of mistreatment but (perhaps like many prisons in the United Kingdom) the prison was overcrowded and also suffered from staff shortages.

190. In his first witness statement Mr Tirman says that Fort Suse "appeared to be a 'normal' prison" with less overcrowding than is typical in the Iraqi system, though he refers to some old and unparticularised instances of beatings. In his second witness statement he says that the fact that the prison is seriously understaffed as well as being overcrowded "exacerbates the risks to the claimants' safety particularly in relation to non-state actors". The prison is still below capacity but even so, there is no evidence of human rights abuses other than one instance which has not been clearly particularised.

191. We have considered with care all Mr Tirman's detailed criticisms of Fort Suse, but again we are far from persuaded that the claimants' detention there would carry with it a real risk of treatment contrary to the standards of article 3, whether by reason of the general conditions in the prison or through specific ill-treatment at the hands of the authorities or of other prisoners. We are fortified in that conclusion by the fact that Fort Suse is visited regularly by the Kurdish Human Rights Commission and by the International Committee of the Red Cross.

192. On the evidence before the court we cannot dismiss the possibility that, if convicted, the claimants would be sent to a prison other than Fort Suse and about which we do not have the same detailed information. But having regard to the assurances given and to the absence of evidence of serious problems at MOJ-run prisons, we do not think that this possibility carries with it a real risk of treatment contrary to article 3. We do not regard it as reasonably foreseeable that the claimants would be held at a non-MOJ-run prison.

Conclusion

193. In our judgment the evidence falls well short of establishing substantial grounds for believing that the claimants would face a real risk of treatment contrary to article 3 if they were transferred into the custody of the Iraqi court and were detained thereafter in an Iraqi prison.

194. In the circumstances it is unnecessary for us to spend any time considering the wider international law position. The tests in *R (B) v Secretary of State for Foreign and Commonwealth Affairs* are plainly not satisfied and there is no basis for concluding that the treatment of the claimants in prison would in any respect be in breach of internationally accepted norms.

Overall conclusion on risk

195. For the reasons given when considering each of the main areas of risk relied on by the claimants, and applying the tests in *R (B) v Secretary of State for Foreign and Commonwealth Affairs*, there is nothing to show that if the claimants are transferred into the custody of the Iraqi court, the Iraqi authorities intend to subject them to

treatment so harsh as to constitute a crime against humanity or that there is an immediate likelihood of their experiencing serious injury (in the sense evidently contemplated in that case). There is indeed no real risk of their being treated in any way contrary to internationally accepted norms. It follows that there is no justification in international law for the United Kingdom declining to comply with its obligation to transfer the claimants. If, therefore, we are right in the conclusions we have reached on the application of the Convention (see the summary at para 95 above), the United Kingdom must comply with its obligation to transfer the claimants and the Convention does not prevent such compliance.

196. If we are wrong in the conclusions we have reached on the application of the Convention, and if the claimants are entitled to rely as they contend on the full force of the *Soering* principle, then in our view their transfer into the custody of the Iraqi court would be incompatible with article 1 of protocol no. 13 (concerning the death penalty) but would otherwise not be in breach of the Convention.

The impact of customary international law

197. This part of the claimants' case relates in particular to the prohibition on torture, which they submit is a rule of customary international law upon which they can rely because rules of customary international law automatically become part of domestic law unless there is a conflict with statute or the matter concerns crimes recognised in customary international law (because of the principle that only Parliament should criminalise conduct). The argument is advanced as an alternative way of putting forward the substantive case concerning the claimants' treatment in prison if and to the extent that they are unable to rely on the Convention. The substantive conclusions we have reached in respect of article 3 mean, however, that there can be no question of the claimants' transfer breaching the prohibition on torture or any related rule of customary international law. In those circumstances we need say nothing further on the issue.

Breach of legitimate expectation

198. This issue arises out of our finding that the claimants, if transferred to the Iraqi authorities, would be at real risk of being subjected to the death penalty in the event of their being convicted after trial before the IHT. Ms Monaghan submits that their transfer would therefore not be in accordance with established government policy not to expose an individual (whether by way of surrender, deportation or extradition) to the real risk of the death penalty. The claimants are submitted to have a legitimate expectation that the Secretary of State will follow published policy unless there are compelling reasons of public interest justifying a departure from the policy. It is further submitted, in reliance on a brief observation in the judgment of the court in *Nadarajah v Secretary of State for the Home Department* [2003] EWCA Civ 1768, at para 54, that under principles of public law the Secretary of State is obliged to follow published policy.

199. We do not think that the observation in *Nadarajah* can have been intended to be read in the unqualified way contended for by the claimants: it seems to us to have been no more than a shorthand reference to the legitimate expectation that a published policy will be followed. More importantly, however, we do not accept that the policy

statements relied on by the claimants go as far as they would need to go in order to provide a proper basis for resisting transfer.

200. In para 114 of the first witness statement of Ms Akiwumi, a senior official in the Ministry of Defence, it is stated that "for policy reasons, the FCO are seeking to obtain, if possible, an assurance that the Claimants would not be subject to the death penalty if convicted". We have referred already to the attempts to obtain such an assurance and the absence of any clear-cut assurance of the kind sought. In an exchange of correspondence during the course of the hearing before us, the Treasury Solicitor confirmed that the policy of the United Kingdom is as summarised in para 114 of Ms Akiwumi's witness statement. The letter also states that, in relation to cases where the offence alleged may be punished by the death penalty, assurances would be sought that capital punishment would not be imposed, but that if no assurance is given "transfer can occur where the imposition of the death penalty will not violate Iraq's international obligations".

201. The claimants have referred to various Parliamentary statements making clear the government's opposition to the death penalty both generally and in relation to Iraq. For example, in the course of a debate on 25 April 2007 the Parliamentary Under-Secretary of State at the Foreign and Commonwealth Office stated that "[t]he British Government are firmly against the use of the death penalty in any circumstances and in all cases. Since the Iraqi Government reintroduced the death penalty in 2004, the United Kingdom, together with the European Union, has repeatedly raised our policy of opposition to the death penalty at the highest level, including with the Iraqi president and prime minister".

202. All this is clear evidence of a policy of strong opposition to the death penalty and a policy to seek assurances that the death penalty will not be imposed. It does not go so far, however, as a policy not to transfer a person to another state in the absence of such assurances. In practice, of course, the point is capable of arising only in highly exceptional circumstances. The United Kingdom's obligations under the Convention will normally apply. In addition, in the case of extradition there is an express statutory provision (see s.94 of the Extradition Act 2003). But in an exceptional case falling outside those situations, where reliance has to be placed on policy alone, the statements of policy do not go as far as the claimants need them to go in order to succeed on this issue.

Conclusion

203. For the reasons we have given, we conclude that the proposed transfer of the claimants into the custody of the IHT would be lawful and that the claimants' claim for judicial review must be dismissed.

204. Whilst we have been led to that conclusion by our analysis of the legal principles and the factual evidence, we are seriously troubled by the result, since on our assessment the claimants, if transferred, will face a real risk of the death penalty in the event that they are convicted by the Iraqi court. In all normal circumstances the Convention (as well as the Extradition Act 2003 in extradition cases) would operate to prevent such a result. It arises here only because of the highly exceptional circumstances of the case and the application to them of the principles in *R (B) v Secretary of State for Foreign and Commonwealth Affairs*, as we have understood the judgment of the Court of

Appeal in that case. In that and other respects the issues in the present case are of obvious difficulty and importance, and we should make clear that we are minded to grant the claimants permission to appeal if it is sought. We have referred to the Secretary of State's undertaking not to transfer the claimants before this court has given judgment in the case. In the event of permission to appeal being granted, we would expect the Secretary of State to have given careful consideration to how the *status quo* can be preserved pending an appeal, taking into account the expected changes in the legal and practical position concerning the presence of British forces in Iraq after 31 December 2008.