Michaelmas Term
[2023] UKSC 50
On appeal from: [2022] EWCA Civ 334

JUDGMENT

Zubaydah (Respondent) *v* Foreign, Commonwealth and Development Office and others (Appellants)

before

Lord Lloyd-Jones
Lord Kitchin
Lord Sales
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON
20 December 2023

Heard on 14 and 15 June 2023

Appellants
Sir James Eadie KC
Jonathan Glasson KC
David Blundell KC
Melanie Cumberland
Andrew Byass
(Instructed by Government Legal Department)

Respondent
Richard Hermer KC
Ben Jaffey KC
Edward Craven
(Instructed by Bhatt Murphy Solicitors)

Appellants
(1) Foreign, Commonwealth and Development Office
(2) Home Office
(3) Attorney General

LORD LLOYD-JONES AND LORD STEPHENS (with whom Lord Kitchin and Lord Burrows agree):

1. Introduction

1. The issue in this appeal is whether the law applicable under sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995 ("PILA") to torts alleged to have been committed by two of the United Kingdom's security agencies, the Security Service and the Secret Intelligence Service (together "the UK Services"), is the law of England and Wales or the law of each of the six countries in which the claimant alleges he was unlawfully detained and tortured by the United States Central Intelligence Agency ("the CIA").

2. The claimant, Abu Zubaydah, (also known as Zayn Al-Abidin Muhammad Husayn) has been detained without trial by the United States' authorities since March 2002. In these proceedings, the claimant alleges that the UK Services knew that he was being arbitrarily rendered to, detained in, and subjected to extreme mistreatment and torture by the CIA at secret black sites, but nevertheless from at least May 2002 until at least 2006, the UK Services sent numerous questions to the CIA with a view to the CIA eliciting information from him. The claimant alleges that in sending those questions, the UK Services expected and intended (or at any rate did not care) that the claimant would be and was in fact subjected to extreme mistreatment and torture by the CIA during those interrogation sessions or those parts of interrogation sessions which were conducted for the purpose of attempting to obtain answers to the UK Services' questions. The claimant's claim for damages against the UK Services is limited to those personal injuries sustained while he was being mistreated and tortured by the CIA to elicit answers to the UK Services' questions. The claimant had no contemporaneous knowledge of the countries where he was detained and tortured but he now alleges, based on publicly available materials, that the personal injuries which he sustained at the hands of the CIA were sustained in CIA "black site" facilities situated in (a) Thailand; (b) Poland; (c) Morocco; (d) Lithuania; (e) Afghanistan; and (f) Guantánamo Bay ("the Six Countries").

3. The claimant brought these proceedings against the first defendant, the Foreign, Commonwealth and Development Office, and the second defendant, the Home Office, on the basis that the first defendant is vicariously liable for the acts and omissions of officials of the Secret Intelligence Service and the second defendant is vicariously liable for the acts and omissions of officials of the Security Service. The proceedings against the third defendant, the Attorney General, have been instituted on the basis that the claimant has a reasonable doubt as to which Government department is the appropriate defendant to these proceedings: see section 17(3) of the Crown Proceedings Act 1947.

4. The claimant has pleaded his claims under the law of England and Wales. Alternatively, the claimant has pleaded his claims under the law of the country which he was in when he sustained personal injuries. Accordingly, on the claimant's alternative pleading, Thai law is the applicable law in relation to mistreatment or torture resulting in personal injuries in Thailand, Polish law is the applicable law in relation to mistreatment or torture resulting in personal injuries in Poland, and so on. In relation to Guantánamo Bay, the claimant alleges that the applicable law is the law of the United States of America. However, in their Re-amended Revised Open Defence the defendants appear to contend that Cuban law should apply to conduct at Guantánamo Bay because, at para 42(b), it is pleaded that "Guantánamo Bay is within a foreign country to the US". Accordingly, on the alternative to the claimant's primary case that the law of England and Wales applies, there may be an issue whether the law applicable in respect of mistreatment or torture at Guantánamo Bay is the law of the USA or Cuba. In addition, so far as concerns Guantánamo Bay, the claimant pleads, in the alternative to his primary case that the law of England and Wales applies, US law including the Alien Tort Statute 1789 which recognises the subset of customary international law in respect of violations of "specific, universal and obligatory" norms of international law. Accordingly, there may be an issue whether the law applicable in respect of mistreatment or torture at Guantánamo Bay is international law.

5. The torts alleged against the defendants under the law of England and Wales are misfeasance in public office, conspiracy to injure, trespass to the person, false imprisonment, and negligence. The cause of action in false imprisonment is not a cause of action in respect of personal injury within section 11(2)(a) of the PILA (set out at para 51 below). However, the parties have proceeded, and we are content to proceed, on the basis that the applicable law in relation to the tort of false imprisonment should be the same law as applicable to the causes of action in respect of personal injury.

6. Neither party drew any distinction for the purpose of this appeal about the applicable law between the different torts on which the claimant relies. For example, nobody suggested on the facts of this case that one applicable law might apply to the tort of misfeasance in public office and another to the tort of false imprisonment. Both parties proceeded on the basis that the law applicable to the claimant's claims as a whole was either the law of England and Wales or the law of each of the Six Countries. We shall do the same.

7. For national security reasons, the position of the defendants has been neither to confirm nor to deny the allegations, whether against the UK Services, who are said to have known about the CIA's alleged actions, or against the US authorities. A declaration has been made by consent under section 6 of the Justice and Security Act 2013 that "the proceedings are proceedings in which a closed material application may be made to the court".

8. It was ordered by consent that the "issue of the law applicable to the Claimant's claim be determined as a preliminary issue".

9. On the hearing of the preliminary issue, the claimant contended that the applicable law is the law of England and Wales while the defendants contended that the applicable law is the law of the country where the mistreatment occurred and the personal injuries were sustained: which we refer to as "the law of each of the Six Countries". Lane J [2021] EWHC 331 (QB); [2021] 4 WLR 39 accepted the defendants' position and declared that the applicable law for the purposes of the claimant's claim is the law of each of the Six Countries.

10. The claimant appealed against Lane J's decision. The Court of Appeal (Dame Victoria Sharp, President of the Queen's Bench Division, Thirlwall and Males LJJ) [2022] EWCA Civ 334; [2022] 4 WLR 40 allowed the claimant's appeal and declared that the law of England and Wales applies.

11. The defendants now appeal to this court. It is appropriate at this stage to record that for the purposes of the preliminary issue only two options as to the applicable law have been presented by the claimant and by the defendants at all judicial tiers including before this court: that is the law of each of the Six Countries or the law of England and Wales. Neither the claimant nor the defendants contend that the law of the USA should apply across the board. We also record that the High Court, the Court of Appeal, and this court have not considered any closed material.

12. In this judgment we will continue to refer to the appellants as "the defendants" and to the respondent as "the claimant".

2. The factual background

(a) Assumed facts

13. There have been no findings of fact in these proceedings. However, by agreement between the parties, the preliminary issue as to the applicable law is to be determined by reference to assumed facts as pleaded in the claimant's Amended Particulars of Claim. As the facts as pleaded in the claimant's Amended Particulars of Claim determine the assumed factual background, it is necessary to set out several parts of those particulars. When we set out an assumed fact from those particulars, it must always be borne in mind that there have been no factual findings in these proceedings.

(b) The information upon which the claimant relied to draft his Amended Particulars of Claim

14. Because the claimant was held for years in detention conditions specifically designed to isolate and disorientate him, he is not able to give detailed evidence, for instance, as to the countries or the locations in those countries in which he was detained and tortured or as to the dates between which he was detained in those countries. Furthermore, the exceptionally grave mistreatment allegedly inflicted on the claimant over a period of years has resulted in lasting damage so that he is unable to comprehend and remember the dates and locations of his torture. In addition, the claimant is still detained in Guantánamo Bay with extremely stringent restrictions on his ability to communicate with his legal representatives. Accordingly, many of the facts alleged in the claimant's Amended Particulars of Claim are taken from publicly available materials rather than from information provided by the claimant. The publicly available materials include (i) a detailed report published by the US Senate Committee on Intelligence dated 9 December 2014; (ii) two judgments of the European Court of Human Rights in applications brought by the claimant, namely *Husayn (Abu Zubaydah) v Poland reported with Al Nashiri v Poland* (2014) 60 EHRR 16 and *Husayn (Abu Zubaydah) v Lithuania* (Application No 46454/11), (unreported) 31 May 2018; and (iii) redacted documents such as a CIA report from 2004 released by the American authorities in 2009.

(c) The claimant

15. The claimant is a Palestinian national. He has never had leave to enter or remain in the United Kingdom. There is no allegation that he has ever been in the United Kingdom though one of his rendition flights may have stopped in London to refuel; see the UN Working Group on Arbitrary Detention Opinion No. 66/2022 dated 6 April 2023. Accordingly, apart from that one possible stop in London during a rendition flight, the claimant has no connection with the United Kingdom.

16. However, equally the claimant is not a citizen of any of the Six Countries, he has never had leave to enter or remain in any of them and there is no indication that he had ever been to any of them prior to his capture and rendition.

17. The claimant's claimed connection with the Six Countries is that he was imprisoned, tortured and sustained personal injuries in those countries.

(d) The UK Services and the defendants

18. The claimant's pleaded case is as follows. The UK Services and the defendants are all emanations of the UK Government. At all material times the relevant personnel in the UK Services were exercising, or purporting to exercise, powers conferred by the law of England and Wales. The personnel were acting in their official capacity and were subject to the supervisory jurisdiction of the High Court in England and Wales and to the criminal law of England and Wales in respect of their relevant acts or omissions.

19. The claimant maintains that at all material times, the relevant personnel in the UK Services were in England and Wales. Accordingly, the knowledge acquired by personnel as to the activities of the CIA was knowledge acquired by personnel in England and Wales. Also, the personnel who drafted the questions and who decided to send and then did send those questions to the CIA did so whilst in England and Wales. Furthermore, the information extracted by the CIA from the claimant was sent to and received by the officials who were at all material times in England and Wales. Accordingly, it is alleged that the relevant acts and omissions of the UK Services took place in England and Wales, and those acts and omissions were committed by the UK Services for the perceived benefit of the UK.

(e) Black sites

20. We repeat that there have been no findings of fact in these proceedings, so the description of black sites is solely based on allegations which have been made by the claimant. We set out under this heading those allegations, but in doing so we are not to be taken as accepting or suggesting that the allegations are true.

21. The claimant alleges that the black sites in question are secret detention facilities operated by the CIA in various countries around the world outside the US legal system and de facto outside the legal systems of the countries in which they are located.

22. The claimant's pleaded case is that the laws of the Six Countries in which he was detained proscribed torture and extreme mistreatment. Accordingly, laws were in existence in the Six Countries which could have protected the claimant. However, the Six Countries were selected because the CIA anticipated that the legal system and the laws of each of those countries would not be invoked against the CIA in respect of the detention, mistreatment and torture of the claimant. Therefore, the CIA could act with impunity to torture the claimant at a "black site" without any reference to the laws of those countries. In short, the countries and the black sites were chosen by the CIA to evade the application and protection of (a) the US legal system and law; and (b) the legal system and law of the country in which the site was located. In this way, individuals could be detained in what were *de facto* legal black holes where

interrogations could take place clandestinely, without the laws of that country being invoked in practice in respect of the individuals.

23. The claimant alleges that the black sites were secret. They were not visited by international welfare organisations, such as the International Committee of the Red Cross. Furthermore, the sites were chosen by the CIA to evade any monitoring of the treatment of detainees by international welfare organisations.

24. It is part of the claimant's case that all the interrogations at the black sites were conducted by members of the CIA and those sites were under the exclusive control of the CIA.

25. The claimant also alleges that the CIA conducted interrogations at those sites without reference to the laws of the countries in which those sites were located.

26. It is part of the claimant's case that no agent of the countries in which the black sites were located played any role in the interrogations which were conducted at the sites.

27. Finally, it is alleged that an individual rendered to a country in which a black site was operated entered the country clandestinely outside ordinary immigration processes.

(f) The claimant's detention, extreme mistreatment and torture

28. We set out several of the claimant's factual allegations contained in the Amended Particulars of Claim all of which are presumed to be true for the purposes of this preliminary application.

29. Para 6 of the Amended Particulars of Claim alleges that:

> "On 27 March 2002, the Claimant was captured in Faisalabad, Pakistan in a raid by Pakistani armed forces working in conjunction with United States personnel. During his capture the Claimant suffered gunshot injuries to his groin, thigh and stomach, which resulted in serious wounds."

30. It is alleged in para 30(a) of the Amended Particulars of Claim that: "After taking custody of [the claimant], CIA officers concluded that he 'should remain

incommunicado for the remainder of his life,' which 'may preclude [the claimant] from being turned over to another country'".

31. Para 7 of the Amended Particulars of Claim alleges that "On 29 March 2002, President Bush approved a plan to transfer the Claimant to a covert detention and interrogation facility operated by the CIA in Thailand". It is also alleged that shortly thereafter, the claimant was forcibly rendered by US forces from Pakistan to a secret CIA black site detention and interrogation facility in Bangkok, Thailand, where he was detained until 4 December 2002.

32. In paras 9, 10 and 11 of the Amended Particulars of Claim, detailed allegations are set out as to the extreme mistreatment and torture to which the claimant was subjected whilst detained in Thailand. Similar but not identical allegations of mistreatment and torture are set out at para 14 in relation to Poland, paras 16 and 24 in relation to Guantánamo Bay, para 18 in relation to Morocco, para 20 in relation to Lithuania and para 22 in relation to Afghanistan. For the purposes of this appeal, it is sufficient to set out the claimant's allegations in full in relation to the period of detention in Thailand.

33. In para 9 of the Amended Particulars of Claim the claimant alleges that during his detention in Thailand:

> "(a) The Claimant's head and faced (sic) were shaved and he was detained naked in a cold and cramped windowless cell which was constantly illuminated with artificial light and into which loud music and artificially generated noise were played at high volume to cause severe disorientation and distress;
>
> (b) The Claimant was deliberately subjected to extreme sleep deprivation. This included being deprived of sleep for a total of more than 126 hours during a 136-hour period between 15 April 2002 and 21 April 2002;
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> (c) The Claimant was repeatedly shackled both during and outside of interrogations;
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> (d) The Claimant was repeatedly slapped in the face and abdomen and was grabbed by the face;
>
> (e) The Claimant was repeatedly doused with cold water;

(f) The Claimant was repeatedly made to stand against a wall for long periods of time;

(g) The Claimant was repeatedly confined inside cramped confinement boxes for long periods of time;

(h) The Claimant was repeatedly made to stand in painful stress positions for long periods of time."

34. It is alleged in para 10 of the Amended Particulars of Claim that whilst detained in Thailand "the Claimant spent 47 days in continuous solitary confinement between 18 June 2002 and 4 August 2002".

35. In para 11 of the Amended Particulars of Claim it is alleged that between 4 August 2002 and 23 August 2002 the claimant was subjected to the CIA's programme of "enhanced interrogation techniques" on a near 24 hours per day basis. It is alleged that the torture and mistreatment he was subjected to during this period included:

"(a) Being strapped to a board and subjected to multiple simulated drowning ('waterboarding') sessions each day, which caused the Claimant to experience severe panic and psychological distress, involuntary bodily spasms, urination, vomiting and unconsciousness;

(b) Being repeatedly locked for long periods inside a confinement box the shape and size of a coffin;

(c) Being repeatedly locked for long periods in a crouching position inside a smaller confinement box with a width of approximately 21 inches, and a depth and height of approximately 2.5 feet;

(d) Being repeatedly shackled and hooded while naked for long periods of time;

(e) Being repeatedly slammed against a concrete wall while naked and hooded;

(f) Being repeatedly grabbed and hit in the face;

(g) Being repeatedly made to stand naked in painful stress positions, with arms extended and shackled above the head, for periods of several days at a time;

(h) Being subjected to extreme sleep deprivation through subjection to the treatment described above and through the use of other deliberate sleep deprivation techniques such as exposure to very loud white noise and being repeatedly doused in cold water;

(i) Being denied appropriate medical treatment for his injuries, which resulted in the serious deterioration of those injuries;

(j) Being denied adequate food, resulting in severe and protracted hunger; and

(k) Being repeatedly threatened and told that the only way he would ever leave the 'black site' facility was in a coffin-shaped box."

36. The claimant alleges he was detained in Thailand until 4 December 2002. Thereafter, a timetable of the alleged events taken from paras 13 to 25 of the Amended Particulars of Claim is summarised below.

(1) On 4 December 2002, the claimant was removed by the CIA from the black site in Thailand and rendered by them to a secret CIA black site in Poland where the claimant was detained, mistreated, and tortured between 5 December 2002 and 22 September 2003. It is sufficient for present purposes to state that the allegations are similar but not identical to the allegations in relation to his mistreatment and torture in Thailand.

(2) On 22 September 2003, the claimant was removed by the CIA from the black site in Poland and rendered by them to Guantánamo Bay military detention camp where the claimant was detained, mistreated, and tortured between 22 September 2003 and 27 March 2004. It is sufficient for present purposes to state that the allegations are similar but not identical to the allegations in relation to his mistreatment and torture in Thailand.

(3) On 27 March 2004, the claimant was removed by the CIA from the detention facilities at Guantánamo Bay and rendered by them to a secret CIA black site in Morocco where he was detained, mistreated, and tortured between 27 March 2004 until an unknown date in February 2005. The claimant alleges, and therefore it is assumed for the purposes of this preliminary issue, that this rendition was carried out in response to the CIA's expectation that the United States Supreme Court would shortly deliver a judgment recognising the right of detainees at Guantánamo Bay to challenge the legality of their detention before US courts, which the CIA wished to prevent the claimant from being able to do. The claimant sets out details of his alleged mistreatment and torture in Morocco. It is sufficient for present purposes to state that the allegations are similar but not identical to the allegations in relation to his mistreatment and torture in Thailand.

(4) On 17 or 18 February 2005, the claimant was removed by the CIA from the black site in Morocco and rendered by them to a secret black site in Lithuania where the claimant was detained, mistreated, and tortured between 17 or 18 February 2005 and 25 March 2006. It is sufficient for present purposes to state that the allegations are similar but not identical to the allegations in relation to his mistreatment and torture in Thailand.

(5) On 25 March 2006, the claimant was removed by the CIA from the secret CIA black site facility in Lithuania and rendered by them to a secret CIA black site in Afghanistan where the claimant was detained, mistreated, and tortured between 25 March 2006 and an unknown date in September 2006. It is sufficient for present purposes to state that the allegations are similar but not identical to the allegations in relation to his mistreatment and torture in Thailand.

(6) On an unknown date in September 2006, the claimant was removed by the CIA from the black site in Afghanistan and rendered by them to Guantánamo Bay.

37. It is alleged in para 24 of the Amended Particulars of Claim that from September 2006 until the present day, the claimant has been detained at Guantánamo Bay in the highest security detention camp. It is also alleged that throughout this period the claimant has been subjected to extremely stringent detention conditions which include: "(a) Being prohibited from having contact with the outside world (save occasional meetings with lawyers and occasional postal contact with his family); (b) Being hooded whenever he is transferred from his cell to meet his lawyers". It is alleged in para 25 of the Amended Particulars of Claim that "[a]s a result of his mistreatment, the Claimant suffered more than 300 seizures between 2008 and 2011 alone."

(g) Allegations against the defendants

38. It is alleged in para 26 of the Amended Particulars of Claim that:

> "From at least May 2002, the [UK Services] were aware that the Claimant was being arbitrarily detained without trial at secret CIA 'black site' detention and interrogation facilities and was being subjected to extreme mistreatment and torture during interrogations conducted by the CIA."

Accordingly, it is presumed for the purposes of this preliminary issue that the UK Services had that knowledge and that they had acquired that knowledge from at least May 2002. It is then alleged in para 27 of the Amended Particulars of Claim that "[n]otwithstanding that knowledge, from at least May 2002 until at least 2006" the UK Services committed acts and also omitted to act. The acts allegedly committed by the UK Services were that they "sent numerous questions to the CIA to be used in interrogations of the Claimant for the purpose of attempting to elicit information of interest to the [UK Services]". It is also alleged that the UK Services omitted to act in that they "did not seek any assurances that the Claimant would not be tortured or mistreated and did not take any steps to discourage or prevent such torture or mistreatment being inflicted against the Claimant during interrogation sessions intended to elicit information in response to those questions from the [UK Services]". We refer to these together as "the acts and omissions of the UK Services".

39. In para 28 of the Amended Particulars of Claim the claimant asserts further facts which are to be inferred namely that:

> "(a) The [UK Services] sent those questions to the CIA in the knowledge and with the expectation and/or intention that the CIA would subject the Claimant to torture and extreme mistreatment at interrogation sessions conducted for the specific purpose of attempting to extract information in response to those questions;
>
> (b) The [UK Services] sent those questions to the CIA in the knowledge and with the expectation and/or intention that the torture and extreme mistreatment would be inflicted on the Claimant at secret CIA 'black site' detention and interrogation facilities where the Claimant was being held in incommunicado arbitrary detention without access to any legal representation and without any ability to vindicate his right not to be subjected to torture or mistreatment;

> (c) The [UK Services] were aware that the treatment which the Claimant would be subjected to during those interrogations would contravene the prohibition on torture contained inter alia in the United Nations Convention Against Torture; and
>
> (d) As a direct result of receiving those questions from the [UK Services], the CIA conducted interrogation sessions at CIA 'black site' facilities during which the Claimant was subjected to a range of brutal interrogation techniques which constituted torture and cruel, inhuman and degrading treatment and which were intended to compel the Claimant to provide information in response to the questions from the [UK Services]."

All these inferred facts are presumed to be true for the purposes of this preliminary application.

40. In para 36 of the Amended Particulars of Claim, the claimant returns to the extent of the UK Services' knowledge of the detention, extreme mistreatment, and torture of individuals in CIA black sites by members of the CIA. It is alleged that:

> "(a) Between 2002 and 2004, UK personnel from [the UK Services] and the Ministry of Defence were involved in between 2,000 and 3,000 interviews of detainees held by US detaining authorities.
>
> (b) In 2002 there were at least 38 occasions where officers of the [UK Services] witnessed or heard about the mistreatment of detainees in US custody.
>
> (c) On more than 100 occasions officers of the [UK Services] were informed by foreign liaison services about instances of detainees being mistreated in US custody.
>
> (d) On an unknown number of occasions UK personnel from [the UK Services] witnessed detainees being seriously mistreated and/or were directly involved in serious mistreatment (for example by being consulted about whether to administer mistreatment).

> (e) On an unknown number of occasions UK personnel from [the UK Services] reported the mistreatment of detainees which they had witnessed to the Head Offices of [the UK Services].
>
> (f) From January 2002 onwards, reports about the mistreatment, torture and rendition of detainees in US custody were regularly and widely published in the international news media and by organisations such as the United Nations, the International Committee of the Red Cross and non-governmental organisations such as Amnesty International, Liberty and Reprieve."

41. It is relevant to note that certain facts are not alleged in the claimant's Amended Particulars of Claim. The defendants are not alleged: (a) to have played any part in the claimant's capture, rendition or detention; (b) to have been present at, or physically participated in, the treatment inflicted upon the claimant while he has been detained by the US authorities; (c) to have had any direct contact with the claimant; or (d) to have been aware of the claimant's precise location at any time during the relevant period (2002 – 2006).

(h) The torts alleged against the defendants under the laws of England and Wales

42. As we have indicated, at para 5 above, the torts alleged against the defendants under the laws of England and Wales are misfeasance in public office, conspiracy to injure, trespass to the person, false imprisonment, and negligence. It is a feature of each of the torts that they are alleged to have involved conduct not only by the UK Services but also by the CIA.

43. In respect of the claim in misfeasance in public office it is alleged, inter alia, (at paras 46 ff) that the acts and omissions of the UK Services in relation to the provision of questions were committed by public officers in purported performance of their official functions as members of the UK's security and intelligence services. It is said that they were specifically intended to injure the claimant whom the public officers knew and intended would be subjected to torture and severe mistreatment by the CIA in the Six Countries as a direct result of those acts and omissions. Alternatively, it is alleged that the public officers committed those acts and omissions in the knowledge or with reckless indifference to the fact that they had no lawful power to aid, abet, counsel, procure or encourage the infliction of torture and cruel, inhuman and degrading treatment by the CIA and that the claimant was likely to be injured as a result of those acts and omissions.

44. In respect of the claim in conspiracy, it is alleged, inter alia, (at paras 49-50) that the defendants combined with each other and with officials of the United States to take unlawful action with the intention of causing damage to the claimant. In particular, it is alleged that they combined to supply questions to the CIA with the intention that those questions would be put to the claimant during unlawful interrogation sessions involving extreme mistreatment and torture of an individual who was being held in arbitrary incommunicado detention.

45. In respect of the claims in trespass and false imprisonment, it is alleged, inter alia, (at para 51) that the defendants are jointly liable with the US authorities on the basis that they induced, incited or encouraged the claimant's false imprisonment and the assaults and batteries in the Six Countries, or that these matters were undertaken pursuant to a common design with the US authorities.

46. In respect of the claim in negligence, it is alleged, inter alia, (at para 56) that the defendants sent multiple questions in circumstances in which the defendants knew or ought reasonably to have known that the claimant would be subject to mistreatment, torture and arbitrary detention in the Six Countries.

(i) The relevant laws of the Six Countries

47. The relevant laws of the Six Countries are pleaded between paras 57 and 106 of the claimant's Amended Particulars of Claim. Foreign law is a question of fact and therefore it is assumed for the purposes of this preliminary issue that the laws are as alleged in the Amended Particulars of Claim.

(j) The personal injuries allegedly sustained by the claimant and the remedies which he seeks

48. In para 109 of the Amended Particulars of Claim the claimant sets out particulars of the personal injuries which he sustained because of his mistreatment and torture. However, the claimant does not seek compensation for all the personal injuries which he sustained throughout the period 2002-2006. Rather, his claim is confined to those personal injuries inflicted on him by the CIA to elicit answers to the UK Services' questions. Unsurprisingly, in the Amended Particulars of Claim, the claimant is unable to identify at which "black site", in which country and upon what dates he was mistreated and tortured by the CIA in order to elicit answers to those questions. Furthermore, the allegation in the Amended Particulars of Claim that the UK Services sent questions to the CIA during the period 2002 to 2006 does not identify the number of questions sent or the dates upon which each question was sent. Accordingly, it is not possible from the Amended Particulars of Claim to identify, for instance, whether the bulk of the questions were sent at a time when the claimant was in any one of the Six

Countries or whether the CIA attempted to elicit answers to those questions whilst the claimant remained in that country or deferred doing so until the claimant was in another of the Six Countries. Consequently, it is not possible to state in which of the Six Countries the claimant received most of his personal injuries as a result of the UK Services sending the questions to the CIA. Rather, the claim is based on the proposition that he received personal injuries because of the CIA attempting to elicit answers to those questions in each of the Six Countries.

49. In addition to damages for personal injuries, the claimant seeks aggravated damages "to compensate for the extraordinary levels of suffering, distress and humiliation he has endured as a result of the oppressive conduct of the Defendants". He also seeks exemplary damages "in light of the [defendants'] unconstitutional and arbitrary conduct".

3. Relevant legislative provisions and legal principles

50. Part III of the PILA entitled "Choice of Law in Tort and Delict" provides the rules for determining the law applicable to claims in tort and delict. The relevant sections in part III of the PILA for the purposes of this appeal are: (a) section 11 which makes provision for a general rule identifying the applicable law; (b) section 12 which enables the general rule to be displaced in certain defined circumstances; and (c) section 14 which provides for the application of the law of the forum if the application of the law of a country outside the forum "would conflict with principles of public policy".

(a) The general rule

51. Section 11 of the PILA, headed "Choice of applicable law: the general rule" provides:

> "(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.
>
> (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—
>
> (a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law

> of the country where the individual was when he sustained the injury;
>
> (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and
>
> (c) in any other case, the law of the country in which the most significant element or elements of those events occurred.
>
> (3) In this section 'personal injury' includes disease or any impairment of physical or mental condition."

52. To apply the general rule it is first necessary, under section 11(1), to determine whether "the events constituting the tort … in question" occurred in a particular country. If so, then under the general rule the applicable law is the law of that country. However, "[w]here elements of" "the events constituting the tort … in question" occur in different countries, then section 11(2) makes provision for identifying the applicable law under the general rule depending on whether the cause of action is in respect of (a) personal injury caused to an individual or death resulting from personal injury; (b) damage to property; or (c) any other case. In relation to a cause of action in respect of personal injury caused to an individual then the applicable law under the general rule is "the law of the country where the individual was when he sustained the injury".

(b) Displacing the general rule (section 12)

53. Section 12 of the PILA, headed "Choice of applicable law: displacement of general rule" provides:

> "(1) If it appears, in all the circumstances, from a comparison of—
>
> > (a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and
> >
> > (b) the significance of any factors connecting the tort or delict with another country,

> that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.
>
> (2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events."

54. The approach to be adopted when considering whether the general rule is displaced pursuant to section 12 was considered by the Court of Appeal in *VTB Capital plc v Nutritek International Corpn* [2012] EWCA Civ 808; [2012] 2 Lloyd's Rep 313 and on appeal in that case by the Supreme Court [2013] UKSC 5; [2013] 2 AC 337. In the Supreme Court, Lord Clarke of Stone-cum-Ebony turned to section 12 at paras 203 to 206. He set out, at para 203, four principles in relation to the application of section 12 which had been identified by the Court of Appeal at para 149. Lord Neuberger of Abbotsbury and Lord Reed agreed with Lord Clarke's analysis of the applicable law; see para 100 (Lord Neuberger), and para 240 (Lord Reed). We repeat those four principles.

55. The first principle:

> "The exercise to be conducted under section 12 is carried out after the court has determined the significance of the factors which connect a tort or delict to the country whose law would therefore be the applicable law under the general rule."

The second principle:

> "At this stage there has to be a comparison between the significance of those factors with the significance of any factors connecting the tort or delict with any other country. The question is whether, on that comparison, it is 'substantially more appropriate' for the applicable law to be the law of the other country so as to displace the applicable law as determined under the 'general rule'."

The third principle:

> "The factors which may be taken into account as connecting a tort or delict with a country other than that determined as being the country of the applicable law under the general rule are potentially much wider than the 'elements of the events constituting the tort' in section 11. They can include factors relating to the parties' connections with another country, the connections with another country of any of the events which constitute the tort or delict in question or the connection with another country of any of the circumstances or consequences of those events which constitute the tort or delict."

The fourth principle:

> "In particular the factors can include (a) a pre-existing relationship of the parties, whether contractual or otherwise; (b) any applicable law expressly or impliedly chosen by the parties to apply to that relationship, and (c) whether the pre-existing relationship is connected with the events which constitute the relevant tort or delict."

56. Lord Clarke, at paras 204 to 206, referred to and endorsed the illuminating discussion in Dicey, Morris & Collins, *The Conflict of Laws*, 15th ed (2012), para 35-148, as to the general approach under section 12 to the displacement of the general rule under section 11. This discussion is now to be found in the 16th edition (2022), vol 2, at para 35-151. We set out para 35-151:

> "The provisions of section 12 have been applied to displace the law applicable under section 11 on only a few occasions. The following points, in particular, are to be noted. First, the rule applies irrespective of whether the applicable law has been determined by section 11(1) … or by one of the limbs of section 11(2) …. Secondly, it would seem that the case for displacement is likely to be the most difficult to establish in cases falling within section 11(2)(c), because the application of that provision of itself requires the court to identify the country in which the most significant element or elements of the tort are located. Thirdly, section 12 envisages displacement of the general rule not only in relation to the case as a whole, but also in relation to a particular issue or issues. Fourthly, section 12 may lead to the application of the

> law of any country other than that designated by section 11. Fifthly, the factors to be taken into account include, but are not limited to, factors relating to the parties (including any pre-existing relationship between them), to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events. Sixthly, the relevant connection may be to the territory of a particular country, or to its legal system, with the consequence that the court may take into account a choice of law provision in a contract between the parties. Finally, it has been emphasised that 'substantially' is the key word in determining whether displacement of the general rule should be permitted and that the general rule should not be dislodged easily, lest it be emasculated. The general rule in section 11 is not displaced simply because on balance, when all factors relating to a tort are considered, those that connect the tort with a different country prevail. Accordingly, the party seeking to displace the law which applies under section 11 must show a clear preponderance in the significance of relevant factors (including, in particular, those referred to in section 12(2)) which point towards the application of law of the other country. As the cases demonstrate, this exacting threshold is not so high as to render displacement of the general rule illusory; it is not, for example, necessary to show that the connection to the country whose law applies under section 11 is insignificant. Whether that test is satisfied will depend on the facts of the case and on the particular issue or issues which arise for decision. If, however, in addition to the factors to which the general rule in section 11 refers, there are other significant factors connecting the tort to the country whose law applies under that rule (such as the fact that it is the national law or country of residence of at least one party), this will make it much more difficult to invoke the rule of displacement in section 12."

(c) The test before an appellate court can interfere with the evaluative judgment in sections 11 and 12

57. The essential evaluative nature of the exercise required to be performed by a judge under sections 11 and 12 of the PILA informs the test to be applied on an appeal against the judge's conclusion. An appellate court will be slow to interfere. In *VTB Capital* Lloyd LJ, delivering the judgment of the Court of Appeal, observed (at para 150):

> "… it is 'quintessentially' for the judge to make an assessment of the significance of the elements of the events constituting the tort for the purposes of section 11(2)(c). This court will not interfere with that assessment unless it is satisfied that the judge 'made such an error in his assessment as to require this court to make its own assessment: …'"

This observation was based on a similar observation in the judgment of Tuckey LJ in *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] 12 All ER (Comm) 385 at paras 46 and 47. *VTB* was concerned with the tort of deceit and the application of section 11(2)(c), but this observation applies equally to the other heads in section 11(2) and to the comparison exercise under section 12. An appellate court should not interfere with a judge's evaluation under sections 11 and 12 unless there is shown to be a clear error of law, or the judge has reached a conclusion not reasonably open to them. (See also Dicey, Morris and Collins, para 35-150).

4. Application of the law of the forum on grounds of public policy

58. If the application of the law of a country outside the forum "would conflict with principles of public policy" then section 14 of the PILA provides for the application of the law of the forum. Section 14 is headed "Transitional provision and savings" and in so far as relevant provides:

> "(1) ….
>
> (2) ….
>
> (3) Without prejudice to the generality of subsection (2) above, nothing in this Part—
>
> > (a) authorises the application of the law of a country outside the forum as the applicable law for determining issues arising in any claim in so far as to do so—
> >
> > > (i) would conflict with principles of public policy; or
> >
> > > (ii) … ; or

(b) affects any rules of evidence, pleading or practice or authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum.

(4) ….”

59. In the Amended Particulars of Claim, at paras 42 to 45, relying on section 14 of the PILA, the claimant asserts that it would conflict with principles of public policy for the applicable law to be the law of each of the Six Countries, as opposed to the law of England and Wales. In agreeing to a preliminary issue as to the applicable law the parties were at cross purposes. Those advising the claimant understood that the issue to be determined would be whether the applicable law was the law of England and Wales or the law of each of the Six Countries pursuant to sections 11 and 12 of the PILA. Those advising the defendants, however, understood that the issue would extend also to issues of public policy under section 14.

60. At the hearing of the preliminary issue before Lane J the claimant contended that it was premature to decide issues of public policy as those issues should await evidence as to the content of any applicable foreign law and a proper understanding of that law in order to assess whether it conflicts with principles of public policy. Lane J, at para 75, rejected the claimant’s prematurity argument and held, at para 88, that the claimant’s case on section 14 failed.

61. On appeal to the Court of Appeal the claimant’s only submission on public policy was that it was premature to decide issues of public policy. In view of the Court of Appeal’s conclusion that the law applicable to the claimant’s claim was the law of England and Wales the further issue whether the application of the laws of each of the Six Countries would conflict with principles of public policy did not arise. However, having heard argument on this issue the Court of Appeal dealt with it briefly between paras 51-59. The Court of Appeal accepted, at para 56, that the claimant had understood that the preliminary issue did not extend to issues of public policy under section 14 of the PILA. Furthermore, the Court of Appeal stated, at para 57, that there was “some force in the submission that to decide these issues now is premature”. The Court of Appeal noted that the claimant had not yet served any Reply and that the Reply would be the place for the claimant to set out any case that the application of the laws of any of the Six Countries to the claimant’s claim would conflict with principles of public policy. The Court of Appeal accepted, at para 58, that “[until] that has been pleaded out … it is premature to decide these issues”.

62. On appeal to this court, the issues agreed between the parties were confined to sections 11 and 12 of the PILA. There was no issue before this court under section 14 of

the PILA. In considering the defendants' appeal concerning the application of section 12, the parties proceeded on the basis that the determination of the defendants' appeal did not require any consideration of the potential application of section 14 of the PILA. We consider that there is an artificiality about deciding which law governs the liability in tort of the UK Services without considering public policy considerations under section 14 of the PILA. Although, we express no view on the matter, there is scope for suggesting, for example, that on the presumed facts of this case, it is a constitutional imperative that the applicable law in relation to the tort of misfeasance in public office in relation to the acts and omissions of the UK Services should be the law of England and Wales. However, we have been presented with a preliminary issue on sections 11 and 12 of the PILA and must seek to address it solely on that basis. We conclude this part of the judgment by observing that, depending on the outcome of the appeal, it may be necessary for a court to consider the impact, if any, of section 14 of the PILA at a later stage of these proceedings.

5. The judgments of the High Court and the Court of Appeal in relation to the exercise under sections 11 and 12 of the PILA

(a) Common ground at all judicial tiers in relation to the general rule under section 11(2)(a) of the PILA

63. Before Lane J and before the Court of Appeal it was common ground, and it remains common ground in this court, that elements of the events constituting the torts alleged occurred in different countries and that, unless displaced, section 11(2)(a) of the PILA produces the result, under the general rule, that the applicable law in the context of these proceedings is the law of each of the Six Countries. Accordingly, the focus of the dispute between the parties on the preliminary issue before Lane J and before the Court of Appeal was, and remains in this court, on the claimant's submission that under section 12 of the PILA the general rule is displaced and that the appropriate law for the purposes of the claimant's claims against the defendants is the law of England and Wales.

(b) Lane J's approach to section 12 of the PILA

64. In relation to the approach to section 12 of the PILA, Lane J directed himself correctly, by reference to the then current edition of Dicey, Morris and Collins. The relevant passage, which appears at para 35-151 of the current 16th edition, is set out at para 56 above.

65. Lane J considered, between paras 49 and 60, the significance of the factors which connected the tort with the Six Countries. He identified, at para 49, two such factors. The first was that this is where the injuries sustained by the claimant occurred, which he

considered significant because the country where the injuries were sustained is the general rule in section 11(2)(a) of the PILA. The second factor was that those causing the injury to the claimant, his CIA gaolers and interrogators, were physically present with him when the injuries were caused. As the Court of Appeal observed, at para 26, and we would observe, the second factor was, on these facts, the inevitable corollary of, and adds nothing to, the first.

66. Lane J rejected, at para 58, the claimant's submission that the significance of the injuries occurring in the Six Countries was reduced "to any material extent" because the claimant had no control over his presence in those countries.

67. Lane J also rejected, at para 60, the claimant's submission that the significance of the connection to the Six Countries was reduced because the defendants, when committing the torts, were indifferent as to the country in which the claimant was being detained.

68. Finally, Lane J also rejected, at paras 50 and 51, the claimant's submission that the significance of the connection to the Six Countries was reduced because the claimant had been rendered to the Six Countries precisely because this would enable him to be detained and tortured outside the laws and legal systems of those countries.

69. Lane J considered, between paras 61 and 63, the significance of the factors which connected the torts with England and Wales. Lane J was prepared to accept three factors on which the claimant relied, namely: (a) the alleged actions of the UK Services of submitting questions to the CIA were more likely than not to have taken place in England; (b) the UK Services' alleged actions were undertaken for the perceived benefit of the UK; and (c) the defendants were all emanations of the UK state. However, Lane J considered these factors were of limited significance.

70. Lane J, between paras 64 and 70, compared the significance of the factors pointing in each direction. He stated at para 67 that "the significance of the claimant sustaining injuries in the Six Countries does not fall to be materially diminished". He also stated, at para 69, that although it was from England that the UK Services sent questions to the CIA, this factor was of limited significance "because it is only an element of the overall treatment of the claimant by the CIA in the Six Countries". He concluded at para 70, that the general rule was not displaced as it was not substantially more appropriate for the applicable law for the purposes of this claim to be the law of England and Wales.

(c) The Court of Appeal's approach to section 12 of the PILA

71. It is sufficient to state that the Court of Appeal identified several errors in the judge's approach to the exercise under sections 11 and 12 of the PILA. We set out those errors in the next part of this judgment. The Court of Appeal stated, at para 42, that the "judge ought to have concluded that, so far as the torts allegedly committed by the [UK] Services were concerned, the significance of the factors connecting the torts with the Six Countries was minimal, while the significance of the factors connecting the torts with England and Wales was very substantial". Accordingly, the Court of Appeal, performing for itself the exercise under sections 11 and 12 of the PILA, concluded "that it is substantially more appropriate for the applicable law in this case to be the law of England and Wales than the laws of [each of] the Six Countries".

6. Errors of approach by the judge in relation to the exercise under sections 11 and 12 of the PILA and whether the Court of Appeal was entitled to interfere with the judge's evaluative exercise

72. The Court of Appeal identified three errors in the judge's approach to the exercise under section 12 of the PILA which, in its view, invalidated the judge's conclusion.

(a) The required focus under section 12 of the PILA on the torts committed by the defendants

73. First, the Court of Appeal considered that the judge had failed to focus on the torts allegedly committed by the UK Services for which the defendants are said to be vicariously liable. Section 12 requires a comparison of the significance of the factors which connect a *tort* with the country whose law would be the applicable law under the general rule and the significance of any factors connecting the *tort* with another country. The required focus is on the torts committed by the defendants or those for whom they are responsible. Instead, the Court of Appeal considered, the judge had focused on the overall conduct of the CIA. In our view, there is force in this criticism. The judge observed (at para 62):

> "Any provision of information to be used in interrogation by the CIA was a component in the overall exercise undertaken by the CIA. It was the methods adopted by the CIA in putting the questions to the claimant that are said to have occasioned the physical and psychological harm to him."

Similarly, the judge observed (at para 69):

> "Whilst I accept the information allegedly provided to the CIA is more likely than not to have come from officials of [the UK Services] who were, at the time, in England, the significance of this imparting of information in the context of the present claim is limited because it is only an element of the overall treatment of the claimant by the CIA in the Six Countries."

In our view, the Court of Appeal correctly identified that the emphasis placed by the judge on the overall course of conduct of the CIA, which minimised the role of the UK Services in the tort alleged to have been committed, tended to distort his evaluation of the competing considerations under section 12.

(b) Reduced significance of the factors connecting the tort with the Six Countries

74. The second ground on which the Court of Appeal concluded that the judge had erred in his approach to the section 12 exercise was that he was wrong to discount the reasons advanced by the claimant for saying that the factors connecting the tort with the Six Countries were of reduced significance. Males LJ identified (at para 38) three factors which reduced the significance of the factors connecting the torts with the Six Countries.

> (1) First, the claimant had no control over his location and in all probability no knowledge of it.
>
> (2) So far as the UK Services were concerned, the claimant's location from time to time was irrelevant and may well have been unknown.
>
> (3) The claimant had been rendered to the Six Countries precisely because this would enable him to be detained and tortured outside the laws and legal systems of those countries.

On this basis, the Court of Appeal considered that the significance of the factors connecting the tort with each of the Six Countries was minimal. The judge had not had proper regard to those principles and, as a result, his assessment was wrong in law.

75. So far as the first factor is concerned, the point which had been urged on the court by Mr Hermer for the claimant was that the significance of the injuries occurring in the Six Countries was reduced because the claimant was not voluntarily present in any of those Six Countries, having been unlawfully taken to and detained there by the

CIA against his will. The situation was therefore very different from one in which a person was voluntarily present in another country and might have a reasonable expectation that the local law might apply to acts or events taking place there. The judge simply observed (at para 58) that while there was some force in this comparison, it did not serve to reduce to any material extent the significance of the claimant's injuries being sustained in the Six Countries, against the background of the pleaded laws of those countries. In our view, the Court of Appeal was correct to identify this as an error by the judge.

76. So far as the second factor is concerned, the judge (at para 60) did not consider that it had any material impact. In the judge's view, the fact of the matter was that each of the injuries occurred on the territory of a particular country. Even if the defendants were indifferent to the countries chosen by the CIA for the black sites, the injuries still took place there and it was hard to see why any such indifference should lead to the law of England and Wales being substituted for the law of the country concerned. The locations to which the CIA took the claimant were not "incidental" so far as that agency was concerned and it was the CIA that caused the injuries to the claimant. In our view the Court of Appeal was correct to identify this as an error by the judge. The judge's response reflects his focus on the activities of the CIA, referred to above. In addition, it fails to take account of the fact that from the perspective of the UK Services the geographical location of the claimant was fortuitous and a matter of no significance. It seems to us that, as a result, the strength of the connection of the torts to each of the Six Countries is inevitably diminished.

77. So far as the third factor is concerned, the judge addressed a rather different point from the one that was being advanced on behalf of the claimant. The judge observed (at para 50) that while it may have been the result in practice that the black sites within each of the Six Countries were deliberately used by the United States in order to be free to act with impunity, irrespective of the laws of the country in question, this did not mean that the laws of the country concerned in some way ceased to exist. On the contrary, the claimant's pleaded case made plain that each of the Six Countries had laws which, on their face, would appear to proscribe the treatment the claimant says he received. Mr Hermer's point, however, was not that the link with the Six Countries was weakened by any deficiency in the law of any of those countries (with the possible exception of Guantánamo Bay). It was, rather, that those countries had been chosen by the CIA because it was likely that, in fact, the application of the local law could be evaded. The claimant had been removed there and was being held there against his will because it was believed that he could be insulated from the application of the local law. That is likely to have been the reason for the selection of each of the Six Countries. The whole purpose was to insulate the claimant from his environment in the sense that the occurrence and the parties were such that they did not interact with their geographical location. This, it might be noted, is one of the situations, identified by the Law Commission in its Working Paper which gave rise to the PILA, where the application of the lex loci delicti is not called for on any ground of policy, and may therefore be inappropriate (Law Commission, Working Paper No. 87, Private International Law –

Choice of Law in Tort and Delict (1984) (Law Com WP 87, Scot Law Com WP 62), para 4.94. We agree with the Court of Appeal that this factor was bound to reduce the strength of the connection between the tort and the Six Countries. As Mr Hermer put it, the CIA were, and were assumed by the UK Services, to be "acting within their own law" and "operating their own framework of value and law" over the operations. In our view the judge erred in dismissing this consideration as irrelevant to the section 12 exercise.

(c) Significance of the factors connecting the tort with England and Wales

78. The third ground on which the Court of Appeal concluded that the judge had erred in his approach to the section 12 exercise was that, because he approached the UK Services' conduct as merely one component in the overall exercise undertaken by the CIA, he had been dismissive of the factors connecting the tort with England and Wales. The Court of Appeal identified the following factors.

> (a) The judge accepted that the UK Services' conduct in requesting information from the CIA was more likely than not to have taken place in England. It would therefore be in accordance with the principle of territoriality for the legality of that conduct to be determined in accordance with the law of England and Wales.
>
> (b) The judge accepted that the actions taken by the UK Services were undertaken "for the perceived benefit of the United Kingdom" and its national security.
>
> (c) They were taken by UK executive agencies acting in their official capacity in the exercise of powers conferred under UK Law. The UK Services were subject to UK criminal and public law. Males LJ observed, referring to *Entick v Carrington* (1765) 2 Wils KB 275, that the fact that executive bodies are subject to English tort law has for centuries been a recognised means of holding the executive to account, controlling abuse of power and ensuring the rule of law.

Males LJ, at para 41, considered, correctly in our view, that these were strong factors connecting the tortious conduct with England and Wales which the judge had incorrectly downplayed.

(d) Whether the Court of Appeal was entitled to interfere with the judge's evaluation and to perform for itself the exercise under sections 11 and 12 of the PILA

79. We consider that, for the reasons it gave and which are considered above, the Court of Appeal was correct to identify a series of errors in the approach of the judge which were sufficiently significant to justify the intervention of the Court of Appeal and to justify it in performing for itself the exercise under sections 11 and 12.

7. Error of approach by the Court of Appeal

80. It seems to us, however, that the Court of Appeal has also fallen into error in relation to the required focus under section 12 of the PILA on the torts committed by the defendants. Section 11(1) provides that the general rule is concerned with "the country in which the events constituting the tort … in question occur". Similarly, section 12 refers to "the significance of the factors which connect a tort … with the country whose law would be the applicable law under the general rule" and with "another country". In our view, the Court of Appeal, in approaching the section 12 exercise, interpreted the scope of the relevant torts too narrowly in that it equated the torts in question with the conduct of the UK Services which is alleged to be wrongful. Thus, at para 25 of his judgment, Males LJ described the required structured approach to section 12 in the following terms:

> "First, it must identify the factors which connect a tort with the country whose law would be applicable under the general rule (in this case, the laws of the Six Countries) and assess their significance. This requires the court to focus on the conduct of the defendant which is alleged to be wrongful (ie the tort)."

This equates the wrongful conduct of the defendant with the tort. In the same way, at para 37 Males LJ observed:

> "… [T]he judge did not focus on the wrongful conduct allegedly committed by the Services. The alleged tortious conduct consisted of the sending of requests to the CIA in the knowledge or expectation that this would result in the torture or extreme mistreatment of the claimant. Instead, the judge viewed the Services' conduct as no more than one component 'in the overall exercise undertaken by the CIA' (at para 62) or as 'only an element of the overall treatment of the claimant by the CIA in the Six Countries' (at para 69). That may be a valid way of looking overall at what happened to the claimant, but this is not a claim against the CIA. What section 12 requires is a focus on the tort committed by the defendants (or those for whom they are responsible). In this respect the judge's error

> was similar to the error which the Supreme Court in *VTB Capital plc v Nutritek* held to have been made by the Court of Appeal."

As Sir James Eadie KC submits on behalf of the defendants, these passages conflate the conduct of the UK Services with the torts. The Court of Appeal should have focused on the torts alleged against the UK Services for which the defendants are said to be vicariously responsible.

81. In the unusual circumstances of this case, the elements of the torts alleged are not limited to the conduct of the UK Services. In the case of misfeasance in public office, conspiracy, and negligence, the alleged torts are actionable only on proof of damage. While trespass to the person and false imprisonment are actionable without proof of damage, they are alleged here to have been committed jointly with the CIA. It can be seen from the pleaded case for the claimant, see paras 38 - 46 above, that in the circumstances of this case each alleged tort to which the exercise under section 12 relates is not co-extensive with the conduct of the UK Services and that, by focusing solely on the conduct of the UK Services which is said to have taken place in England and Wales, the Court of Appeal followed an unduly narrow approach. By equating the tort with the wrongful conduct allegedly committed by the UK Services, the Court of Appeal's analysis failed to take account of the conduct of the US authorities which led to the infliction of injury and damage.

82. In our view, the Court of Appeal itself erred in its approach and, as a result, it is necessary for this court to perform the exercise under sections 11 and 12 for itself.

8. Authorities

83. Before turning to that exercise, it is convenient to refer to certain authorities. On behalf of the defendants it is submitted that although these authorities are not binding factual precedents, they illuminate how other courts have performed the exercise under sections 11 and 12. In particular the defendants submit that the evaluative assessment of the judge in the present case was consistent with the previous rejection by courts in this jurisdiction of attempts to displace the general rule in cases involving allegations of rendition, detention or mistreatment, and that the Court of Appeal did not recognise the true significance of past case law, in particular *Belhaj v Straw* [2014] EWCA Civ 1394; [2017] AC 964.

84. Of the authorities to which we have been referred, Sir James Eadie accepts that *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327; [2007] QB 621 differs from the present case in that it was concerned simply with detention in Iraq in circumstances where the local law had been amended to give the multi-national force

operating there the necessary powers to intern suspects in accordance with UN Security Council resolutions. The claimant, a dual British and Iraqi national, was arrested and detained by British forces in Iraq on the ground that he was suspected of terrorist activities. The British forces were part of a multi-national force acting under the authority of a Security Council resolution made under article 42 of the UN Charter. That resolution gave the multi-national force authority to intern persons where it was necessary for imperative reasons of security. The claimant sought judicial review of his detention on the ground that it infringed his right to liberty under article 5 of the Convention on Human Rights and Fundamental Freedoms as given effect by the Human Rights Act 1998. The Court of Appeal held that, although Convention rights applied to a person detained by British forces in Iraq, the obligations of the United Kingdom under the Security Council resolution prevailed to the extent that there was a conflict by virtue of article 103 of the UN Charter. The Court of Appeal further held, with regard to the claimant's claim in the tort of false imprisonment at common law, that it was not substantially more appropriate under section 12 of the PILA for the applicable law for determining the lawfulness of the claimant's detention to be the law of England rather than the law of Iraq. Brooke LJ observed (at para 106) that, given that the laws of Iraq had been adapted to give the multi-national force the requisite powers, it would be very odd if the legality of the claimant's detention was to be governed by the law of England and not the law of Iraq. Accordingly, it held that the claimant's detention was lawful. On a further appeal in *Al-Jedda*, the House of Lords held ([2007] UKHL 58; [2008]AC 332 at paras 40-43) that the Court of Appeal had not made an error of law in dealing with this issue. As Males LJ pointed out in the Court of Appeal in the present proceedings, at para 44, the decision that Iraqi law was the applicable law in these circumstances clearly gave effect to the reasonable expectations of the parties arising from the incorporation of Security Council resolutions into Iraqi law which afforded specific protections to the occupying forces. We also note that in *Al-Jedda* in the Court of Appeal Brooke LJ added (at para 108):

> "It is, of course, correct that the legality of Mr Al-Jedda's detention cannot be tested in an Iraqi court because of the immunity afforded to the multi-national force forces by Iraqi law. But these proceedings have shown that he is able to have it tested in an English court. He is not being arbitrarily detained in a legal black hole, unlike the detainees in Guantanamo Bay in the autumn of 2002 …"

85. In *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB), the claimant, an Afghan national, was captured by UK armed forces during a military operation in Afghanistan. He was imprisoned on British military bases in Afghanistan for some three months until he was transferred to the custody of the Afghan authorities. He claimed that his detention by UK armed forces was unlawful under the Human Rights Act 1998 and under the law of Afghanistan. All of the relevant events occurred in Afghanistan. It was not suggested that there were any factors which displaced the general rule under section 11 of the PILA and it was therefore common ground that the

applicable law was the law of Afghanistan. As Males LJ observed in the Court of Appeal in the present proceedings (at para 46), this common ground is not surprising. British forces were operating in Afghanistan pursuant to UN Security Council resolutions under a broadly equivalent regime to that which had applied in Iraq. Once again, the application of the law of Afghanistan gave effect to the parties' reasonable expectations. As a result, section 12 was not considered in *Serdar Mohammed*.

86. Much closer to the facts of the present case are *Belhaj v Straw* [2013] EWHC 4111 (QB); [2014] EWCA Civ 1394; [2017] AC 964 and *Rahmatullah v Ministry of Defence* [2019] EWHC 3172 (QB).

87. In *Belhaj v Straw*, the first claimant, a Libyan national, alleged that he had been unlawfully detained and had sustained personal injury in China, Malaysia, Thailand and Libya and on board a US registered aircraft. He alleged that he had been abducted in Thailand by US agents and rendered to Libya on a jet aircraft owned by a CIA front company. He alleged that he was mistreated during the flight, on arrival in Tripoli and during a period of four years while he was held in prison in Libya. It was alleged that the defendants, ministers, officials, departments and agencies of the UK Government had participated in his unlawful abduction and removal to Libya and had colluded in his mistreatment. At first instance Simon J held that the applicable law under section 11 was the law of the countries where the claimant had been detained and mistreated and that that law was not displaced by section 12. He noted that none of the locations where the claimant alleged he was detained was under British control. The alleged detentions and transfers were said to have involved or to have resulted from the actions of agents of foreign states. Even in respect of the two causes of action which might be said to have a real link to the United Kingdom, misfeasance in public office and negligence, the basis of the claims was the allegation of unlawful detention in and transfer from various foreign states. The locations where the injuries were said to have occurred were not under UK control. The claimant was not a UK national and had no right to enter or remain in the United Kingdom. The Court of Appeal held (at para 144) that Simon J had made no error in the application of the PILA and observed (at para 148) that the decision that the general rule should not be displaced was not a marginal one.

88. The issue in *Belhaj* arose in the context of a dispute as to which party had the burden of pleading the applicable provisions of foreign law. (See Simon J at para 124.) However, we are unable to accept the submission of Mr Hermer that the decisions of the judge and the Court of Appeal on the section 12 issue were obiter. In each case the decision was a necessary part of the court's reasoning and part of the ratio decidendi. Nevertheless, the section 12 exercise is fact specific and there are important points of distinction between *Belhaj* and the present case. The first claimant in *Belhaj* had connections with Libya where he was a prominent political and public figure. He was a Libyan national, a political opponent of the former head of state, Colonel Gaddafi, a former Commander of the Tripoli Military Council and the leader of a political party in Libya. (See section 12(2) of the PILA.) Furthermore, in *Belhaj* it was conceded that

certain elements of the claim would be governed by foreign law. The claim for false imprisonment in China and Malaysia related to detention under Chinese and Malaysian immigration laws. Similarly, it is said that a later period of detention in Libya was under purported colour of Libyan national security law.

89. In *Rahmatullah v The Ministry of Defence and the Foreign and Commonwealth Office* [2019] EWHC 3172 (QB), the claimants were Pakistani nationals captured by British forces in Iraq who were handed over to United States control and taken to Afghanistan where it was alleged that they were subjected to prolonged detention, torture, and other mistreatment. The claim against the defendants concerned alleged mistreatment by UK personnel upon arrest and before transfer to the control of the United States, the transfer itself and failures thereafter to intervene so as to bring to an end the detention and further mistreatment by the US authorities. In respect of the last category of claim (the return claim) the claimants relied upon a Memorandum of Understanding of 2003 between the United States and the United Kingdom and upon the common law torts of misfeasance in public office and negligence which would be engaged only in the event that English law was found to apply (para 5). Turner J noted (at paras 26-28) that the general rule under section 11 applied on the basis that the loss and damage alleged had been sustained in Iraq and then in Afghanistan. He referred to the claimants' submission that the locations at which they were detained were as a matter of fact, albeit not of law, effectively operated and occupied outwith the auspices of the authorities of those nations. Furthermore, the claimants were in Afghanistan involuntarily as a result of extraordinary rendition. In the judge's view, however, this was insufficient to demonstrate that it would be substantially more appropriate to apply English law. The judge noted, further, that those in senior positions who were to be held accountable for the alleged failure to secure the return of the claimants were based in England and acting or failing to act in the exercise of State authority. The judge observed that those considerations were not insignificant but recalled that similar considerations had not been afforded determinative weight in *Belhaj* (para 29). With regard to a submission on behalf of the claimants as to the danger of legitimising forum shopping by illegal rendition, the judge noted (at para 34) that it was accepted by the defendants that circumstances could arise in which this was a legitimate concern, where, for example, a detainee had been relocated in a rogue state selected for its lack of adequate legal protection for those within its geographical and jurisdictional boundaries. However, there was in that case no evidence to suggest that any consideration of the putative advantages of the application of Afghan law lay behind the rendition decision or that Afghan law would provide "a particularly suitable environment within which to achieve any such darker purpose". The judge then simply concluded (at para 35) that, having given careful consideration to all the factors relied on by the claimants, it would be disproportionate to list them all in full and it was sufficient to state that he was satisfied that taken together they did not displace the general rule. In the circumstances and in agreement with the Court of Appeal (at paras 47 and 49), we are unable to attach any great weight to the decision.

90. Finally in this regard, Mr Hermer has drawn to our attention the decision of the Federal Court of Australia in *Habib v Commonwealth of Australia* [2010] FCAFC 12; (2010) 183 FCR 62 where the claimant alleged that "officers of the Commonwealth committed the torts of misfeasance in public office and intentional but indirect infliction of harm by aiding, abetting and counselling his torture and other inhumane treatment by foreign officials while he was detained in Pakistan, Egypt and Afghanistan and at Guantánamo Bay " (para 2). The claimant sought "redress from the Australian government for the alleged acts of Australian officials [which were] unlawful under Australian law and in respect of causes of action recognised by Australian law" (para 71). This was, of course, a very different context from the present and no legislation resembling the PILA was applicable. Nevertheless, Mr Hermer makes the point that before the Federal Court of Australia there was no suggestion that the claim should be governed by foreign law, the parties and the court proceeding on the basis that Australian law was the applicable law.

9. This court's performance of the exercise under sections 11 and 12 of the PILA: the general rule and its displacement

91. The principal factor which connects the alleged torts with the law which would be applicable under the general rule in section 11, that is the law of each of the Six Countries, is the fact that the claimant's injuries were sustained there. This is the reason why the general rule would lead to the application of each of those laws. The point can be amplified by pointing to the fact that those gaolers and interrogators causing injury to the claimant were physically present with him when the injuries were sustained, but, on the facts of this case, this is essentially the same point. No other factor is said to connect the torts under consideration to any of the Six Countries.

92. In our view, on the alleged facts, the significance of the connection between the torts and each of the Six Countries arising from the claimant's detention there and the infliction of his injuries there is massively reduced by the following factors, which also show the inappropriateness of applying the laws of each of the Six Countries to the claims against the defendants.

93. First, in the more normal circumstances in which section 12 could usually be expected to operate, the voluntary presence of a party within a country other than his home country may well give rise to a significant link with that country for this purpose. A person in those circumstances could be considered to have a reasonable expectation that certain aspects of his situation or activities might be governed by the law of that country. The present case could hardly be more remote from such a case. On the assumed facts, the claimant has been unlawfully rendered against his will to a series of foreign countries in succession in which he has been detained, interrogated and tortured. He did not even know in which country he was held at any given time. It was part of a deliberate plan to disorientate him that he should be denied knowledge of where he was.

In these circumstances, his involuntary presence in any of the Six Countries cannot constitute a meaningful connection with that country. Furthermore, he could have had no reasonable expectation that the law of wherever he was should apply to his situation.

94. Secondly, although it is alleged that the UK Services were aware that the claimant had been unlawfully rendered and was being held against his will and tortured at CIA-operated secret detention facilities (Amended Particulars of Claim, para 47), there is no suggestion that the UK Services were aware or ever took steps to find out where the claimant was. The UK Services were entirely indifferent to where the claimant was being held; from their perspective the claimant's geographical location was entirely immaterial. As Males LJ observed in the Court of Appeal (at para 38(2)), it is fanciful and has not been alleged that the UK Services ever considered that they were submitting themselves successively to the laws of Thailand, Poland, the United States (or possibly Cuba), Morocco, Lithuania and Afghanistan or that they ever expected or intended their conduct to be judged by reference to those laws.

95. Thirdly, the claimant was rendered to and held in each of the Six Countries by the CIA without any reference to the laws of those countries. The CIA-operated secret detention facilities in which the claimant was held and interrogated were insulated environments within which he could be denied any access to the local law or recourse to local courts, and on the assumed facts it is an appropriate inference that their locations were selected with this purpose in mind.

96. Fourthly, the fact that the claimant was held not in one secret detention facility in one country but in six such facilities in six different countries is itself of considerable importance here. The sheer number of such black sites in which the claimant was held diminishes the significance of the law of any one of them. Furthermore, while each of the claimant's injuries will have been sustained in one of the Six Countries, it seems highly improbable that the claimant, even if now aware of the countries in which he was held, would be able to say in which country which injury was sustained; see para 48 above.

97. Fifthly, although nobody has contended in these proceedings that the law of the United States of America should apply to these claims (save possibly in relation to Guantánamo Bay), it is a significant feature of the case that the claimant was unlawfully rendered and held and interrogated by agents of the United States in CIA-operated detention facilities in six different locations. His captors and those who actually administered the ill-treatment were not agents of any of the Six Countries (save possibly in relation to Guantánamo Bay) but of a third party, the United States. It would be surprising if the law of the Six Countries was the governing law when it is not being alleged that anyone from five of those Six Countries (we put to one side Guantánamo Bay) had anything to do with the alleged torts. As Mr Hermer puts it, this underscores how the CIA's black sites in each of the Six Countries operated as "de facto exclaves"

where the laws and jurisdiction of those countries did not run. This serves further to diminish the significance of the place of his detention and ill-treatment as factors connecting the torts to each of the Six Countries.

98. Turning to consider the other side of the coin, there are substantial factors here which connect the torts with the United Kingdom.

99. First, while it is correct that the claimant is not a citizen of the United Kingdom, has no right of entry or residence here or, so far as is known, any other personal connection with the United Kingdom, he is suing in respect of torts which he alleges were committed by agents of the Secret Intelligence Service and the Security Service, and for which it is alleged that the UK Government in the person of the Foreign, Commonwealth and Development Office, the Home Office and the Attorney General is vicariously liable.

100. Secondly, the events which constitute the torts alleged against the UK Services were committed in part by the UK Services in England and Wales and in part by the CIA in the Six Countries. The way in which each tort is put in the claimant's pleading has been considered at paras 42-46 above. The significance of the relevant conduct of the CIA, in particular in inflicting injuries on the claimant in the Six Countries, as a relevant factor under section 12 has been considered at paras 92-97 above. The relevant conduct alleged against the UK Services is that, notwithstanding their knowledge that the claimant was being arbitrarily detained without trial at secret CIA detention and interrogation facilities, and that he was being subjected to extreme mistreatment and torture during interrogations conducted by the CIA, from at least May 2002 until at least 2006 they sent numerous questions to the CIA to be used in interrogations of the claimant for the purpose of attempting to elicit information of interest to the UK Services. It is further alleged that, in doing so, they did not seek any assurances that the claimant would not be tortured or mistreated and did not take any steps to discourage or prevent such torture or mistreatment being inflicted during interrogation. The judge accepted that the relevant acts and omissions of the UK Services in requesting information from the CIA were more likely than not to have taken place in England. He also accepted that they were committed by the UK Services for the perceived benefit of the United Kingdom.

101. Thirdly, the actions were taken by UK executive agencies acting in their official capacity in the purported exercise of powers conferred under the law of England and Wales (given the known location of the UK Services in London). The defendants are all emanations of the UK Government and were at all material times subject to the criminal and public law of England and Wales.

102. In our view, the claimant has established a compelling case in favour of the displacement of the general rule in the unusual circumstances of this case. We have no hesitation in accepting the submission that, on the basis of a comparison of the significance of the factors connecting the alleged torts with the Six Countries and with England and Wales, it is substantially more appropriate for the applicable law to be the law of England and Wales.

10. Conclusion

103. For these reasons we would dismiss this appeal.

LORD SALES (dissenting):

Introduction: the PILA regime

104. In this judgment I will adopt the same defined terms as set out by Lord Lloyd-Jones and Lord Stephens. Part III of the PILA was passed to implement recommendations by the Law Commission and the Scottish Law Commission in their report entitled *Private International Law: Choice of Law in Tort and Delict* (1990) (Law Com No 193, Scot Law Com No 129) ("the Law Commissions' Report") to abolish the double actionability rule and to establish in its place a code for determining the applicable law to be used for determining issues relating to tort. Section 9(4) provides that "The applicable law shall be used for determining the issues arising in a claim, including in particular the question whether an actionable tort … has occurred." Part III applies in relation to claims against the Crown: section 15(1).

105. Sections 11 and 12 establish the basic regime. They are set out at paras 51 and 53 above. Section 11 lays down the general rule to establish the applicable law in relation to a claim in tort. It is common ground that the various claims brought by the claimant are of that character. Where the claim is brought in an English court and the conduct complained of would constitute a tort in English law, the analysis required under sections 11 and 12 proceeds by reference to the elements of such a tort (the position may be different if the conduct complained of would constitute a legal wrong according to foreign law but not according to English law: see Dicey, Morris and Collins, *The Conflict of Laws*, 16th ed (2022), vol 2, para 35-136). Section 12 has the effect that the general rule is a form of default rule, which can be displaced in certain circumstances.

106. Section 11(1) provides that the applicable law "is the law of the country in which the events constituting the tort … in question occur". It is common ground that in the present case the issue of what events constitute the tort is to be addressed by reference to the English law of tort.

107. The claims brought by the claimant are for causes of action in respect of personal injury caused to him, where in each case some of the events which constitute the relevant tort occurred in different countries (his claim for false imprisonment has been treated as a claim also in respect of personal injury). This is analysed below. Section 11(2) makes provision for determination of the applicable law under the general rule "[w]here elements of those events" - meaning, elements of "the events constituting the tort in question" as referred to in subsection (1) - occur in different countries. For "a cause of action in respect of personal injury caused to an individual", section 11(2)(a) provides that the applicable law is to be taken as being "the law of the country where the individual was when he sustained the injury." Subparagraph (b) sets out the general rule in relation to damage to property. Subparagraph (c) provides that in any other case the applicable law under the general rule is to be taken to be "the law of the country in which the most significant element or elements of those events occurred."

108. The rule in relation to personal injury claims as set out in section 11(2)(a) is clear. If there is doubt about where the individual happened to be when he sustained the injury, a court applying the rule can find the relevant facts. In the present proceedings, to the extent that it is necessary to do so, this can be done by reference to evidence heard in closed session. However, for present purposes the parties have invited the courts to address the question of the applicable law as a matter of principle at an earlier stage, by reference to the claimant's pleaded case. The claimant sustained the relevant personal injuries in a range of countries other than the United Kingdom, namely the Six Countries.

109. Section 12 provides for displacement of the general rule in certain circumstances. It is of central importance in this appeal. It is helpful to set it out again here:

> "(1) If it appears, in all the circumstances, from a comparison of-
>
> > (a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and
> >
> > (b) the significance of any factors connecting the tort or delict with another country,
>
> that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues

> or that issue (as the case may be) is the law of that other country.
>
> (2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events."

As appears from subsection (1), there is a heavy onus to displace the general rule: it must appear that "it is substantially more appropriate" for the applicable law to be the law of the relevant other country.

The Claimant's pleaded case

110. Lord Lloyd-Jones and Lord Stephens have set out the claimant's case above. In summary, his case is that:

> (1) In late March 2002 the claimant was captured and transferred to a secret detention centre operated by the CIA in Thailand. Thereafter, he was moved to other secret detention facilities operated by the CIA in the Six Countries. In the period when he suffered treatment resulting in personal injuries, the claimant was being arbitrarily detained at those secret detention facilities in the Six Countries. At these facilities, he was subjected to extreme mistreatment and torture during interrogations conducted by the CIA;
>
> (2) The claimant pleads that he was held and mistreated by the CIA at detention centres in Thailand from about late March 2002 until 4 December 2002; in Poland from 5 December 2002 to 22 September 2003; in Guantánamo Bay between 22 September 2003 and 27 March 2004; in Morocco between 27 March 2004 and 17 or 18 February 2005; in Lithuania between 17 or 18 February 2005 and 25 March 2006; in Afghanistan between 25 March 2006 and some time in September 2006; and in Guantánamo Bay again from September 2006 until the present day;
>
> (3) The UK Services, acting by officials of the Security Service for whom the second defendant is vicariously liable and by officials of the Secret Intelligence Service for whom the first defendant is vicariously liable, were aware of the claimant's detention and mistreatment by the CIA;

(4) With that knowledge, from at least May 2002 until at least 2006, the UK Services sent questions to the CIA to be asked in interrogations of the claimant in order to elicit information of interest to the UK Services, with the knowledge, expectation or intention that the CIA would subject the claimant to torture and extreme mistreatment at interrogation sessions conducted at the detention facilities for the purpose of attempting to extract information in response to them.

111. As appears from the claimant's pleaded case and the materials set out in it, the CIA decided to abduct the claimant and subject him to mistreatment for their own purposes. The questions alleged to have been sent by the UK Services were, in this context, sent with a view to extracting information from the claimant for their benefit in the course of a pattern of conduct commenced and continued throughout by the CIA in order to obtain information for themselves.

112. The claimant alleges that he suffered personal injuries arising from these events in circumstances constituting the torts in English law of misfeasance in public office, conspiracy to injure by unlawful means, trespass to the person (assault and battery), false imprisonment, and negligence. For the purposes of application of section 11 of the PILA to determine the preliminary issue it is agreed that he suffered the relevant personal injuries which comprise elements of these torts in one or other of the Six Countries. However, he claims that pursuant to section 12 it is substantially more appropriate for the applicable law to be the law of England and Wales. In the alternative, he contends that, pursuant to section 14(3)(a), it would conflict with principles of public policy for the applicable law to be the law of any of the Six Countries where he alleged he was unlawfully detained and mistreated. The defendants say that the general rule in section 11 should be applied, so that the applicable law is that of the particular Six Countries where the claimant suffered his personal injuries.

The decisions of the courts below and the issues on the appeal

113. The parties agreed that the question of the applicable law should be determined as a preliminary issue. The issue for debate in this court concerns only the application of sections 11 and 12 of the PILA. I prefer to say nothing about section 14.

114. At first instance, Lane J held that the general rule in section 11 applied and was not displaced pursuant to section 12. Therefore, the applicable law governing the torts alleged by the claimant was to be taken to be the law of whichever of the Six Countries was the location where he sustained the relevant personal injury.

115. In the Court of Appeal Males LJ gave the sole substantive judgment, with which Thirlwall LJ and the President of the Queen's Bench Division agreed. The Court of Appeal held that Lane J had made legal errors in his assessment so that the court was

required to apply section 12 for itself. The Court of Appeal held that it is substantially more appropriate for the applicable law governing the claimant's claims to be the law of England and Wales.

116. The defendants now appeal to this court in relation to the preliminary issue arising in respect of sections 11 and 12. The issues which arise on the appeal are:

> (1) Did Lane J err in his decision in respect of the application of sections 11 and 12 and in concluding that the laws of the Six Countries, rather than the law of England and Wales, are the applicable law in relation to the torts alleged by the claimant, so that the Court of Appeal was entitled to overrule that decision?
>
> (2) If he did err, did the Court of Appeal err in turn when it revisited the question of the application of sections 11 and 12, in concluding the law of England and Wales is the applicable law in relation to those torts?
>
> (3) If so, with the result that this court has to apply sections 11 and 12 afresh according to our own judgment, what is the applicable law in relation to the torts alleged by the claimant?

Analysis

(1) Did Lane J err in law such that his decision can be said to be wrong?

117. It is not helpful for me to spend much time on this issue, as the majority in this court endorse the view of the Court of Appeal that Lane J did err in law. However, I should record that I do not associate myself with that view. When I first read the judgment of Lane J, it did not seem to me that he had committed any error of law. Despite the criticisms of his judgment by the Court of Appeal and by the majority in this court, I remain unpersuaded that he did.

118. Lane J correctly directed himself by reference to sections 11 and 12 of the PILA and relevant authorities on those provisions; it is not suggested by anyone that, in weighing up the matters to which sections 11 and 12 call attention, he reached a conclusion which could be said to be irrational or outside the range of conclusions which were legitimately open to him; and I do not see that he misunderstood the nature of the claimant's claim in any respect, failed to have regard to any relevant consideration or took into account any irrelevant consideration. Where it is said that Lane J downplayed particular features of the case or overplayed other features, it seems to me that all that he was doing was ascribing different weights to aspects of the case in

a way that fell within the bounds of the task posed for him by sections 11 and 12 of the PILA and as he was required to do under that Act.

119. The principles according to which an appellate court will review and overturn an evaluative judgment made by a lower court are well established. The approach which the Court of Appeal was required to follow was to "review" Lane J's judgment (CPR r 52.21(1)) in order to determine whether it was "wrong" (CPR r 52.21(3)). It is not sufficient that the appellate court might have arrived at a different evaluation if it had carried out the exercise itself. This is the approach to be adopted to the application of section 12 of the PILA: see *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5; [2013] 2 AC 337 ("*VTB Capital*"), para 199 (Lord Clarke of Stone-cum-Ebony), and also the general comments made by him at para 229 and by Lord Neuberger of Abbotsbury at paras 81 and 91. Where, as is the case under section 12, the court has to apply not a simple bright-line rule but a legal standard which requires an overall evaluation of a number of factors, the observation by Hoffmann LJ in *In re Grayon Building Services Ltd* [1995] Ch 241, 254, is apposite: "generally speaking, the vaguer the standard and the greater the number of factors which the court has to weigh up in deciding whether or not the standards have been met, the more reluctant an appellate court will be to interfere with the trial judge's decision."

120. In my respectful opinion, the Court of Appeal was wrong to criticise Lane J's reasoning. When Lane J said (para 58) that the point made by Mr Hermer KC that the significance of the link to the Six Countries was reduced because the claimant had no control over his presence there had "some force" but that "it does not serve to reduce to any material extent the significance of the claimant's injuries being sustained in the Six Countries", he did not ignore the point, but was engaged in weighing those factors against each other as he was entitled to do. Similarly, when Lane J referred to Mr Hermer's point that the significance of the link with the Six Countries was reduced because the UK Services did not know and did not care where the claimant was being held and said again that he did not consider "this point has any material impact" (para 60), he did not ignore the point; on the contrary, he took it into account but held that it was outweighed by other features of the case, as he was entitled to do. The same comment applies in relation to Lane J's statement (para 62) that the significance of the facts that the actions of the UK Services took place in England, were undertaken for the perceived benefit of the UK and that the UK Services were emanations of the UK state "is … limited". He was entitled, indeed right (see para 111 above), to say there that "[a]ny provision of information to be used in interrogation by the CIA was a component in the overall exercise undertaken by the CIA", and was also entitled, and right, to place emphasis upon the fact that it was the methods used by the CIA in the Six Countries which caused the claimant to sustain the personal injuries in issue. He was also entitled, and again in my opinion was right, to say (para 69) that the significance that the questions from the UK Services were sent from England was limited "because it is only an element of the overall treatment of the claimant by the CIA in the Six Countries."

121. Accordingly, I do not agree with the first criticism of Lane J's judgment by the Court of Appeal, that the judge erred by not focusing on the wrongful conduct by the UK Services: para 37. In fact, it seems to me that this criticism reflects the error made by the Court of Appeal in its own approach, as explained by Lord Lloyd-Jones and Lord Stephens at paras 80-82 above, namely to concentrate on the conduct of the UK Services rather than on the factors connecting the various torts with one country or another. Nor do I agree with the Court of Appeal's second criticism of Lane J's judgment, at para 38, that he was wrong to discount the reasons advanced by the claimant for saying that the factors connecting the torts with the Six Countries were of reduced significance. Lane J considered all of these points and explained his view about them. In my opinion, the Court of Appeal's criticism simply reflects a disagreement about the weight to be accorded to certain factors in the overall evaluation exercise, rather than any legal error by the judge. Nor do I agree with the third criticism advanced by the Court of Appeal (paras 40-41), that Lane J was wrong to assess the sending of questions by the UK Services in the context of the overall conduct of the CIA in relation to the claimant (as he did at paras 62 and 69) and should have found that the UK Services would reasonably have expected that their conduct would be subject to English law. That again, in my opinion, reflects a difference in view regarding the weight to be attached to the competing factors and also the Court of Appeal's own error in focusing on the conduct of the UK Services rather than the elements of the torts.

(2) Did the Court of Appeal err such that its decision can be said to be wrong?

122. Applying the same appellate approach when reviewing the decision of the Court of Appeal, I agree with Lord Lloyd-Jones and Lord Stephens that the Court of Appeal erred in its application of sections 11 and 12 by focusing on the conduct of the UK Services rather than on the elements of the torts: paras 80-82 above.

(3) Application of sections 11 and 12 afresh

123. The result of all this is that it falls to this court to apply sections 11 and 12 of the PILA for itself.

124. In what follows, in no way do I seek to minimise the seriousness of the appalling mistreatment which the claimant suffered according to his statement of case, which is assumed to be true. However, the fact that the claimant considers that his interests may best be protected if English law is found to be the applicable law does not affect the task of the court, which is to apply sections 11 and 12. In the field of conflicts of laws it is usually the case that a party will contend for application of the system of law which gives it the greatest forensic advantage or provides for the greatest or lowest level of recovery (depending on whether the party is bringing or defending the claim). The applicable law provisions under sections 11 and 12 of the PILA are neutral in their

application and do not prioritise the choice or interests of either side in the debate regarding which law should apply. One could imagine a situation in which application of the law of one or more of the countries where the claimant was held and tortured (say, for the purposes of illustration, Poland) would be significantly more advantageous for the claimant in terms of the relief he could obtain than English law, so that it would then be in his interests to contend that Polish law was the applicable law and in the interests of the UK Services to argue the opposite. Such a reversal ought not to affect the application of sections 11 and 12.

125. I find it useful to use this example as a thought experiment to test the application of those provisions. If it were the case that the claimant would be better protected under the laws of the Six Countries where he was in fact subjected to torture, would one nonetheless conclude that English law rather than those laws was the applicable law? I find it difficult to see how that could be right.

126. Four further general points should be made by way of introduction to this part of my judgment. First, since sections 11 and 12 set out a neutral objective test to determine the applicable law, the focus under section 12 is on the significance of the factors which connect the tort in issue with the country identified under section 11 and those which connect the tort with another country. Section 11 does not drop out of the picture for the purposes of making that comparison. On the contrary, the matters identified in subparagraphs (a) and (b) of subsection (2) represent Parliament's own assessment of the elements of a tort which are prima facie to be regarded as the most significant for cases falling within those subparagraphs, so that no evaluation of that is called for under subparagraph (c).

127. Secondly, the test under the PILA is a substantive legal test, not a matter of case management. As Lord Clarke made clear in *VTB Capital* at para 209, the test under section 12 of the Act is not to be equated with an exercise to find the most appropriate forum for a trial in case management terms. Rather, as he noted was observed by Dicey, Morris and Collins, "section 12(1) expressly focuses upon the particular torts", rather than the broader question of identifying the forum conveniens (appropriate forum). It might well be the case that it would make for a simpler and less costly trial if English law were to be applied in relation to all the claimant's claims, but that is not a relevant consideration in applying sections 11 and 12.

128. Thirdly, the claimant has alleged that he suffered at the hands of the CIA in each of the Six Countries, with complicity on the part of the UK Services, in identified periods of time. The fact that it may be difficult to know precisely when (and hence where) any individual event of mistreatment occurred is not a good reason, in my opinion, to conclude that English law rather than the laws of the Six Countries should apply. Such doubts as arise relate to problems of evidence which may be reduced or eliminated at trial (including in closed session) and which in any event would be

resolved in the usual way on the balance of probabilities in the light of such evidence as there is and by the drawing of reasonable inferences in the light of that evidence. Taking the example of advantageous Polish law given above, if it proved to be necessary to identify what torts the claimant suffered while in Poland, the courts could make findings about that in this normal way.

129. Fourthly, the PILA is neutral as to the content of the law which might be found to be applicable pursuant to sections 11 and 12. Those provisions are intended to give a clear answer, even if the answer is that the applicable law is of a state which does not provide any cause of action at all in relation to the conduct complained of. Having said that, it should be observed that this is obviously not the position as regards the conduct of the CIA in the extremely troubling circumstances of this case. It is hard to imagine that any system of law would not provide a cause of action for the very serious ill-treatment which the claimant suffered at their hands, and the pleadings in relation to the laws of the Six Countries indicate that they do.

130. I turn now to consider and compare the significance of the factors which connect the torts with the law which would be applicable under the general rule (that is, the laws of the Six Countries) and the significance of the factors connecting the tort with England and Wales. The parties have proceeded on the common basis that the same analysis applies to all the torts, without seeking to draw any distinctions between them. Therefore, although the tort of misfeasance in public office depends upon abuse of duties which exist only in English public law, it is not appropriate to focus on that aspect of the tort as something which in itself creates any especially significant link with England and Wales. In any event, the way in which causes of action are formulated in different ways in different legal systems is not in itself a material factor in the analysis under section 12, which as explained above is neutral so far as that is concerned.

131. In my view, significant weight attaches to the factors which connect the torts in issue with the Six Countries.

132. It is highly significant that the claimant sustained his personal injuries and was imprisoned in the Six Countries. That is picked out in section 11(2)(a) as presumptively the most significant element of the events which occurred (see para 126 above), for good reasons as explained in the Law Commissions' report. The laws of almost all countries will protect a person's physical integrity in some way, as the pleading of the laws of the Six Countries tends to indicate, so the place where the injury was sustained provides a clear point of connection with one particular legal system out of a range of possible candidate laws to guide the choice of applicable law. The presence of a person in the country where he sustains the injury indicates that he was subject to the protection of the law of that country, thereby establishing a direct link between him and that law.

133. That link exists even though the CIA sought to conceal from the claimant and the world that he was present in the Six Countries to avoid application of the law in those countries. Notwithstanding that he was prevented from gaining access to the authorities and the courts of those countries while he was located there, as Lane J pointed out he was still in the legal space governed by their laws and entitled to all the relevant protections their laws afforded. It is not the case that no law applied to him at all while he was there, only that he was prevented from being able to have recourse to it at that time. That is also true of the law of England and Wales, or indeed any law. But when he came to be in a position to assert his legal rights in some accessible forum, as he now does in these proceedings, he was able to assert his rights under the laws of those places. He does so now in these proceedings, by his alternative claim to relief under the laws of the Six Countries. In the hypothetical advantageous Polish law example referred to above, I think the claimant would clearly be entitled to seek to avail himself of a right to sue on the basis of that law, which was the very law under whose protection he was when he was injured. He could have done so if he had managed to escape from his captivity while in Poland and commenced proceedings there, and I do not think it should make a difference that the CIA were successful in preventing him from doing that by unlawfully detaining him.

134. It is also highly significant that the CIA agents were present in the Six Countries when they subjected the claimant to mistreatment, imprisoned him and inflicted the injuries he suffered. The Court of Appeal thought that Lane J had given undue prominence to the significance of this point, because "this was in reality the inevitable corollary of the judge's first factor [the place where the claimant sustained his injuries]" (para 26). I do not agree. The point is distinct and has distinct and additional significance. It is not always the case that a tortfeasor acts in the jurisdiction where the claimant suffers injury: for example, a long-range weapon might be used from outside that jurisdiction. In any event, the significance of the presence of the claimant in a particular jurisdiction is that he is under the protection of the laws of that jurisdiction, whereas the significance of the presence of the wrongdoer in a particular jurisdiction when they act to inflict personal injury is that they are subject to the laws of that jurisdiction and are answerable for their actions according to those laws. In other words, not only does the presence of the claimant establish a relevant and strong link for him with the laws of that place, the presence of the wrongdoers in that place establishes a relevant and strong link between them and the laws of that place. Both factors count when considering section 12.

135. The Court of Appeal sidestepped this point by criticising Lane J for focusing on the conduct of the CIA and looking at the conduct of the UK Services in the context of the activities being carried on by the CIA: see paras 33 and 36-37. In my respectful opinion, it was the Court of Appeal rather than Lane J which erred on this issue. It is unreal to analyse the position in relation to the UK Services as something distinct from the position in relation to the CIA: see para 111 above. The CIA agents were the actors who took the initiative in seizing, imprisoning and torturing the claimant. It was they who directly inflicted the injuries which he suffered. The torts pleaded against the UK

Services all depend upon the UK Services opportunistically taking advantage of the state of affairs which the CIA had brought about on their own initiative and for their own purposes, and then making themselves complicit in that conduct (as Mr Hermer described it). The CIA were the primary tortfeasors and the UK Services made themselves jointly liable for, or in some way that carries with it legal responsibility adopted or foresaw, the torts committed by the CIA.

136. This seems to me to be an important feature of the case which cannot be ignored for the purposes of the analysis under section 12. Suppose that one of the CIA agents who inflicted the injuries on the claimant were present in the UK or could otherwise be brought within the jurisdiction of the courts of England and Wales for the purposes of being sued here: they could be joined in the action against the UK Services, not least because they are alleged to be joint tortfeasors in respect of various of the torts alleged. Where the CIA agents and the UK Services are alleged to be joint tortfeasors in relation to the same tort, I do not think it makes sense to analyse the applicable law differently depending on which of the potential defendants happens to be before the court. That is essentially adventitious so far as concerns the factors connecting the tort to one country or another, which is the focus of section 12. For the other torts alleged (such as negligence), it is the essence of the allegations made against the UK Services that they were looking to, and in some way seeking to benefit from, the wrongful mistreatment of the claimant by the CIA in foreign countries. The wrongfulness of the mistreatment of the claimant in those countries is primarily to be judged by reference to the laws of those countries, which were applicable both to the claimant and to the CIA agents when the mistreatment occurred.

137. One can also test the point in this way. It would have made a significant difference if the CIA had not chosen to seize, imprison and torture the claimant on their own initiative, but instead only did so at the instigation of the UK Services. If the UK Services had been the prime movers in such a scheme, that might have been a powerful factor pointing in favour of connecting the torts with England and Wales (though even then, I do not think it is necessarily the case that it would outweigh other factors pointing in a different direction: compare the discussion of applicable law in relation to the tort of conspiracy in *VTB Capital* below). The fact that they were not the prime movers greatly diminishes the force of that connecting factor in my opinion.

138. At the heart of the torts alleged in these proceedings is that the claimant was imprisoned by the CIA in the Six Countries and was tortured by the CIA in those countries. It is the essence of all the torts alleged that the claimant was imprisoned and that he was tortured. Absent those events, the requests allegedly sent by the UK Services would not have constituted torts against him. When the torts alleged are analysed in this way, as they must be, the judgments in *VTB Capital* indicate that the strongest connecting factors are with the Six Countries.

139. In *VTB Capital* it was alleged that a group of Russian defendants conspired together in Russia to deceive the claimant (VTB) in England by statements made to it in England. The case was primarily concerned with identifying the forum conveniens (appropriate forum) for the trial of the claims, but the question of the applicable law of the torts alleged fell to be considered, since it was a relevant factor in deciding which out of Russia and England and Wales was the appropriate forum. By a majority (Lord Neuberger, Lord Mance and Lord Wilson) it was decided that Russia was the appropriate forum. Lord Clarke dissented on that issue and Lord Reed agreed with his judgment. The foundation for Lord Clarke's dissent was that the applicable law in relation to the torts alleged (deceit and conspiracy to injure) was the law of England and Wales. The majority did not disagree, but considered that even allowing for this the appropriate forum was still Russia.

140. Lord Clarke gave the fullest consideration to the application of sections 11 and 12 of the PILA. Section 11(2)(a) and (b) did not apply, so section 11(2)(c) had to be considered. In relation to the tort of deceit, at para 200, Lord Clarke said that the most important elements of the facts constituting the tort of deceit were "by their intrinsic nature, the reliance on the misrepresentations by VTB and the loss suffered by VTB". For this reason, the general rule pursuant to section 11(2)(c) was taken to be that the law of England and Wales was the applicable law. Lord Clarke pointed out (para 205) that the test under section 11(2)(c), whilst not identical with that under section 12, substantially overlapped with it: displacement under section 12 of the general rule identified pursuant to section 11(2)(c) would be particularly difficult "because the application of that provision [section 11(2)(c)] itself requires the court to identify the country in which the most significant element or elements of the tort are located". Clearly, the significance of the various elements making up the tort is in itself a factor of significance when applying the test in section 12. The law identified under section 11(2)(c) as the applicable law for the tort of deceit was not displaced under section 12. The majority agreed that the law of England and Wales was the applicable law for that tort.

141. Turning to the present case, the most significant elements of the facts constituting each of the torts alleged are the direct invasion of the claimant's bodily integrity by the CIA, and his suffering personal injury as a result or, in the case of false imprisonment, his placement in enforced detention by the CIA. Those events happened in the Six Countries. In my view, the reasoning in *VTB Capital* shows that this in itself is a strong indication that the factors connecting the torts with the Six Countries are highly significant. This analysis highlights the importance of the points made at paras 111 and 134-138 above.

142. In addition to deceit, the claimant in *VTB Capital* also pleaded the tort of conspiracy to injure by unlawful means, the unlawful means being the same fraudulent representations relied on for the case in deceit: paras 183-184. It was alleged that the agreement to use those unlawful means had been made in Russia: paras 7, 9 and 52

(Lord Mance), 100 (Lord Neuberger) and 183 (Lord Clarke). However, Lord Clarke said of the case in conspiracy (para 201) that "the essence of the case is that the representations were made as part of a common design" according to which the representations were made in England, were relied on in England and the loss was sustained in England. At para 223, Lord Clarke accepted VTB's submission that "the critical ingredients of all the torts took place in England". In other words, the most significant elements of the tort of conspiracy were where it was carried into effect to inflict the intended harm on the victim, which happened in England. Lord Clarke's conclusion was that English law was the applicable law in respect of the tort of conspiracy. Lord Mance and Lord Neuberger, with whose judgments Lord Wilson agreed, were not so definitive, but were prepared to assume that English law was the applicable law in relation to the conspiracy claim.

143. This part of the reasoning in *VTB Capital* again reinforces my view that it is inherent in the nature of the torts alleged by the claimant in the present case that they have a strong connection with the Six Countries, as compared with their connection with England. In the present case, as in *VTB Capital*, the most significant elements of the tort of conspiracy are where it was carried into effect to inflict the intended harm on the claimant, which is in the Six Countries. The significance of this is not materially diminished for the purposes of the comparison required by section 12 by the fact that the decision of the UK Services to involve themselves in the infliction of harm on the claimant was taken in England: in *VTB Capital* the fact that the agreement which was the foundation of the claim in conspiracy was made by Russian persons in Russia did not serve to make Russian law the applicable law; what was more significant was that the conspiracy was carried into effect and the intended injury was inflicted in England. The argument in favour of the law of the Six Countries being the applicable law is stronger still in relation to the tort of negligence, where the connecting factor with England is merely foreseeability of harm being inflicted in a foreign country rather than active encouragement of or complicity in the infliction of that harm.

144. I consider that some significance attaches to the factors that the UK Services were present in England when they played their part in the alleged events which constitute the torts, were subject to the law of England and Wales when they acted, and that they acted by officers who are UK nationals and in order to promote the interests of the UK. I also consider that, apart from the matters I have highlighted above, the personal connection of the claimant (who is a Palestinian national) and of the CIA agents with either England or the Six Countries is non-existent. (This might require some qualification with respect to the CIA agents in relation to Guantánamo Bay, but in the overall context of this case I do not think such connection as they might have with that territory is a significant factor). However, in my view the factors to which I have referred above are more significant overall in connecting the torts with the Six Countries than with England and Wales.

145. The decisions of Simon J and the Court of Appeal (Lord Dyson MR, Lloyd Jones and Sharp LJJ) regarding applicable law in *Belhaj v Straw* [2013] EWHC 4111 (QB), on appeal at [2014] EWCA Civ 1394, [2017] AC 964, also support the view that the applicable law in this case is the laws of the Six Countries. In *Belhaj* it was alleged that the UK Services had been aware of a plan involving US agents to seize the two claimants in the course of travelling from China and to subject them to rendition via Malaysia and Thailand to Libya, in the course of which they were subjected to unlawful imprisonment and serious mistreatment which was continued in Libya. It was alleged that the UK Services provided information to support that rendition and mistreatment and make it possible, with the result that they were complicit in and liable for a range of torts committed in the course of these events equivalent to those alleged in the present proceedings and in a similar manner. Simon J held that the applicable law was the laws of the relevant foreign states where the detention and mistreatment took place, saying at para 133:

> "In the present case none of the locations where the claimants allege they were detained, or from where they allege they were transferred, was under British control. The alleged detentions and transfers are said to have involved, or to have resulted from, the actions of agents of foreign states. Even in respect of the two causes of action which might be said to have a real link to the United Kingdom (misfeasance in public office and negligence) the basis of the claims is the allegation of unlawful detention in and transfer from various foreign states. This is not a case in which it would be 'substantially more appropriate' to apply English law. Nor are the locations where the claimants say their injuries occurred under United Kingdom control. It is also pertinent to note that the claimants are not, and never have been UK nationals, did not have the right to enter or remain in the United Kingdom and were not resident within the United Kingdom during the relevant period."

146. The Court of Appeal upheld Simon J's decision regarding the applicable law and endorsed this reasoning: paras 142-148. The Court of Appeal said (para 148) that his decision that the general rule under section 11 was not displaced pursuant to section 12 "was not a marginal one"; that is, it was clear that the general rule was not displaced.

147. The Court of Appeal in the present case considered that the reasonable expectations of the parties would have been that the law of England and Wales applied to the torts: para 41. I respectfully disagree. The notion of the reasonable expectations of the parties in a case like this seems unreal, speculative and unhelpful as a guide to the application of sections 11 and 12. It is difficult to believe that any of the relevant persons involved in the events in question (the claimant, the CIA agents or the UK

Services) had any or any precise expectation at the time that any particular law governed in relation to the events constituting the torts. A relatively sophisticated legal analysis is required to determine that after the event. To say that an expectation one way or the other was a reasonable expectation is really to state a conclusion by applying the law in the light of such an analysis, rather than to be guided by any significant feature of the real world as events unfolded.

148. If anything, if (contrary to my view) it were necessary to try to assess the reasonable expectations of the parties, I think they would tend in favour of the law of the Six Countries being the applicable law. As explained above, I do not think it is right to leave the CIA out of the picture for the purposes of the analysis. The CIA agents inflicted the harm in the Six Countries. They must have known that the claimant had the protection of the laws of those countries, even though they took steps to prevent him gaining access to the courts or law enforcement authorities there. They will have known that, should a time come when the claimant did gain access to a court which could enforce his rights, the obvious country to focus on to determine what rights he had which were violated was the country where the harms were inflicted on him. In so far as the claimant had any expectation of which law should apply to him, again the most obvious is the law of the place where the mistreatment was inflicted on him, followed perhaps by the law of the USA whose agents were directly involved in inflicting that mistreatment on him. Although, like the claimant, the UK Services may not have known where the claimant was located at any particular time, the same is true for the UK Services, in so far as they can be said to have had any expectation which law applied in relation to his mistreatment.

149. This is not a case in which the parties had some prior relationship which connects them and the torts in issue to a particular system of law, such as a contract which specifies a law to govern some relevant dimension of their interaction; nor is the case analogous to those considered at para 3.8 of the Law Commissions' report. The Law Commissions' report addressed the issue of reasonable expectation in the general run of cases, such as the present, where there is no such special feature at para 3.2. It was emphasised that the structure of the rules to determine the applicable law proposed in the report:

> "… would promote uniformity and discourage forum shopping. To the extent that the parties have any expectations at all, a general rule based on the applicability of the lex loci delicti probably accords with them. Where, as will often happen, one of the parties is connected with the place of the wrong, as where he is habitually resident there, it is right that he should be able to rely on his local law. As for the person who acts in a country with which he has no lasting connection, he can expect that if he commits a wrong he will be liable to the extent that the law in question stipulates.

> Similarly if he has a wrong committed against him, he can expect to have no more preferential treatment than if the wrong had been committed against someone habitually resident there."

I would add that this reasoning also indicates that if a party has a wrong committed against him, he can ordinarily expect to have no less preferential treatment than if the wrong had been committed against someone habitually resident there. Again, it is relevant to refer to the advantageous Polish law example given above.

150. Even if a comparison of the significance of the factors connecting the alleged torts with England and Wales with the significance of the factors connecting the alleged torts with the Six Countries might be said to indicate that they are more finely balanced than the analysis above would suggest, I consider that in this case there would still be some considerable way to go before it could be said, in the words of section 12(1), that "it is substantially more appropriate" for the applicable law to be the law of England and Wales rather than the laws of the Six Countries. In my respectful opinion, as in *Belhaj v Straw* (above), this is not a marginal case on this point. It is usually the position in cases involving argument about applicable law that there will be factors pointing in different directions. The regime for choice of applicable law in sections 11 and 12 of the PILA is weighted heavily in favour of the applicable law given by the general rule in the interests of seeking to achieve a reasonably high degree of certainty in its application.

151. The general rule is displaced on very few occasions, as noted by Dicey, Morris and Collins and as stated by Lord Clarke in *VTB Capital* at para 205. Lord Clarke endorsed the treatment in Dicey, Morris and Collins: "Importantly they stress the use of the word 'substantially', which they describe as the key word, and conclude that the general rule should not be dislodged easily, lest it be emasculated. The party seeking to displace the law which applies under section 11 must show a clear preponderance of factors declared relevant by section 12(2) which point to the law of the other country." As he observes (para 206), that approach is borne out by the cases. Lord Clarke referred to relevant authorities and called attention to the view of Lord Wilberforce, who was a member of the House of Lords Committee which considered the Bill which became the PILA, that it would be a "very rare case" in which the general rule under section 11 would be displaced. Clearly Lord Clarke agreed with that view.

152. In carrying out the comparison exercise under section 12(1), particular attention is required to be given to the factors identified in section 12(2): (a) "factors relating to the parties", (b) "factors relating … to any of the events which constitute the tort … in question" and (c) "factors relating … to any of the circumstances or consequences of those events".

153. Taking these in turn, save to the extent that they overlap with (b) and (c), the factors relating to the parties are not highly significant in my view in terms of connecting the torts to the UK or the Six Countries, although there are factors which link the UK Services with the UK: see paras 132-133, 144 and 149 above. It is highly significant that the claimant was present in the Six Countries and subject to the protection of their laws when he was imprisoned and tortured there: paras 132-133 and 149 above. The factors relating to the events which constitute the torts point strongly in favour of an overall connection with the Six Countries: see *VTB Capital* and paras 132-133 above. The factors relating to the circumstances or consequences of those events overlap with those in (b) and point strongly in favour of connection with the Six Countries. The dominant consequence of the events is that the claimant was imprisoned and suffered personal injuries in the Six Countries. The dominant circumstances of the events are that he was imprisoned and tortured by CIA agents in the Six Countries in the course of a scheme and a pattern of conduct carried out by them on their own initiative and for their own purposes, in which the UK Services were only peripherally involved.

154. For these reasons I respectfully disagree with my colleagues and conclude that the applicable law for the torts relied on by the claimant are the laws of the Six Countries.