Neutral Citation Number: [2010] EWCA Civ 758
Case No: A2/2009/1844
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(QUEEN'S BENCH DIVISION)
Underhill J

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2010

Before :

LADY JUSTICE ARDEN
SIR JOHN DYSON (JSC)
and
LORD JUSTICE ELIAS

- -

Between :

HILAL ABDUL RAZZAQ ALI AL JEDDA	**Appellant**
- and -	
THE SECRETARY OF STATE FOR DEFENCE	**Respondent**

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- -

Mr Richard Hermer QC, Mr Tom Hickman & Mr Alex Gask (instructed by Public Interest Lawyers) for the Appellant
Mr Jonathan Swift & Mr Ben Olbourne (instructed by **Treasury Solicitor**) for the Respondent

Hearing dates : 11-12 March 2010

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Judgment

Lady Justice Arden :

1. In this action, Mr Al Jedda, who has both Iraqi and British nationality, seeks damages for unlawful imprisonment by reason of his detention by British forces in a military detention centre in Iraq. On this appeal we have to determine whether this action was properly dismissed by Underhill J on 5 March 2009 following the trial. The period for which damages is claimed constitutes part only of the period for which Mr Al Jedda was detained, namely that following the adoption of the new Constitution of Iraq on 20 May 2006 to 30 December 2007, the date of his release.

2. The claim was raised by amendment. Mr Al Jedda's original claim was for declaratory relief or habeas corpus. In earlier proceedings, Mr Al Jedda sought declaratory relief and damages under the Human Rights Act 1998 ("HRA") but the House of Lords held that no such claim lay because the United Kingdom's obligations had been displaced by its obligations under the UN Charter ([2008] 1 AC 332). The earlier proceedings leading to the decision of the House of Lords are referred to in this judgment as *Al Jedda 1*. This court in *Al Jedda 1* held that, under section 11 of the Private International Law (Miscellaneous Provisions) Act 1995 ("PILA"), the law governing any claim for false imprisonment was that of Iraq. The House of Lords agreed with that holding.

3. In legal terms, this is an unusual case. Mr Al Jedda was detained by British forces in Basra on 10 October 2004 on security grounds. He was suspected of being a member of a terrorist group said to be involved in weapons smuggling and explosive attacks in Iraq. He remained in detention until 30 December 2007. He was at no time charged with any offence. It has been held that he is unable to bring any claim to test the lawfulness of his detention under the HRA (*Al Jedda 1*), although, following the dismissal of that claim by the House of Lords, Mr Al Jedda has made an application to the European Court of Human Rights ("the Strasbourg court"). The Grand Chamber of the Strasbourg court had a hearing in his case on 9 June 2010, and judgment from that court is pending. It has also been held that Mr Al Jedda cannot bring any claim in tort under the common law. Notwithstanding that Mr Al Jedda's detention was by British forces, the lawfulness of his detention can only be determined if, at all, in these proceedings, that is, under the law of Iraq, where the detention occurred.

Factual and legal background

4. The summary which follows draws together material to be found in the Amended Particulars of Claim, paragraphs 7 to 29 of the judge's judgment and a background note prepared by Mr Richard Hermer QC, Mr Tom Hickman and Mr Alex Gask, who appear on this appeal for Mr Al Jedda.

5. The basis of the legal regime in Iraq, relevant to the internment of those deemed to be a security risk by foreign forces, went through a number of changes from the date of the commencement of the occupation until Mr Al Jedda's release.

6. The invasion of Iraq commenced on 20 March 2003 and the occupation on 1 May 2003. During this time the United Kingdom forces were obliged to conduct themselves in accordance with international humanitarian law. Mr Hermer accepts that, as well as responsibilities, this gave them certain limited powers, including

(under the Fourth Geneva Convention of 1949 ("Geneva 4") and Hague Regulations 1907) the power to intern civilians where necessary for imperative reasons of security.

7. The occupying powers, principally the United States of America and the United Kingdom, formed the Coalition Provisional Authority ("CPA") which commenced promulgating laws. In May 2003, the CPA promulgated CPA Regulation 1 which provided that they would temporarily exercise the powers of government and that they were vested with executive, legislative and judicial authority necessary to achieve their objectives. On 10 June 2003, the CPA promulgated CPA 3 which set out the basis of security-related detentions. This set out the process for the internment of individuals by CPA forces, which is consistent with Geneva 4.

8. On 8 March 2004 the CPA promulgated the Transitional Administrative Law ("TAL"), or Interim Constitution, setting out a legal regime for the anticipated return to sovereignty. By Article 26C of the TAL, CPA laws were expressly deemed to remain in effect when full sovereignty was restored:

> "The laws, regulations, orders, and directives issued by the Coalition Provisional Authority pursuant to its authority under international law shall remain in force until rescinded or amended by legislation duly enacted and having the force of law"

9. At this stage Iraq was still under an occupation and the internment of civilians was governed by international humanitarian law, and the laws promulgated by the CPA. The occupation ended on 28 June 2004. After that date, the United Kingdom forces were present in Iraq with the consent of the Iraqi government. In anticipation of the ending of the occupation, the Security Council of the United Nations ("the UN") acting under Chapter VII of the UN Charter, passed resolution 1546 ("UNSCR 1546"). The terms of the resolution welcomed the resumption of full sovereignty by the new Interim Government of Iraq and included (by way of annexed letters) the authorisation of the Multinational Force ("MNF"), which included the United Kingdom, to intern civilians where deemed "necessary for imperative reasons of security". A letter from the US Secretary of State Colin Powell annexed to UNSCR 1546 stated:

> "Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, *internment where this is necessary for imperative reasons of security,* and the continued search for and securing of weapons that threaten Iraq's security. A further objective will be to train and equip Iraqi security forces that will increasingly take responsibility for maintaining Iraq's security. The MNF also stands ready as needed to participate in the provision of humanitarian assistance, civil affairs support, and relief and reconstruction assistance requested by

> the Iraqi Interim Government and in line with previous Security Council resolutions." (emphasis added)

10. The most material change in the legal framework, for the purposes of this claim, was the entry into force of the new Iraqi Constitution on 19 May 2006. The relevant provisions of the Constitution of Iraq are set out in the Appendix to this judgment, including the rights on which Mr Al Jedda relies. Importantly the Constitution includes the following provisions:

    (a) the Constitution stands as the supreme law of Iraq (Article 13(1));
    (b) any law which contradicts the Constitution is deemed to be void (Article 13(2));
    (c) internment without trial is prohibited (Articles 15, 19(12) and 37(1)(B));
    (d) any limitation on a constitutional right may not violate "the essence" of the right (Article 46).

11. By Article 143 the TAL was expressly annulled. The special regime established by Article 26(C) TAL, which ensured the continued validity of laws, regulations, orders and directives, was not, at least not expressly, carried over into the Constitution.

12. The authority of the MNF under UNSCR 1546 was extended by UNSCR 1637 of 8 November 2005 and UNSCR 1723 of 28 November 2006 until 31 December 2006 and 31 December 2007, respectively. These resolutions also annexed an exchange of letters between the Prime Minister of Iraq and the US Secretary of State, Condeleeza Rice, referring back to the original exchange of letters annexed to UNSCR 1546. That exchange contains the only explicit reference to internment. The House of Lords in *Al Jedda 1* held that UNSCR 1546 not only authorised but also obliged the MNF to exercise the powers of detention where it was necessary to do so for imperative reasons of security. As the later resolutions of the Security Council extend UNSCR 1546, I need not refer to them separately in this judgment.

13. As to Mr Al Jedda's detention, the position was as follows. In the run up to the return of sovereign powers on 30 June 2004, the CPA revised and reissued CPA 3. Expressed to be pursuant to its UN mandate and consistently with Geneva 4, this provided a more detailed procedure for the authorisation of the detention of security detainees. This was the legal position that appertained at the point at which Mr Al Jedda was arrested in October 2004, namely that his internment was lawful as a matter of Iraqi law by virtue of CPA 3 which was itself lawful by its incorporation into domestic law through the gateway of Article 26 of the TAL. For the purposes of this claim Mr Al Jedda does not dispute the legality of the power to detain in Iraqi law whilst the TAL was applicable.

14. After Mr Al Jedda was released, the Secretary of State made a decision to remove Mr Al Jedda's British nationality. That decision is under appeal, and we are not concerned with this matter.

15. Mr Al Jedda commenced a challenge before the High Court in the summer of 2005 premised upon an assertion that the detention was contrary to his rights protected under Article 5 to Schedule 1 to the HRA. He was able to bring such a claim as a consequence of the decision of the Court of Appeal in the case of *R (Al Skeini and others) v Secretary of State for Defence* [2007] QB 140, later upheld by the House of

Lords (see paragraph 97 below), that the rights enjoyed under the HRA extended to British military bases in Iraq.

16. In *Al Jedda 1*, the House, other than Lord Rodger, rejected the argument that the acts of members of the CPA could be attributed to the UN as the MNF was not established at the request of the UN, and was not mandated to operate under its auspices or as a subsidiary organ of it. Nonetheless the Article 5(1) claim failed because the House held that, by virtue of the operation of Article 103 of the UN Charter (which gives obligations owed under the Charter greater precedence than any other international treaty obligations), Mr Al Jedda's Article 5(1) rights were qualified or displaced by what the House of Lords concluded was an obligation to intern where necessary mandated by UNSCR 1546 (and subsequent UN resolutions to the same effect). However, whilst holding that Mr Al Jedda's Article 5(1) rights had been qualified or displaced by the obligation to intern, the House did so only to the degree strictly necessary and without prejudice to the other Convention rights he enjoyed (see [39] per Lord Bingham, [126] to [129] per Baroness Hale, [136] per Lord Carswell and [152] per Lord Brown of Eaton-under-Heywood). As Lord Bingham put it at paragraph 39 of his judgment:

> "39 Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention..."

17. The House thus did not hold that the protection guaranteed to Mr Al Jedda by the Convention was completely displaced. On the contrary, the passages cited above demonstrate that the House contemplated that international law in the form of the resolutions of the Security Council and the Convention could together form the legal order applying to detention pursuant to UNSCR 1546 and subsequent resolutions. That means that, even if the present claim cannot be used to determine the lawfulness of the detention of Mr Al Jedda, there would not be as a result a complete "legal black hole" as he is not completely deprived of protection under the Convention. The House in *Al Jedda 1* did not go on to consider the precise scope of the authorisation given by the UN, and no such issue on the scope of the resolutions has been raised for our consideration on this appeal. As we are not dealing with Convention rights, no issue arises on this appeal with regard to the scope of the residual protection afforded by the Convention.

18. The system for authorising and reviewing his detention may be summarised in very brief terms as follows:

i) Following his arrest, the decision to review his internment (initially authorised by the senior officer in the detaining unit) was conducted within 7 days by the Divisional Internment Review Committee (DIRC). This comprised the officer commanding the detention facility (ie the person who had made the initial decision to detain), together with legal and military personnel.

ii) Their recommendation was passed to the Commander of the United Kingdom forces.

iii) Under the regime in force at the time of Mr Al Jedda's detention, reviews were conducted twenty-eight days after the date of internment, then at three months after the date of internment, then at three-monthly monthly intervals. Changes to that regime were made in January 2005 which provided for an initial DIRC review within forty-eight hours of the initial decision to intern, further reviews at monthly intervals, and additional *ad hoc* reviews in certain circumstances.

iv) Changes to this system were implemented after July 2005 in order to take into account some criticisms of it by the Divisional Court in *Al Jedda 1* ([2005] EWHC 1809 (Admin), Moses and Richards LJJ). The main change was that the sole decision was no longer that of the Commanding Officer on the recommendation of DIRC but rather the Commanding Officer now became a member of the DIRC which also compromised members of the legal, intelligence and other staffs. Representations could be made by the internee in writing which were considered by the legal branch and put before the DIRC for consideration.

v) In addition to the DIRC, in 2006 a Combined Review and Release Board (CRRB) was created, partly in response to concerns about the lack of Iraqi involvement in the process.

vi) At the 18 month point of detention the internment fell to be reviewed by the Joint Detention Committee (JDC). This body included senior representatives of the MNF, the Iraqi interim government and the detaining state (HM Ambassador for the United Kingdom). It only met once and delegated powers to a Joint Detention Review Committee (JDRC), which comprised Iraqi representatives and officers from the MNF.

vii) The system for reviewing Mr Al Jedda's detention did not provide him with any right to a hearing. However, each body would entertain written representations from internees or matters raised by them with representatives of the Army legal branch, who paid regular visits to the detention facility.

19. During the occupation, the CPA promulgated CPA 17, entitled *Status of the Coalition Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq*. This provided for the MNF to enjoy immunity "from Iraqi legal process". Section 2 CPA 17 (revised) provided (so far as material) that:

> (1) unless otherwise provided in CPA 17, the MNF, CPA and [others] were immune from Iraqi legal process.

(2) MNF and CPA personnel were to respect the Iraqi laws relevant to those personnel.

(3) MNF and CPA personnel were to be subject to the exclusive jurisdiction of their sending states.

I set out the relevant provisions below.

20. The essential facts for the purposes of this appeal are: (1) Mr Al Jedda was detained pursuant to arrangements agreed between British forces and the Iraqi government prior to the adoption of the new Constitution in fulfilment of the United Kingdom's obligations under the UN Charter; (2) those arrangements complied with Geneva 4; (3) the Iraqi government did not withdraw its agreement to those arrangements after the adoption of the new Constitution; and (4) those arrangements made no provision of any sort for a hearing or any review by an independent judicial officer.

The Issues

21. There are five issues raised by this appeal:

i) Was the detention of Mr Al Jedda from 20 May 2006 unlawful under Iraqi law by reason of the operation or effect of the Iraqi Constitution? ("the lawfulness of detention issue")

ii) In so far as Mr Al Jedda's claim raises any issue as to the meaning or effect of provisions of the Iraqi constitution, is the issue justiciable in an English court? ("the justiciability issue")

iii) If Mr Al Jedda's detention from 20 May 2006 was unlawful under Iraqi law, should the relevant provisions in Iraqi law be disapplied on the basis that they are inconsistent with the requirements of international law and their enforcement would accordingly be contrary to public policy pursuant to section 14(3) of PILA ? ("the public policy issue")

iv) Does the immunity conferred on British forces operating in Iraq by CPA 17 have the effect that Mr Al Jedda's claim discloses no actionable tort for the purposes of section 9 (4) of PILA? ("the CPA 17 issue")

v) Is the Secretary of State entitled to rely on the defence of act of state? ("the act of state issue")

22. Issues (ii) and (iv) are raised by the respondent's notice. Other issues were raised in the judge's judgment, but they are not raised on this appeal, and I need not therefore refer to them.

ISSUE 1: THE LAWFULNESS OF DETENTION ISSUE

1.1 *Expert evidence on the meaning and effect of the Constitution of Iraq*:

23. There were four expert witnesses on the law of Iraq. Mr Al Jedda called Professor Fedtke. Shortly before the hearing, Mr Al Jedda also served two witness statements of

Mr Zyed Safad. The Secretary of State called Dr. Jonathan Morrow, to whose report the witness statement of Mr Sermid D. Al-Sharaf was attached.

24. The judge described the qualifications of the experts, and gave his general assessment of their evidence, as follows:

> "39 Both parties adduced expert evidence as to the meaning and effect of the provisions of the Constitution which are in issue before me. The Claimant relied on a report from Dr. Jorg Fedtke, who is at present Professor of Comparative Law and Director of the Institute of Global Law at University College London (though he is about to take up a chair at Tulane University in New Orleans). He supplemented his report in oral evidence and was cross-examined. Prof. Fedtke is a very highly-qualified expert in comparative constitutional law, with (so far as relevant for present purposes) a particular specialist interest in the constitutional protection of human rights. He was among the experts who gave advice to the Constitutional Committee, under the auspices of the Office of Constitutional Support (which is part of the United Nations Assistance Mission for Iraq ("UNAMI")). He has also served on a number of occasions as a legal expert for UN and EU funded projects on various aspects of constitutionalism in the Arab region. He was a careful and frank witness, and both his written report and his oral evidence were admirably clear and succinct. The Claimant also put in evidence shortly before the hearing (without objection) two declarations from Zyad Saeed, a practising Iraqi lawyer with international law qualifications: these were largely concerned with other issues but one of them bore tangentially on the issue of the status of CPA 3.
>
> 40 The Secretary of State relied on evidence from two experts. The first, Dr. Jonathan Morrow, is not an academic or practising lawyer: indeed his doctorate is not in law. He is however qualified as a legal practitioner of the Supreme Court of New South Wales and he gained experience in constitutional drafting as one of the legal advisers to the United Nations Transitional Administrator in East Timor. With the benefit of that experience, he also acted as an adviser to the Judicial Reform Commission of the Government of Afghanistan on constitutional questions and to the Kurdistan Regional Government in connection with the negotiation of TAL. In 2005 and 2006 he advised the US Congressional think-tank, the United States Institute of Peace, on issues arising out of the drafting of the Iraqi Constitution; and in that capacity he spent most of the summer of 2005 in Baghdad and had considerable contact with the Constitutional Committee and its advisers. He too gave oral evidence before me. He is not an academic lawyer of the eminence of Prof. Fedtke; but he clearly had relevant expertise and I found his evidence useful. Dr. Morrow annexed to his report a short opinion addressed to the present issue from a second

> expert Sermid Al-Sarraf, who is a lawyer with both Iraqi and US qualifications.
>
> 41 I have found the expert evidence helpful; but the actual issues which I have to consider are such that I need not be as wholly dependent on it as an English judge generally is when having to decide issues of foreign law. No doubt as a result of the substantial input of comparative lawyers, the concepts (particularly in those aspects relating to human rights) and drafting techniques used in the Constitution of Iraq are not unfamiliar to an English lawyer, particularly since the incorporation into our law of the European Convention on Human Rights, and do not require a uniquely Iraqi perspective in order to be understood. Nor in any event were either Prof. Fedtke or Dr. Morrow experts in Iraqi law as such. I do however remind myself that I must consider the provisions of the Constitution as an aspect of Iraqi law and as they would fall to be interpreted by an Iraqi court."

25. Professor Fedtke expressed the view that the Constitution was the highest law, and stood at the apex of a hierarchy of legal norms, and accordingly all other laws had to comply with the Constitution. This is recognised in Article 13(1) and Article 13(2) goes on to say that any law that contradicts the Constitution is void. He expressed the view that the powers of courts to review legislation for constitutionality was vested in the Iraqi Federal Supreme Court ("IFSC").

26. In his report, Professor Fedtke made essentially four points: firstly, that a provision for detention without a judicial process violated the Constitution; secondly, that CPA 3 would be declared to be unconstitutional and void by the IFSC after 20 May 2006; thirdly, that in any event CPA 3 did not have the force of law after that date, and fourthly, that the arrangements authorised by UNSCR 1546 were insufficiently precise to authorise the procedure for detention under which Mr Al Jedda was detained.

27. Professor Fedtke stated that any limitation on rights conferred by the Constitution, which included the right to liberty, had to be effected by law. CPA 3 had the force of law only by virtue of Article 26(C) of TAL, which was repealed by Article 143 of the Constitution, and accordingly CPA 3 could not be relied upon as authority for detaining Mr Al Jedda after 20 May 2006. Furthermore, no reliance could be placed on the resolutions of the UN because the procedure in the Constitution for approving international instruments had not been followed. In order to satisfy this procedure there had to be a resolution of the legislature, the Council of Representatives, but this had not been obtained. In the opinion of Professor Fedtke, there were a number of respects in which the procedure for detaining Mr Al Jedda did not comply with the Constitution, but, in particular, detention had to have the prior authorisation of an independent judge. He considered that the right not to be detained without judicial decision was of the essence of the right to liberty. Thus, in his opinion the detention of Mr Al Jedda in accordance with CPA 3 after the Constitution came into force violated Articles 15 and 37(1)(B) of the Constitution and would be declared null and void. In cross-examination Professor Fedtke maintained his position. Even under a state of

emergency, there had to be review by a judicial body at some point though it might be at a later point in time than if there was no state of emergency.

28. A key conclusion of Professor Fedtke was as follows:

> "63. The judicial safeguards contained in Articles 15 and 37(1)(B) of the Iraqi Constitution form the essence of the right to liberty and the right not to be kept in custody or investigated except according to a judicial decision."

29. Mr Zyad Safed, a practising lawyer in Iraq, gave evidence that under Iraqi domestic law a judicial officer had to authorise the issue of an arrest warrant and a judicial officer had to review his detention every 15 days. In addition, if a person was detained for longer than 6 months, he had to be brought before a criminal court. He expressed the view that Mr Al Jedda would have been able to apply to the IFSC for a declaration that CPA 3 was void after the adoption of the new Constitution.

30. Dr Jonathan Morrow produced a long report but the important points seem to me to be as follows. In his opinion Article 26 of the TAL demonstrated that the CPA laws have an existence independent of the TAL because Articles 26(A) and ((C)) are not expressed to last only for so long as the TAL remains in force. He drew the conclusion, based on the examples of the German Constitution and the Constitution of East Timor that:

> "It seems generally to be the case that post-transitional constitutions affirm the validity of pre-existing legislation, although it is doubtful that such an action is in fact necessary."

31. Dr Jonathan Morrow also expressed the view that CPA 3 was an "existing law" for the purpose of Article 130. At a later point in his report, he argued that the fact that the government of Iraq came to an agreement with the United Kingdom which acknowledged that the latter would intern persons for imperative reasons of security supports the view that CPA 3 was considered to remain in force. However, this was in 2004. An annulment or amendment would have to be in the Constitution itself, by the passing of Iraqi legislation or by court decision. There was no such legislation or court decision at the date of his report at least. In several places, he relies on what he understood to be the drafters' intention based on his contact with them in 2005 (see, for example, paragraphs 62, 128-134 and 149), but cites no document recording this intention. As to CPA 17, he merely recorded that commentators have reached the conclusion that this remained in force even after the Constitution was adopted.

32. As to Article 13(1), Dr Jonathan Morrow opined that this is directed largely at Iraq as a geographic entity in circumstances where the only part of Iraq that might have been thought to have qualified commitment to the Constitution was the Kurdistan region. With respect, it seems to me that Dr Jonathan Morrow at this point gave insufficient weight to the opening words of Article 13, which state that the Constitution is "the pre-eminent and supreme law of Iraq without exception".

33. Dr Jonathan Morrow considered that it was "unlikely" that an Iraqi court would strike down the whole of CPA 3 on the grounds that there was an inconsistency with Article 15. He did not consider that CPA 3 would have become unlawful on the adoption of

the Constitution. Dr Jonathan Morrow relies on a presumption of regularity and opines that, notwithstanding Articles 15, 19 and 37, the absence of a decision on the detention point from the IFSC or any other court with constitutional authority, together with the absence of any legislative amendment action, implied that CPA 3 was part of the law of Iraq.

34. Dr Jonathan Morrow did not deal in detail with Article 46 of the Constitution. He merely reached the view that, if an Iraqi court concluded that CPA 3 was potentially inconsistent with the Iraq Constitution, it may be that it would have to consider the effect of Article 46. He considered that it was conceivable in view of the nature of Articles 15, 19(12) and 37(1)(B) of the Constitution that an Iraqi court might find that CPA 3 is inconsistent with the Constitution (Report, paragraph 113).

35. Dr Jonathan Morrow concluded that Article 46 could assist a court seeking to reconcile CPA 3 with the Constitution. The Iraqi court could conclude that CPA 3 did not violate the essence of the rights in Articles 15 and 19 (12) and 37(1)(B) to the extent that it did not provide a judicial review. He wrote in his report: "An Iraqi court could conceivably conclude that CPA 3 preserves the "essential" element of judicial protection, namely a regular review procedure established by law, carried out by lawyers, in which the Iraqi Government had decision-making authority." However, he accepted that, if the word "judicial" in Articles 15 and 37 meant reviewability by specifically an Iraqi court and this was seen to be of the essence of the right, then the exception provided in Article 46 would not work to resolve the apparent contradiction.

36. Dr. Jonathan Morrow's conclusion was as follows:

> "149. In summary, there is reason to believe that an Iraqi court or legislature might decide that CPA Memorandum Number 3, or parts thereof, [was] void on the grounds that it contradicts the Constitution, and in particular the provisions in the Constitution guaranteeing judicial review of detention. However, it was not the intention or view of the drafters of the Constitution that the Constitution be inconsistent with or displace the power of internment embodied in CPA Memorandum No.3. There is a body of Iraqi state practice, both on the public record and set out in the witness statements in the proceedings of [the] House of Lords in *R (on the application of Al Jedda) v Secretary of State for Defence (Respondent)* [2007] UKHL 58, to the effect that the Iraqi government did not believe the power of internment set out in CPA Memorandum Number 3 was inconsistent with the Constitution. I am of the view that an Iraqi court or legislature would make efforts to construe the Constitution in such a way that no contradiction was found, or that any contradiction did not imply that CPA Memorandum Number 3 was void. I am of the view that, in view of the intention of the drafters of the Constitution, and in the absence of a relevant decision of the Iraqi legislature or court, it is difficult for a UK court to conclude that CPA Memorandum No.3 is, as a matter of Iraqi law, void."

37. Mr Sermid D. Al-Sarraf, a practising attorney from Iraq, stated in his report that Article 130 preserved the laws made by the CPA. He drew attention to the fact that the Constitution made specific mention of CPA laws that were invalidated. He referred to new legislation passed after the adoption of the new Constitution that referred to the CPA laws. He produced examples but it is not clear whether he meant that these new laws assumed that the CPA laws remained in force or whether these new laws specifically repealed CPA laws. However he stated that there had been decisions of the Court of Cassation of Iraq that recognise that CPA laws have remained part of the law of Iraq.

1.2 *The judge's findings*

38. The judge held that he did not have to be wholly dependent on the expert evidence. He held that the Constitution incorporated concepts from the Convention and that the techniques used "did not require a uniquely Iraqi perspective in order to be understood". He also held that neither expert was an expert in Iraqi law as such. On the other hand, he reminded himself that he would have to consider the provisions of the Constitution as an aspect of Iraqi law and as they would fall to be interpreted by an Iraqi court.

39. There was an issue before the judge as to the extent to which provisions of the laws promulgated by the CPA were intended to survive the coming into force of the Constitution. The judge held that the laws promulgated by the CPA were maintained and preserved by Article 130 of the new Constitution.

40. The judge then moved to the question whether CPA 3 violated the essence of Mr Al Jedda's constitutional rights. The judge held that neither of the Iraqi experts had expressed a view on this issue. The views of Professor Fedtke and Dr Morrow were based essentially on arguments that did not require any comparative law expertise. The judge was not able to draw on any *travaux préparatoires*. The judge held that it was inherently unlikely that the Constitution was intended absolutely to outlaw detention without judicial process, whatever the circumstances. He regarded it as particularly unlikely that the Constitution of Iraq was intended absolutely to outlaw detention without judicial process given the circumstances prevailing at the time of its adoption. He referred to Article 61(9) of the Constitution of Iraq (set out in the Appendix to this judgment), dealing with emergencies.

41. The judge attached weight to the circumstances prevailing in Iraq at the time of the adoption of the constitution. He was concerned about applying the "essence" concept in Article 46 as he thought that there was no difference between the core of Article 37(1)(B) and that provision itself.

42. The judge concluded that he could not believe that an Iraqi court which had held that there was power to detain without judicial process would have found the particular form of process adopted inadequate to protect the essence of the constitutional right (judgment, paragraph 54).

43. He held that his reasoning did not depend as such on whether a state of emergency was at the material time in place in Iraq (judgment, paragraph 55).

44. The judge concluded that CPA 3 (as revised and as modified by CPA 99) remained effective as part of Iraqi law throughout the period of Mr Al Jedda's detention and the claim thus fell to be dismissed.

1.3 Submissions on this issue

45. Mr Hermer submits that the judge erred in concluding that the absence of any judicial safeguard did not infringe the essence of Mr Al Jedda's right to liberty guaranteed by the Iraqi Constitution. The judge erred in considering that Professor Fedtke was not an expert in Iraqi law. He was in fact amply qualified to give evidence on the meaning of the Iraqi Constitution and was so qualified to a greater extent than Dr Jonathan Morrow. The judge erred in thinking that he was free to depart from the view expressed by Professor Fedtke as it was not clearly contradicted by Dr Jonathan Morrow. The evidence before the judge "went one way". Dr Jonathan Morrow merely said that it was conceivable that the essence of Mr Al Jedda's right to liberty had not been infringed. The judge interpreted this to mean that Dr Jonathan Morrow's opinion was that it was arguable. Mr Hermer submits that it was not disputed by Professor Fedtke that the opposite of his view was arguable, and there was no dispute between the experts such as to warrant the judge's departure from their opinions.

46. Furthermore, on Mr Hermer's submission, if the judge was free to depart from the experts, he reached the wrong conclusion. Moreover, since the judge's conclusion was founded on his own analysis of the words of the Iraqi Constitution, rather than on expert evidence, this court is as well placed as the judge to decide on this issue, and it need not be referred back to the judge.

47. Mr Hermer submits that the judge was wrong to find that executive detention with administrative review can ever constitute the essence of the right to judicial review in the event of the loss of liberty. Although there is some flexibility, what amounts to the essence of a right does not depend upon current political considerations. Either the protection satisfies the limitation clause in Article 46, or it does not. Moreover, the judge gave insufficient weight to the fact that executive review in this case was not independent. In addition, the judge failed to consider the fact that under applicable procedures Mr Al Jedda had no information as to the basis of his detention other than in the most general terms and was given no right to make oral representations or give inadequate access to a lawyer. It was not enough that an executive body regularly reviewed his detention. Under the jurisprudence of the Strasbourg court, a panel of three laypersons and judge with power to make recommendations was not equivalent to judicial review. Mr Hermer refers to the fact that there were criminal detainees at the same military facility at which Mr Al Jedda was detained who were visited by Iraqi judges and whose cases were considered by the Iraqi courts. Mr Hermer submits that there was no evidence that it would have been impossible to provide access to an Iraqi court. Moreover, a reviewing committee could have comprised an Iraqi or other independent judge.

48. Mr Jonathan Swift, for the respondent, submits with regard to the expert evidence that this court is not in the same position as the judge and that the judge's conclusion should therefore be accorded significant weight. He submits that Professor Fedtke was not an expert in Iraqi law. He was a comparative constitutional expert. He did not rely on decisions of the Iraqi courts or Iraqi laws. The judge was not bound to prefer the evidence of Professor Fedtke because Dr Jonathan Morrow had not gone

further than to say that it was arguable that an Iraqi court would find that the essence of the right to judicial review of detention in the Constitution was not infringed by the regime of preventative detention in force under CPA 3. The judge was entitled to apply his own knowledge of interpretive techniques. The judge effectively rejected the evidence of Professor Fedtke on all key points.

49. Mr Swift further submits that the judge was fully aware of the procedures for reviewing Mr Al Jedda's detention. In Mr Swift's submission, the composition of the bodies responsible for the review of Mr Al Jedda's detention was appropriate, because the purpose of the review was not to consider the reasons why he had been detained in the first place but whether his detention should continue. Furthermore, the process of making decisions at the DIRC was structured to avoid the risk that disproportionate importance would be given to the views of the military. The majority of the personnel on the review bodies was Iraqi. The procedures had to be assessed in the round.

50. Mr Swift submits that the fact that some form of judicial review of the merits of detention might satisfy the requirements of Articles 15 and 37(1)(B) does not provide a conclusive answer to the question of what is the essence of the relevant right. The fact that there could have been a full judicial review does not preclude the lawfulness of a system enabling a restrictive review as provided by CPA 3. Moreover, given the security situation in Iraq, an Iraqi court would be likely to afford the executive an area of discretion within which it could determine what means of review was appropriate. The Iraqi courts would have regard to the wider interests as well as the interests of Mr Al Jedda, including the rights of all persons present in Iraq, and in particular their right to security. The Iraqi courts would also have regard to the fact that the system applied to Mr Al Jedda enabled decisions "to be taken by reference to the full range of intelligence information which would not be available if the review were to be undertaken by an Iraqi court". The position of criminal detainees is different from that of a detainee on security grounds.

51. Mr Swift further submits that, if the core of the right guaranteed by Article 15 of the Iraqi Constitution requires a judicial element, Article 46 would have no real role in relation to Article 15. Article 46 cannot permit modifications according to the circumstances. The fact that the Strasbourg court uses the concept of essence of the right, often as a substitute for proportionality, does not inform one that an Iraqi court would do so.

52. Mr Swift submits that the procedures available to Mr Al Jedda did not rule out judicial involvement, but did contemplate administrative boards.

53. Mr Swift makes the point that an Iraqi court could take into account the fact that the Geneva conventions were well known and well understood to assist in restoring stability. They would be familiar to the troops contributing to the security operation. The troops were assisting Iraq in Iraq's fight for survival. The administrative boards were a sufficient guarantee of the objective scrutiny of information. Administrative boards had advantages over judges and the system was acceptable to the MNF. It was a system which could be used by all the allied troops.

1.4 Conclusions

54. I reject Mr Swift's submission that this court is not in as good a position as the judge to review the expert evidence. The judge was not influenced by his view as to the demeanour of the witnesses. The first question is the proper approach to findings of foreign law. Findings of fact about foreign law have been called issues of fact "of a peculiar kind" (per Cairns J in *Parkasho v Singh* [1968] P 233 at 250). As with other findings of fact, and subject to making appropriate allowance for the fact that the judge saw the witnesses give evidence, an appellate court should consider the evidence afresh and reach its own view as to whether the judge's findings were justified (see per Megaw LJ in *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223). It is not an objection to making a finding of foreign law that the question is a novel one which has not been decided in the jurisdiction in question. The judge is entitled and bound to bring his own skill and experience to forming his conclusion: see, for example, *MMC Proceeds Ltd v Bishopsgate Investment Trust* [1999] CLC 417. In addition, while a court is not free to do its own researches into the law of Iraq, it is bound to bring to its task the knowledge of techniques drawn from its own knowledge of comparative constitutional law and international human rights law. The jurisprudence of the Strasbourg court is suitable for this purpose, since the Strasbourg court has to draw together the differing traditions of the members of the Council of Europe. Knowledge of techniques drawn from comparative law is part of a judge's skill, and is not the same as using knowledge of a particular legal system. Moreover Strasbourg jurisprudence has been used by apex courts throughout the world, for example, see *Lawrence v Texas* 539 US 558 (2003) (United States Supreme Court) and *State v Makwanyane* (1995) 3 (SA) 391 (Constitutional Court of South Africa).

55. A major issue between the parties is whether the judge was entitled to accept the evidence of Dr Jonathan Morrow, who simply said that an Iraqi court might find that detention without judicial intervention was constitutional in some circumstances, relying on Article 46, in preference to that of Professor Fedtke who was clear that Article 46 could not authorise the removal of a right to have the lawfulness of detention reviewed by a court. In my judgment, the judge was not prevented from preferring Dr Jonathan Morrow on this point merely because he said that a point was conceivable, provided that the judge considered that he was in a position to reach a conclusion on this matter. I am more troubled by his conclusion that the right conferred by Article 15 to a decision by a competent judicial authority could be eliminated under Article 46. The judge did not consider that the judicial safeguard was of the "essence" of the right to liberty. One factor impelling him in that direction was the fact that he thought that, if the judicial safeguard were of the essence of the right, it was difficult to see how Article 46 could ever operate in relation to it, since it would be (as Professor Fedtke put it in his oral evidence) "all courtyard" and no core.

56. In my judgment, Article 46 has content in relation to Article 15. For example, circumstances may sometimes make it necessary to provide for a longer period before the detainee has access to a court, and so on. A distinction can in such cases be drawn between the essence of a right and the remainder of the right. Article 46's primary function is to act as a stopping point. There comes a point when the intervals are so great that they contravene the right conferred by Article 15. There is, therefore, a distinction between the "courtyard", as Professor Fedtke put it, and "the core". I am not dissuaded from this view by the fact that Professor Fedtke could not in cross-

examination see a difference between the core and the non-absolute essence of the right.

57. There was an issue before the judge as to whether Article 130 covered CPA 3. The judge decided the issue against Mr Al Jedda and he does not pursue it on appeal. Mr Swift submits that the fact that CPA 3 was continued by the Constitution is of some relevance as it is unlikely that the Constitution would both facilitate and disable the same legislation. I do not consider that this follows. It is equally possible that the Constitution was adopted on the basis that thenceforward existing laws would be subject to constitutional review. Accordingly, it is not enough to say that CPA 3 formed part of the existing laws. It did not follow that an Iraqi judge would have found that there was no violation of the Iraqi Constitution.

58. To my mind, a weakness in the judge's approach is that he attached no real significance to the fact that the Constitution was a higher law. Professor Fedtke gave clear evidence that this meant that the Constitution was a higher law than any other law and that accordingly, any other law would be subject to review for compatibility with the Constitution. Indeed, Article 13 states that a law that does not comply with the Constitution is void. The review of legislation for compatibility with the Constitution was expressly contemplated by the Constitution.

59. As to the essence of a right, Articles 15 and 37(1)(B) on their face contemplate (1) authorisation by judicial officer and (2) regular review. Article 15 is not specific about timing and no doubt the detail was left to be worked out by the criminal procedure code or by the courts. Judicial intervention was a requirement for lawful detention under Iraqi criminal law before the Constitution and therefore its importance would be well known to the courts of Iraq even before the adoption of the new Constitution in May 2006.

60. The judge gave three reasons why he was prepared to conclude that a process which prescribed non-judicial process for reviewing detention would not infringe the essence of the right conferred by Article 15. Firstly, a country in transition, or some internal emergency, might require a system of executive detention for security reasons. Secondly, in the light of the recent history in Iraq, it was, in the judge's judgment, unlikely that an Iraqi court would hold that CPA 3 was unconstitutional. In addition, Article 46 was a power of derogation, which enabled there to be a system of executive detention.

61. I would agree with the judge that the essence of a right is not immovable and inflexible, or unresponsive to the circumstances. In a normal state of affairs, a person who has been arrested can be brought before a judge in very short order. It may be different if there is a national emergency: see, for example, *Brogan v United Kingdom*, Application no. 11209/84, 29 November 1988. It follows that regard can also be had to the fact that the Iraqi political situation is in transition. The Strasbourg jurisprudence provides an example of that: see *Py v France* (Application no 66289/01, 11 January 2005 at [61] to [65]). Thus, what constitutes the essence of a right can change. However, as I have said, Article 46 acts as a stopping point. The concept of the essence of a right means that the right has a core which is constant and constitutes a norm which prevails in all circumstances.

62. In my judgment, the judge should not have been so ready to accept, even with the security situation in Iraq, that an Iraqi court would find that Article 46 could sanction an abrogation of the right not to lose one's liberty without a judicial decision. Even though detention complied with Geneva 4 and was authorised by UNSCR 1546, the fact remains that the loss of liberty was indefinite and, however regular the review, the fact remained that release was discretionary. It does not seem to me that a court using its judicial experience even in Iraq would reach the conclusion that the essence of the right to liberty is preserved in those circumstances where a person has so little control over his own freedom and dignity. There was no judicial process to enable it to be determined, for example, whether "imperative reasons of security" in fact continued. The crucial role of judicial safeguards is obvious in this situation.

63. In my judgment, the meaning of the Constitution of Iraq has to be ascertained without reference to the fact of the presence of foreign forces in Iraq. The fact that the MNF had to have a power of internment does not, as the judge recognised in relation to maltreatment, mean that the detainee had no rights and that the MNF did not need to respect the rights of detainees. But, if the MNF was to have the legal justification for derogating from those rights, it was its responsibility to secure its own position, and any derogation from fundamental rights required by it in my judgment is most likely to be found (if it exists), not in the Constitution of Iraq, which lays down the values which govern the ordinary relationship between the Iraqi state and the Iraqi citizens, but in some other instrument or doctrine. That is the conclusion to which the evidence of Professor Fedtke inevitably led, and in my judgment it should have been accepted in preference to the equivocal evidence of Dr Jonathan Morrow on this point.

64. I would attach weight to the fact that the Constitution of Iraq is stated to be the supreme law without exception. We have, moreover, not been shown any provision of the Constitution which states that compliance with international law overrides the rights conferred by it.

65. In my judgment, on the evidence as to foreign law, Issue 1 should have been decided in Mr Al Jedda's favour.

66. Since preparing this judgment, I have had the benefit of reading the draft judgments of Sir John Dyson SCJ and Lord Justice Elias. I am indebted to them but in so far as they have reached different conclusions on this issue, I respectfully disagree. We are concerned with the meaning of Articles 15 and 37(1)(B) of the Iraqi Constitution. The provisions of Article 78 of Geneva 4, and of the *Siracusa* principles, are important, but of limited assistance in this task. The former deals with the position of an occupying power and the latter deals with the situation of emergency powers. Neither deals with the relationship between a government and its citizens where there has been no derogation because of an emergency. Under Article 61 of the Iraqi Constitution, which is set out in the Appendix to this judgment, states of emergency can be declared for successive periods of thirty days, and all the necessary powers to deal with the emergency can then be delegated to the Prime Minster. Those powers must be regulated by laws which do not contradict the Constitution but, if they are necessary to deal with the situation (and that involves showing necessity), they may, as I read Article 61, depart from other powers, including Articles 15 and 37(1)(B). I respectfully doubt therefore the utility of praying in aid the turmoil in Iraq: if there was a state of emergency there were other provisions in the Constitution which

authorised the taking of other powers which could have been but which were not used.

67. As both Sir John Dyson SCJ and Lord Justice Elias observe, we are concerned to determine whether the interposition of a judicial officer is as a matter of the interpretation of the Constitution of Iraq of "the very essence" of Articles 15 and 37B. The title of that officer is not important. Sir John Dyson SCJ concludes that the essence of the relevant rights is to have a decision on deprivation of liberty made by a person with judicial qualities, but not necessarily a judge. As I see it, the decision must be taken by a judge who has judicial independence. Under the Constitution of Iraq, the judiciary is an independent organ of state. Independence in this context is clearly a reference to both institutional and individual independence. (These concepts are referred to in the *Bangalore Principles of Judicial Conduct* (2002) and explained in the *Commentary* thereon issued by the United Nations, September 2007). Thus the judiciary must be independent of the parties and of the state, in addition to having an independent frame of mind. They must have the constitutional guarantees necessary for them to reach an independent conclusion and those do not exist where the tribunal is composed of officers of the MNF, or representatives of the government of Iraq or of the United Kingdom and United States. In addition, what is also required is "a judicial decision". That must mean a decision which follows a judicial process, that is, a process which is fair and gives the internee a hearing and the possibility of examining the evidence against him (on this, see generally per Lord Phillips in *Secretary of State for the Home Department v AF* [2009] UKHL 28 at [63] to [66]). The process of review in the present case, while it satisfied Geneva 4, did not constitute an independent process or indeed a judicial process. A judge also has to have certain qualities. I agree with Sir John Dyson SCJ that these qualities include impartiality and competence in legal matters. However, he does not have to be an expert in matters outside the law. On security matters, he can be assisted by expert evidence. The fact that the MNF might decide to withhold evidence on intelligence from an Iraqi court but not from a review body set up under CPA3 does not lead to the conclusion that there is no constitutional right to have the application for review of the detention heard in a judicial process. Moreover, for a decision to be a "judicial decision", the decision must also be that of a judge, and thus it may well not be enough that the decision is made by a panel of persons, one of whom happens to be a judge.

68. The independence of the judiciary is an essential element of the rule of law and of the very essence of the right of liberty. As Lord Atkin said in an oft-quoted passage in his dissenting judgment in *Liversidge v Anderson* [1942] AC 206 at 244:

> "It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law."

69. I have therefore not been persuaded by the judgments of Sir John Dyson SCJ and Lord Justice Elias on this issue.

ISSUE 2: THE JUSTICIABILITY ISSUE

70. The judge held that there was no conceptual difficulty about applying the law of Iraq and it made no difference in principle that the relevant provisions were in the Constitution. He distinguished the earlier authorities that had been cited to him.

71. Mr Swift submits that the judge erred in finding that Mr Al Jedda's claim that his detention was incompatible with the Constitution was justiciable in an English court. He submits that for the court to enter into such questions as whether the detention of Mr Al Jedda was inconsistent with the Constitution of Iraq would breach the obligation of comity between friendly nations. In addition, there was no clear and manageable standard which an English court could apply to answer them. In *Buck v Attorney General* [1965] Ch.745, 768 and 769 to 770, this court held that an action the object of which is to determine the validity of a foreign constitution will not be entertained, although a private law action which requires the determination of the constitutionality of a foreign law where that is incidental to the main issues in dispute will be: *Dubai Bank Ltd v Galadari (No 5*) (Times, 20 June 1990). Mr Swift submits that the questions raised in this case are of significant importance to the Iraqi state. Making the assessments and striking the balances required in interpreting the Constitution is an intensely national exercise. Therefore, the courts of England and Wales should not entertain such arguments. The position is even worse in the case such as this where the court is having to second-guess what principles would be adopted. A decision on the appropriateness of the limitation on the right of liberty would be regarded as significantly trespassing on the sovereignty of the Iraqi state itself.

72. In relation to a lack of manageable standards, Mr Swift relies on *Buttes Gas and Oil Co v Hammer* (Nos 2 and 3) [1982] AC 888 at 937-8. Lord Wilberforce there referred to the undesirability of the English court entering into issues as to the validity of acts of foreign states within their own territory and the difficulty of doing so where there are no "judicial or manageable standards" for doing so.

73. Mr Hermer seeks to uphold the judgment of the judge. The courts on his submission have had not difficulty in interpreting the validity of sovereign decrees: see, for example, *A/S Tallinna Laevauhisus v Estonian State Steamship Line* (1947) 80 Lloyd's LR 99.

74. In my judgment, the judge was right. As can be seen from the discussion under Issue 1, the provisions of the Constitution with which this appeal is concerned clearly provide judicial and manageable standards. English courts are familiar with constitutional interpretation. The issues in this action do not involve a challenge to the validity of the Constitution of Iraq. This court would only be reaching conclusions as to the meaning of the Iraqi Constitution for the purposes of this private law claim in damages. The fact that Iraq is another sovereign state does not preclude this court from adjudicating upon Mr Al Jedda's claim. In *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, the House of Lords did not shrink from the conclusion that a resolution of the Revolutionary Command Council of Iraq was contrary to public policy notwithstanding that it was an act of a foreign state within its own jurisdiction. The passage from *Buttes Gas* relied upon by Mr Swift was considered by the House of Lords in that case. The House concluded that, while it may occasionally be the case that the resolution of a dispute may involve the

application of standards of this kind, it was open to the court in other cases to consider whether the acts of a foreign state violated international law, or were contrary to public policy (see in particular per Lord Nicholls at [25] to [26], and per Lord Steyn at [113]).

75. In the circumstances I agree with the judge's conclusion on this point.

ISSUE 3: PUBLIC POLICY

76. The House of Lords had held in *Al Jedda 1* that UNSCR 1546 required the United Kingdom as a matter of international law to detain persons for imperative reasons of security. The judge held that the Secretary of State could not be held liable in damages for complying with international obligations.

77. Mr Swift submits that, if Mr Al Jedda should succeed in establishing that his detention in Iraq by the British contingent of the MNF was unlawful under Iraqi law, the English courts should refuse to apply Iraqi law on the grounds of public policy. The judge accepted that contention. Mr Swift relies on s 14(3)(a)(i) of PILA which provides:

> "…[N]othing 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 –
>
> (ii) would conflict with principles of public policy…"

78. Mr Swift submits that section 14(3)(a)(i) is not limited to cases where the enforcement or recognition of foreign laws would occasion gross infringement of human rights, as in *Oppenheimer v Cattermole* [1976] AC 249. It is also applicable where in the eyes of an English court enforcement or recognition of the foreign law would be manifestly contrary to the public policy of English law: *Kuwait Airways Corporation v Iraq Airways (No 4 and 5)*. Mr Swift also relies on *Al Jedda 1*, as showing that a law could be disapplied even if it was one to protect human rights. It is relevant that the international community has promoted the enactment of the Constitution of Iraq. The reason for invoking public policy rests on the UNSC resolutions, which I have described above.

79. Mr Swift dismisses the objection that application of the public policy exception results in the application of international law by the back door. On the contrary, on his submission, it does no more than disapply the foreign law and require the English court to look elsewhere for the law to be applied. Furthermore, once it has been determined that an otherwise applicable rule of foreign law should not be applied as a matter of public policy, the necessary consequence is that the court should determine the claim in accordance with the legal norm that is consistent with English public policy. Thus it would be correct to disapply so much of Iraqi law as is inconsistent with the United Kingdom's international obligations. Mr Swift submits that Mr Al Jedda's submission is contrary to *Al Jedda 1*. The United Kingdom's obligations under Article 103 of the UN Charter prevail over other obligations that it may have.

80. Mr Hermer submits that it is surprising that the Secretary of State should seek to rely on section 14(3) of PILA given the acceptance throughout *Al Jedda 1* that the applicable law was that of Iraq. In those circumstances, the judge should not have rejected the submission that it was an abuse of process for the Secretary of State now to rely on section 14(3). Mr Swift's response to that submission is that there is no question of the Secretary of State being prevented from relying on public policy by reason of the position which had been adopted in that case. Section 14 (3) of PILA was not then in point. I agree.

81. In any event, Mr Hermer submits, the principle of international comity makes clear that the courts should be slow to disapply the law of a foreign state on the ground that it is contrary to public policy: cf *Kuwait Airways Corp v Iraqi Airways Co (no 4 and 5)* [2002] 2 AC 833. Article 15 is a provision of the constitution of a foreign state and the international community had encouraged and facilitated the enactment of the new Constitution. The Constitution also protects fundamental human rights.

82. Furthermore, on Mr Hermer's submission, the judge's conclusion would enable the executive to implement international obligations without accountability in domestic law. It would enable the government to refuse to pay damages for breach of contract on the grounds that performance would conflict with an international obligation. In addition, the provision of international law in question was not a provision of private international law or a provision which governs the rights and liberties of individuals, but a provision of public international law applicable to the state. Such a provision cannot replace a rule of private law. In this case the court could not properly have applied CPA 3 because that does not represent the law of Iraq. Furthermore, there is no inconsistency between the requirements of Iraqi law and the requirements of international law. The UN resolutions do not require there to be no judicial review. The House of Lords did not decide the lawfulness of detention without judicial process.

83. Finally, submits Mr Hermer, even if the UN resolutions required detention without access to judicial process, it would not constitute a breach of international law for the court to find that in so doing the United Kingdom was in breach of Iraqi law and was liable in damages. That does not amount to a breach of international law.

84. I now turn to my conclusions. It is clear from *Al Jedda 1* that the United Kingdom had an obligation in international law to act as it did which overrode its obligations under other treaties, including the Convention. The question at this point is whether it is contrary to public policy that Iraqi law should be applied if it might result in a liability on the British government to pay damages for acting on the UN resolutions in a way which breached the Constitution of Iraq.

85. It is not contrary to public policy to apply the law of Iraq to the tortious conduct of British soldiers simply because the British government might become liable in damages on the principle of vicarious responsibility. The courts have in recent years held the government liable in damages for the acts of British soldiers in Kosovo (*Bici v Ministry of Defence* [2004] EWHC 786(QB)). In that case, the parties agreed that English law should apply, but that does not affect the point that I am making. The British government would have been subject to a claim for damages under the HRA if that Act had been held to be applicable in this case. Moreover, the judge did not consider that the same difficulties as he found with the claim before him would apply

to an action for damages for maltreatment. He gave permission to amend to introduce such a claim. There is no appeal from that part of his order, and that claim has yet to be tried.

86. However, the effect of applying Iraqi law to Mr Al Jedda's claim to determine the lawfulness of his detention is that the British government is at risk of liability for doing no more than carrying out its international obligations, in circumstances where its obligations under the UN Charter have been sufficient to qualify protection for Mr Al Jedda under the Convention. Nonetheless, in my judgment, that does not mean that it is appropriate to invoke the public policy exception. That exception falls to be applied if the relevant law of Iraq is in some way in itself offensive or objectionable. It does not apply simply because a remedy exists in Iraqi law which would not be available under domestic law. There is nothing inherently offensive or objectionable about the Iraqi law on which Mr Al Jedda relies. A failure by the MNF (subject to CPA 17) to obtain immunity from Iraqi law would not of itself make it contrary to public policy to apply Iraqi law. I would thus allow the appeal on this issue.

ISSUE 4: THE CPA 17 ISSUE (Immunity of MNF personnel in Iraq)

87. CPA 17 was revised and re-issued on 20 June 2004. I need not set out the recitals, though I note that they refer to "fundamental arrangements that have customarily been adopted to govern the deployment of Multinational Forces in host nations". We have not been shown any other material that might throw light on the meaning of CPA 17 in its revised form. There is an important definition in section 1 of "Iraqi legal process". This is defined as meaning "any arrest, detention or legal proceedings in Iraqi courts or other Iraqi bodies, whether criminal, civil, or administrative." The important provisions are in section 2, headed *Iraqi Legal Process*. In material part, section 2 provides as follows:

> "1) Unless provided otherwise herein, the MNF..their Personnel…shall be immune from Iraqi legal process.
>
> 2) All MNF Personnel…shall respect …Iraqi laws…
>
> 3) All MNF Personnel… shall be subject to the exclusive jurisdiction of their Sending States. They shall be immune from any form of arrest or detention other than by persons acting on behalf of their Sending States…."

88. The Secretary of State cross-appeals against the judge's conclusion that CPA 17 only prevented a claimant from bringing proceedings against the MNF in the Iraqi courts. Mr Swift submits that the judge should have held that Mr Al Jedda's claim for unlawful imprisonment under Iraqi law was not actionable under the law applicable to the claim and therefore should be dismissed. Mr Swift refers to section 9 (4) of PILA which provides:

> "The applicable law shall be used for determining the issues arising in a claim, including in particular the question whether an actionable tort or delict has occurred."

89. Mr Swift submits that actionability for this purpose means that the conduct complained of is such as would give rise to civil liability under the applicable law,

here the law of Iraq. In that connection he relies on *OJSC Oil Company Yugraneft v Abramovich* [2008] EWHC 2613. He submits that this approach is consistent with section 9 (1) of PILA, which provides that the purpose of Part III of PILA is to make provision for choosing the law to be used for determining issues relating to tort. Actionability is a broad concept and one that is apt to ensure that all issues concerning whether or not liability will be established are determined by the applicable law.

90. The issue in this case is whether or not civil liability exists in this case in Iraqi law. On Mr Swift's submission, CPA 17, properly understood, provided an immunity for the act alleged to constitute a civil wrong. Mr Swift submits that it is clear from CPA 17 that the acts of the MNF were not to be regarded as a civil wrong at all and could not be the subject of legal proceedings in Iraq. Thus the immunity provided is not directed, for example, to the quantification of damages but instead impacted upon the act concerned and altered the quality of that act for legal purposes. It is both in form and substance a modification of the substantive obligation that would otherwise arise. Mr Swift submits that there is no liability for the act of detention in this case and that is entirely consistent with the policy underlying PILA. The approach in PILA is now one of single actionability regardless of the form in which the claim is heard, and the parties are to be in no better and no worse a position on the question of liability than if the claim were determined by the courts of the country of the applicable law. The substantive question to be addressed by the English court in a case such as the present is whether the act complained of would in fact lead to liability under the provisions of the applicable law. The judge thought that it was the intention that members of the MNF who committed wrongs in Iraq should become subject to jurisdiction in their home courts. Mr Swift submits that is not what CPA 17 said or intended. The provisions of CPA 17 should not be read together and it certainly does not follow from the fact that the members of the MNF undertook to respect local laws and exercise jurisdiction over their own forces that they were accepting that members of those forces should be subject in their home courts to claims arising under Iraqi law. Finally, Mr Swift submits that the judge's concerns that, if the Secretary of State was right, Mr Al Jedda would be in a legal black hole and unable to challenge the lawfulness of his detention, are misplaced. The lawfulness of his detention was tested in *Al Jedda 1*, where he claimed that his detention was contrary to his Convention rights under Article 5. It would be anomalous, submits Mr Swift, if the existence of general rules relating to choice of law had the effect in the present case that the liability carefully excluded in Iraq could be asserted in the United Kingdom.

91. In my judgment, CPA 17 is clear. It prevents personnel of the MNF, and the other persons mentioned in CPA 17, from being sued in the courts of Iraq. There is nothing in the wording to suppose that it applies to actions in the courts of the member states, even if they are based on Iraqi law. The privilege conferred by CPA 17 is not to be sued in the courts of Iraq. I do not consider that this has any implications for the actionablity of the claim. If the claims had been time-barred under Iraqi law, there would no longer be any claim under Iraqi law (as was the case with the Russian law claims in *OJSC Oil Co Yugraneft v Abramovich*: see [2008] EWHC 2613 (Comm) at [9], [263] and [342]). However, that is not the position in this case. There is nothing to suggest that the claim does not exist under Iraqi law. I agree with the judge on this issue.

92. CPA 17 has now been suspended, but the critical question is its effect during the period of Mr Al Jedda's detention.

ISSUE 5: ACT OF STATE

93. In the light of the conclusions that he had reached, the judge did not have to deal with the issue of act of state but as the point had been argued he set out his conclusions, citing a number of authorities. His view was that act of state could be relied on by the Secretary of State as a defence to a claim to determine the legality of detention.

94. The judge took as his definition of act of state a passage from the speech of Lord Wilberforce in *Attorney General v Nissan* [1970] AC 179, which I set out below. In that case, a claim was brought against the Crown for damage to a hotel in Cyprus which had been commandeered by British forces to accommodate troops who were on the island in order to assist in a UN peace-keeping operation. Lord Wilberforce analysed the defence of act of state as comprising two parts. The first gave immunity to an agent on the ground. The second was a rule about justiciability. Lord Wilberforce went on to say that the scope of the doctrine was unclear and, in particular, it was not clear to what extent act of state could be relied upon against a British subject.

95. As to the scope of the defence, the judge held that the defence is confined to acts of a character such that it would be wrong in principle for the court to seek to adjudicate upon them. He distinguished *Nissan*, where the act of occupying a hotel for the purpose of providing accommodation for British troops was not regarded by the House of Lords as an act necessary for the implementing of an act of state.

96. The judge started from the proposition that the decision to contribute British forces to the MNF was an act of state. It was a policy decision in the field of foreign affairs. Furthermore, internment was a specific part of the task which it had been invited by the government of Iraq and mandated by the UNSC to undertake.

97. The judge held that, unlike the provisioning of troops, internment necessarily involved an infringement of the rights of others. It was not, however, a case of a decision made in the course of "battlefield operations".

98. As to the question whether an act of state could be relied upon by the British government as against a British national, it was common ground before the judge that that was a point on which there was no decisive authority. Lord Reid considered that a British subject could never be deprived of his legal right to redress by any assertion by the Crown or decision of the court that the acts of which he complains were acts of state. However, the other members of the court declined to decide it. Lord Wilberforce, in particular, expressed the view that it was impossible to accept the broad proposition that in no case could the plea of act of state be raised against a British subject. The judge preferred this latter view. His essential reason was that if the true basis of the rule is that acts done by the Crown abroad in the conduct of foreign relations are of their nature not cognisable in the English courts there was no reason in principle why the position should be any different when the person injured

happened to be a British citizen. The nature of the act would be the same. In support of this approach, he cited a passage from the speech of Lord Pearson.

99. The judge took the view that the robust statements in the authorities to contrary effect were made in the context of those cases. The judge rejected the argument that the constitutional protection given to British subjects would necessarily apply in respect of acts done abroad within the prerogative on foreign relations. In support of this approach, he cited a passage from the speech of Lord Wilberforce, and in addition, from the speech of Lord Pearson in *Nissan*.

100. The judge rejected counter arguments raised by Mr Hermer. Firstly, the judge rejected the argument that it had not been pleaded in *Al Jedda 1*. Secondly, the judge rejected the submission that, if Mr Al Jedda was within the *de facto* jurisdiction of the British forces, he was necessarily within the jurisdiction of the English courts.

101. The judge also rejected the argument that it left Mr Al Jedda in a legal black hole. The judge held that the defence of act of state would apply if he was held in detention in accordance with UNSCR 1546. He distinguished a claim of maltreatment. He held that the defence of act of state would be unavailable in cases of wanton or unjustified violence. He relied on a passage from the speech of Lord Bingham in *R (Al-Skeini and others) v Secretary of State for Defence* [2008] 1 AC 153 at [26], where Lord Bingham held that, even if the Convention did not apply to acts carried out in another jurisdiction, British forces ought still be subject to criminal responsibility under international law, and a claim in tort might also lie, as in *Bici*.

102. The judge further rejected the argument by Mr Hermer based on Article 6 of the Convention. The judge made the assumption that the Convention applied to Mr Al Jedda's detention in Iraq. He accepted Mr Swift's submission that substantive law was not affected by raising the defence of act of state. The judge took the view that the defence did not grant an immunity but defined the extent of substantive rights. But it was not a violation of Article 6 of the Convention to deny him access to the courts to complain of his detention in accordance with UNSCR 1546.

103. Mr Hermer submits that the judge was wrong to permit the Secretary of State to rely on act of state. The defence of act of state should be limited to exceptional situations. If the base at which Mr Al Jedda had been detained had been in the United Kingdom, Mr Al Jedda could have issued *habeas corpus* proceedings. Habeas corpus proceedings could also have been issued in respect of his detention in Iraq because he continued to be under the *de facto* control of the British government (see, for example, *Re Mwenya* [1960] 1 QB 241). Likewise Mr Al Jedda should be able to bring his claim arising out of his detention by British forces before the English courts. He does not challenge the decision to detain him, only the process by which it was continued. Moreover, on Mr Hermer's submission, the defence of act of state rarely applies to an act done under a treaty as a treaty rarely gives rise to an obligation (see *Walker v Baird* [1892] AC 491). The judge's conclusion on this point, coupled with CPA 17, considered below, results in Mr Al Jedda being in a legal black hole, unable to bring British forces to account in either jurisdiction. On Mr Hermer's submission, the plea is rarely available as a defence to a claim in tort or contract. Finally, Mr Hermer submits that the defence of act of state cannot be raised against a British national. He did not pursue any argument based on Article 6 of the Convention.

104. Mr Swift seeks to uphold the judge's decision. The relevant aspect of the act of state doctrine concerns action under the prerogative performed overseas. That provides a defence to acts of the Crown undertaken abroad. Its availability depends on the quality of the act that is impugned and the place where the impugned act occurred. In this case there had been no factual dispute as to the quality of the act. Internment was undertaken pursuant to Crown authority. The fact that Mr Al Jedda is a British subject does not matter. On this submission, and generally, he referred us to the illuminating article by Dr J. G. Collier, *Act of state as a Defence against a British subject* (1968) 26 CJL 102.

105. Basing himself on a passage from Wade and Forsyth, *Administrative Law,* Mr Swift submits that there are three elements to act of state. First, the defence is not available in respect of acts committed in the United Kingdom but is in principle available in relation to acts committed elsewhere. Secondly, in relation to acts committed abroad the key consideration is the nature of the act. This much is clear from *Nissan*, particularly since the case was actually decided on the basis that the act of requisitioning the hotel for accommodation did not have the necessary quality to be considered an act of state. Thirdly, if the act in question is in qualitative terms an act of state, the nationality of the persons affected by it is immaterial. The nationality of the person affected is entirely a matter of fortune. In the present case there is no room for doubt as to the necessary quality of the act of detention. Detention for reasons of security was one of the specific tasks that the MNF was required to undertake under UNSCR 1546. The obligation derived from Article 103 of the UN Charter. Accordingly, the nationality of Mr Al Jedda is immaterial. Furthermore the position of private contractors is also immaterial. Simply because the Secretary of State has a defence on the grounds of act of state does not mean that one should conclude that there is a legal black hole.

106. This is clearly a highly complex area of law, on which we had considerable argument. The phrase "act of state" as Lord Morris of Borth-y-gest said in *Nissan* has a "diversity of meanings" (at page 221). Lord Wilberforce in *Nissan* defined it as follows:

> "Naturally, to start with, one looks for a definition. One which is well known is as follows:
>
> "… an act of the executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown"
>
> (Professor E. C. S. Wade in *British Yearbook of International Law* (1934), vol. XV, p. 103, adopted by *Halsbury's Laws of England*, 3rd ed. (1954), vol. VII, p. 279, n. (i)). This is less a definition than a construction put together from what has been decided in various cases; it covers as much ground as they do, no less, no more. It carries with it the warning that the doctrine cannot be stated in terms of a principle but develops from case to case; it has perhaps the disadvantage that it includes within itself two different conceptions or rules. The first rule is one which provides a defendant, normally a servant of the Crown, with a defence to an act otherwise tortious or criminal, committed abroad, provided that the act was authorised or subsequently ratified

> by the Crown. It is established that this defence may be pleaded against an alien, if done abroad, but not against a friendly alien if the act was done in Her Majesty's Dominions. It is supported in its positive aspect by the well-known case of *Buron v. Denman* (1848) 2 Exch. 167 and in its negative aspect by *Johnstone v. Pedlar* [1921] 2 AC 262.
>
> The second rule is one of justiciability: it prevents British municipal courts from taking cognisance of certain acts. The class of acts so protected has not been accurately defined: one formulation is "those acts of the Crown which are done under the prerogative in the sphere of foreign affairs" (*Wade and Phillips's Constitutional Law*, 7th ed. (1956), p. 263). As regards such acts it is certainly the law that the injured person, if an alien, cannot sue in a British court and can only have resort to diplomatic protest. How far this rule goes and how far it prevents resort to the courts by British subjects is not a matter on which clear authority exists." (at page 232 per Lord Wilberforce)."

107. As I agree with the judge's reasoning as summarised above, I propose to keep my analysis short.

108. Firstly, in my judgment, *Al Jedda 1* established that the United Kingdom was entitled and bound under its obligations under Article 103 of the UN Charter to intern persons where this was necessary for the internal security of Iraq. Internment for this purpose would clearly qualify as an act of state. My conclusion that act of state is a defence here does not go wider than this. It applies, in my judgment, because of the overriding force of UNSCR 1546. If courts hold states liable in damages when they comply with resolutions of the UN designed to secure international peace and security, the likelihood is that states will be less ready to assist the UN achieve its role in this regard, and this would be detrimental to the long-term interests of the states. The individual is sufficiently protected in this situation by compliance with Geneva 4. By virtue of CPA 3, there had to be compliance with Geneva 4. It is thus not correct to say that the executive had unfettered powers of internment. A decision of the executive in breach of Geneva 4 can be remedied in this jurisdiction through the processes of judicial review, and a breach may also constitute a criminal offence over which the United Kingdom courts would have universal jurisdiction under the Geneva Conventions Act 1957. My conclusion is analogous to that reached in *Al Jedda 1* where it was held that Convention rights were displaced by powers conferred by UNSC resolutions to the extent necessary to exercise those powers: see per Lord Bingham at [39], quoted in paragraph 16 above. Within that limit, there can in my judgment be no challenge to a review of detention carried out under those powers in any manner permitted by Geneva 4 or to the legality of a decision to detain made in exercise of the powers conferred by the UNSCR. Both such challenges would be subject to the defence of act of state. The fact that the proper law of an alleged wrong is that of Iraq does not affect this decision. I would add that when holding that the proper law of the tort was the law of Iraq, this court in *Al Jedda 1* excluded a separate claim for habeas corpus ([2007] QB 621 at [100] to [101]). It is unnecessary for me to consider whether there would be a claim for habeas corpus if Mr Al Jedda had not been released.

109. Secondly, the fact that Mr Al Jedda is a British national is not, in my judgment, a bar to the raising of the defence of act of state in respect of acts done abroad as part of a general policy of internment carried out under the authority of the UN for imperative reasons of security. In my judgment, a British national is entitled not to have the defence of act of state raised against him by the British government where he both owes an obligation of allegiance and is constitutionally entitled to be protected against the type of act of which he complains. However, the actions of the British forces in that situation do not infringe any domestic constitutional protection available to Mr Al Jedda as a British national because the act had a legal basis in the overarching provisions of Article 103 of the UN Charter and Geneva 4. I reach this conclusion for this reason and the reasons given in the preceding paragraph and notwithstanding the importance of the accountability of the executive under the law (see *Entick v Carrington* [1558-1774] All ER 4), even in the conduct of foreign relations. However, I do not accept that reliance on act of state is precluded where the loss is suffered by an individual: see, for example, *Buron v Denman* (1848) 2 Exch. 167, cited by Lord Justice Elias.

110. Thirdly, *Nissan* is in my judgment clearly distinguishable. It was no part of the peace-keeping function of the troops to take property without paying for it. In the present case, internment was part of the role which the British contingent of the MNF were specifically required to carry out. The acceptance and carrying out of those obligations was an exercise of sovereign power. It is inevitable that a detainee would suffer the loss of his liberty while he was detained. Therefore, even though Mr Al Jedda's claim is for compensation rather than to challenge the validity of an act of state, and respectfully differing from the tentative illuminating views on this issue of Lord Justice Elias, I consider that the court cannot entertain it.

Disposition

111. For the reasons given above, I have found in Mr Al Jedda's favour on four out of the five issues. However, to succeed on the appeal he needed to win on all of them. Accordingly, I would dismiss the appeal, as well as the respondent's notice.

APPENDIX to the judgment of Arden LJ

Extracts from the Constitution of Iraq (adopted on 20 May 2006)

(Taken from unofficial translation published by the UN)

Article 13

First: This Constitution is the pre-eminent and supreme law in Iraq and shall be binding on all parts of Iraq without exception.

Second: No law that contradicts this Constitution shall be enacted….

Article 15

Every individual has the right to enjoy life, security and liberty. Deprivation or restriction of these rights is prohibited except in accordance with the law and based on a decision issued by a competent judicial authority.

Article 19

First: The judiciary is independent and no power is above the judiciary except the law.

Twelfth:

A. Unlawful detention shall be prohibited.

B. Imprisonment or detention shall be prohibited in places not designed for these purposes, pursuant to prison laws covering health and social care, and subject to the authorities of the State.

Article 37

First:

A. The liberty and dignity of man shall be protected.

B. No person may be kept in custody or investigated except according to a judicial decision.

C. All forms of psychological and physical torture and inhumane treatment are prohibited. Any confession made under force, threat, or torture shall not relied on, and the victim shall have the right to seek compensation for material and moral damages incurred in accordance with the law.

Second: The State shall guarantee protection of the individual from intellectual, political and religious coercion.

Third: Forced labor, slavery, slave trade, trafficking in women or children, and sex trade shall be prohibited.

Article 46

Restricting or limiting the practice of any of the rights or liberties stipulated in this Constitution is prohibited, except by a law or on the basis of a law, and insofar as that limitation or restriction does not violate the essence of the right or freedom.

Article 61

The Council of Representatives shall be competent in the following…

Ninth:

A. To consent to the declaration of war and the state of emergency by a two-thirds majority based on a joint request from the President of the Republic and the Prime Minister.

B. The state of emergency shall be declared for a period of thirty days, which can be extended after approval each time.

C. The Prime Minister shall be delegated the necessary powers which enable him to manage the affairs of the country during the period of the declaration of war and the state of emergency. These powers shall be regulated by a law in a way that does not contradict the Constitution.

Article 130
Existing laws shall remain in force, unless annulled or amended in accordance with the provisions of the Constitution.

Article 143

The Transitional Administrative Law and its Annex shall be annulled on the seating of the new government, except for the stipulations of Article 53(A) and Article 58 of the Transitional Administrative Law.

Sir John Dyson (JSC):

112. I agree with Elias LJ for the reasons that he gives that the continued internment of the appellant after 20 May 2006 was not contrary to the law of Iraq. The central question is whether the procedures for detention provided by section 6 of the revised version of CPA 3 violated the "essence" of the appellant's right not to be deprived of his right to enjoy liberty "except in accordance with the law and based on a decision by a competent judicial authority" (article 15 of the Constitution) and his right not to be kept in custody "except according to a judicial decision" (article 37(1)(B)). This raises the question whether the procedural safeguards provided by CPA 3 are sufficient to deliver the essence of the rights protected by the Constitution.

113. The first question is whether, as is submitted on behalf of the appellant, it is of the essence of these rights that a person is entitled to have the deprivation of his liberty at the outset as well as its continuation on review sanctioned by a judge. I reject this for the reasons given by Elias LJ and Underhill J. In my judgment, it is the right to have the decision made by a person with judicial qualities rather than his or her status as a judge which is the essence of the protected right. The essence of the qualities of a

judge is that he is independent, has the necessary intellectual skills to be able to decide what he has to decide in accordance with the law and, as is stated in the judicial oath which is sworn by judges when they take office in England and Wales, determines the issues that he has to resolve "without fear or favour, affection or ill-will".

114. It is not only a professional judge appointed as such who has these qualities. There is no reason in principle why a rigorous, suitably qualified and independently-minded assessor should not have all the essential qualities of a judge. As Elias LJ points out, such a person if knowledgeable in security issues may be better equipped to provide the essence of the protection of articles 15 and 37(1)(B) than a judge, since he may be better able to examine the security material in a challenging way than a judge.

115. As Underhill J said, the regime provided for by CPA 3 is essentially the regime endorsed by Resolution 1546. It reflects the international standards prescribed by the *Geneva Convention (IV) relative to the protection of civilian persons in Time of War.* It is not unreasonable, if internment is to be permitted at all, to apply these standards by analogy in a situation of serious civil unrest. Article 78 provides for internment by an Occupying Power "for imperative reasons of security" and states:

> "decisions regarding …..internment shall be made according to a regular procedure to be prescribed by the Occupying Power……This procedure shall include the right of appeal for the parties concerned….In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power."

116. It can be seen that this does not require a periodical review by a judge. It is also to be noted that *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984 state at para 70:

> "Although protections against arbitrary arrest and detention (article 9) and the right to a fair and public hearing in the determination of a criminal charge (article 14) may be subject to legitimate limitations if strictly required by the exigencies of an emergency situation, the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency, and respect for them is essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation. In particular:
>
> ……
>
> (d) Where persons are detained without charge, the need for their continued detention shall be considered periodically by an independent review tribunal;

> (e) Any person charged with an offence shall be entitled to a fair trial by a competent, independent and impartial court established by law."

117. The contrast between an "independent review tribunal" to consider continued detention periodically and a "competent, independent and impartial court established by law" to try defendants who are charged with offences is striking. It provides support for the view that the essence of the right protected by articles 15 and 37(1)(B) is not that the decision in question should be taken by a judge or by a court established by law, but by an independent review tribunal. I agree with what Elias LJ says at para [152] below.

118. I also agree with him that further support for the conclusion reached by the judge is to be derived from the circumstances in which the Constitution was passed.

119. I accept the point made by Arden LJ at para 58 that the Constitution is a "higher law". But the judge's approach does not involve according more weight to CPA 3 than the Constitution. Rather, it involves interpreting articles 15 and 37(1)(B) of the Constitution in the light of article 46.

120. At para 62, Arden LJ relies on the fact that the loss of liberty was indefinite and, however regular the review, the fact remained that the release was discretionary. She argues that the "crucial role of judicial safeguards is obvious in this situation". First, I am not sure in what sense the loss of liberty is "indefinite". Section 6(6) of CPA 3 (as revised) provides:

> "Where it is considered that, for continuing imperative reasons of security, a security internee placed in internment after 30 June 2004 who is over the age of 18 should be retained in internment for longer than 18 months, an application shall be made to the Joint Detention Committee (JDC) for approval to continue internment for an additional period. In dealing with the application the members if the JDC will present recommendations to the co-chairs who must jointly agree that the internment may continue and shall specify the additional period of internment. While the application is being processed the security internees may continue to be held in internment, but in any case the application must be finalised not later than two months from the expiration of the initial 18 month internment period."

121. Thus, those who are more than 18 years of age may be interned for longer than 18 months, but only so long as imperative reasons of security continue to exist and the co-chairs of the JDC agree that the internment may continue and then only for such additional period as may be specified by them.

122. Secondly, and for the same reasons, release is "discretionary" only within certain parameters. Internees must be released once the "imperative reasons of security" cease to exist.

123. At para 63, Arden LJ says that the fact that the MNF had to have internment does not mean that the detainee had no rights and that the MNF did not need to respect the rights of the detainees. I agree. But I do not consider that this sheds light on the question whether the process of review created by section 6 of CPA 3 was sufficient to satisfy the essence of the rights created by articles 15 and 37(1)(B) of the Constitution.

124. The second question is whether the procedures adopted were sufficiently competent, independent and impartial to satisfy the essence of article 15 and 37(1)(B). So far as competence is concerned, the composition of DIRC, CRRB and JDRC (described in detail by Elias LJ at paras [135] to [141] below) was such that, for the reasons given by Elias LJ, the tribunals were more likely to be effective than a judge. Decisions could be taken by reference to intelligence information which would not be available if the review were undertaken by a judge of the Iraqi courts.

125. Mr Swift accepts that the review bodies are not institutionally independent of the MNF by whom internees were detained. But I accept his submission that the question is whether the bodies charged with the review of detentions were sufficiently independent of the MNF. In my view, when judged against the background of the circumstances in which the Constitution was passed, and for the reasons give by Elias LJ and the judge, they were sufficiently independent.

126. For these reasons as well as those given by Elias LJ, I would hold that the internment of the appellant after 20 May 2006 was not contrary to the law of Iraq.

127. I do not propose to deal with the other issues since in my judgment they do not arise. I should make the particular point that the Act of state defence raises points of very considerable difficulty. This was an issue on which we did not hear full argument. For this additional reason, since it is not necessary to do so, I would not wish to express a view on it in this appeal.

Lord Justice Elias:

128. I gratefully adopt the analysis of the facts set out in the judgment of Arden LJ.

129. There are five issues which the court needs to decide. The first is whether the internment of the appellant was contrary to the law of Iraq. If it was not, the appeal fails on the merits. If it was, then the Secretary of State prays in aid four principles any one of which, if applicable, would defeat the appeal. In my view, on a proper analysis two raise issues of jurisdiction, whilst the other two are more appropriately described as defences.

130. The two jurisdiction grounds assert that the court ought not to engage with the issue of the legality of the internment at all. The first jurisdiction ground asserts that this is inappropriate because the resolution of the dispute involves the interpretation of the Iraqi constitution, and British courts ought not to embark on that exercise both because it is contrary to the principle of comity between nations for them to do so, and because there are no clear principles which will enable them to carry out that exercise. The second is that the internment is an act of state exercised by the executive on foreign soil and as such cannot be brought into question in the domestic courts. This submission in turn raises two issues: first, whether the act of internment

was an act of state; second, if it was, whether it can be pleaded against a British subject.

131. The two defences both involve the interpretation of different provisions of the Private International Law (Miscellaneous Provisions) Act 1995. The first is the public policy issue. It is said that it would be contrary to public policy to give effect to Iraqi law even if according to that law the internment was unlawful. The second is what Arden LJ has termed the CPA 17 issue. This argument rests upon the fact that under CPA 17, which is part of the law of Iraq, the actions of the British soldiers could not be brought before the Iraqi courts. So, it is said, the application of the law of Iraq does not give the appellant a remedy before the British courts because he could not enforce his claim before the court in Iraq.

Was the continued internment contrary to Iraq law?

132. I first deal with the procedures which enabled the appellant to challenge the legal basis of his detention and then consider whether they were compatible with the law of Iraq.

133. The appellant was initially detained on 10 October 2004 when he was arrested on suspicion of being a member of a terrorist group involved in weapon smuggling and explosive attacks in Iraq. He was released without charge over three years later on 30 December 2007.

134. He does not seek to challenge the legality of the initial period of his detention. His contention is that it became unlawful when the Iraq Constitution came into force on 20 May 2006. It is alleged that certain laws and procedures which had until then justified his detention ceased to do so because they conflicted with Articles of the Constitution.

135. The power of detention was first conferred on the Coalition Provisional Authority (CPA) by a memorandum known as Memorandum No 3 and entitled "Criminal Procedures" (CPA 3). In its original form it was promulgated on 18 June 2003, but it was subsequently revised with effect from 28 June 2004 when the Iraqi interim government was formed; that was prior to the appellant's detention. Section 6 of the revised version is headed "MNF Security Internee Process" and is as follows:

> (1) Any person who is detained by a national contingent of the MNF for imperative reasons of security in accordance with the mandate set out in UNSCR 1546 (hereinafter "security internee") shall, if he is held for a period longer than 72 hours, be entitled to have a review of the decision to intern him.
>
> (2) The review must take place with the least possible delay and in any case must be held no later than 7 days after the date of induction into an internment facility.
>
> (3) Further reviews of the continued detention of any security internee shall be conducted on a regular basis but in any case not later than six months from the date of induction into an internment facility.
>
> (4) The operation, condition and standards of any internment facility established by the MNF shall be in accordance with Section IV of the Fourth Geneva Convention.

(5) Security internees who are placed in internment after 30 June 2004 must in all cases only be held for so long as the imperative reasons of security in relation to the internee exist and in any case must be either released from internment or transferred to the Iraqi jurisdiction no later than 18 months from the date of induction into an MNF internment facility. Any persons under the age of 18 interned at any time shall in all cases be released not later than 12 months after the initial date of internment.

(6) Where it is considered that, for continuing imperative reasons of security, a security internee placed in internment after 30th June 2004 who is over the age of 18 should be retained in internment for longer than 18 months, an application shall be made to the Joint Detention Committee (JDC) for approval to continue internment for an additional period. In dealing with the application the members of the JDC will present recommendations to the co-chairs who must jointly agree that the internment may continue and shall specify the additional period of internment. While the application is being processed the security internee may continue to be held in internment but in any case the application must be finalized not later than two months from the expiration of the initial 18 month internment period.

136. There are, therefore, two different sets of review arrangements. The first, under sub-section 3, requires regular reviews throughout the internment. The second, under sub-section 6, applies where, as in this case, the internment extends beyond 18 months. There must then be specific approval by the JDC.

137. The review under sub-section 3 was conducted by a body known as the Divisional Internment Review Committee (DIRC). It comprised the general officer commanding (GOC) (multi-national division) South East; the chief of staff of the division, a policy adviser to the GOC; the chief 'J2', being a lieutenant and colonel in the intelligence corps; and a commander "legal", being a lieutenant colonel in the Army Legal Service. All save the policy adviser were senior serving officers.

138. The committee met on average once a month. Its terms of reference required it to review all available evidence, intelligence and other paperwork associated with the internee's original detention, as well as any subsequently obtained information and any representations from the internee, and to determine whether his continued internment was necessary for imperative reasons of security.

139. Initially, the DIRC had no decision making power; it simply made recommendations to the GOC who had the final say. However, following criticisms of that arrangement in the Divisional Court in the *Al-Jedda No 1* case the committee took the power to make the decision itself. I refer below to the nature of those criticisms.

140. The DIRC process was modified from some time in mid-2006. A further body, known as the Combined Review and Release Board (CRRB), was established. The purpose was to involve members of the Iraq government more fully in the detention process. The CRRB comprised representatives of the Iraqi Ministry of Justice, the Ministry of the Interior, and the Human Rights division, and three British officers. It did not have access to all the intelligence information and could merely make recommendations which the DIRC would have to consider. In fact, it did make a recommendation in

December 2006 that the appellant should be released. That, however, was not accepted by the DIRC.

141. The procedure under sub-section 6 is rather different. The joint detention committee referred to in that subsection was established by CPA Order No 99 issued on 27 June 2004. It was a large committee numbering up to 21 members and included members of the Iraq interim Government as well as the MNF and a representative from each of the United States and the United Kingdom (who was the ambassador to Iraq). In fact, the task of considering particular cases under the 18 month rule was delegated to a sub-committee known as the Joint Detention Review Committee (JDRC). They had to make a recommendation as to whether the application should be approved or denied but as sub-section 6 makes clear, the co-chairs had the ultimate decision. They had to agree that the internment would continue and also specify any additional period of internment. So the decision was taken at the highest level.

Were the procedures compatible with the law of Iraq?

142. At the hearing before Underhill J, there were three issues which arose under this head. The first was whether CPA 3 continued to form part of the law of Iraq following the adoption of the new constitution. The judge held that it did, and that conclusion is not now challenged.

143. The second issue was whether the procedures complied with Articles 15 and/or 37 of the constitution (reproduced in the Appendix.). The former requires that any deprivation of liberty must be based on a decision by a competent judicial authority; the latter provides that no-one shall be kept in custody except according to a judicial decision. It is not entirely clear whether both these provisions are applicable. It may be that Article 37 is strictly the appropriate provision since this focuses on keeping someone in custody whereas Article 15 seems to focus on the original deprivation of liberty. However, nothing turns on it because it is conceded by Mr Swift that at least one of these provisions applies and that the procedures were not strictly compliant with either since they did not involve a determination by a judge.

144. The third question is whether the procedures can be reconciled with the constitution by relying on Article 46 which is as follows:

> "Restricting or limiting the practice of any of the rights or liberties stipulated in this Constitution is prohibited, except by a law or on the basis of a law, and insofar as that limitation or restriction does not violate the essence of the right."

145. The contention is that the procedures adopted did not violate the essence of the right in either Article 15 or 37 and were therefore compatible with the Constitution. The essential issue on this ground of the appeal is whether that submission is correct.

146. I agree with Arden LJ, and indeed Underhill J at first instance, that the expert evidence provides very limited, if any, assistance on this question. There was no reference to any Iraq judicial authorities, and the clear impression given by the expert evidence is that the experts were adopting views reached by applying what they

considered to be general constitutional principles to the Articles of the constitution. That was also the approach adopted by the judge. He concluded that the procedures did fall within the terms of Article 46 and were therefore lawful under the law of Iraq. However, I agree with Arden LJ for the reasons she has given that this court is in as good a position as the judge to reach a conclusion on this issue and that no particular deference should be shown to the judge's conclusion on the point.

147. The fundamental issue is this: were the procedural safeguards adopted to give effect to CPA 3 sufficient to protect the essence of the rights conferred by Articles 15 and/or 37? This involves a consideration of two interrelated questions. First, what is the "essence" of the right conferred by these provisions? Second, do the procedures violate that essence?

148. As to the first question, there are two possible approaches as to what constitutes the essence of these rights. The first focuses on the specific language in the two Articles - the reference to "competent judicial authority" and "judicial decision" respectively - and treats the need for judicial involvement as an essential requirement in any lawful system of monitoring and review. The second concentrates on what the judicial oversight is designed to achieve. The purpose, it is said, is to prevent arbitrary detention taken without legal authority. The judicial role is to provide an independent and objective review of the material evidence, made in good faith, and to determine whether it is in accordance with the law. The reference to judicial authority or a judicial decision is intended to secure the adoption of procedures which will encompass these characteristics. On this analysis the essence of the right conferred by these Articles requires not the involvement of a judge; rather it requires that the decision displays the essential features of these typically judicial characteristics.

149. I have not found this an altogether easy issue to decide. However, on reflection I have come to the conclusion that the latter analysis is correct. I say this for two quite distinct sets of reasons: the first is general in nature; the second focuses on the particular circumstances in which this Constitution was passed.

150. The first is that in the context of depriving someone of liberty, the essence of justice according to law is that there is an objective and independent assessment of the relevant evidence measured against some legal criteria, in this case the alleged infringement of security. A requirement for a judicial decision according to law is the natural and obvious way of encapsulating these qualities. The judge will typically be learned in the law and will be independent of those seeking to justify deprivation of liberty. But it is those judicial qualities and not the status itself which is important. We would not, I think, consider that the decision met the terms of either Article 15 or 37, even if it were taken by an otherwise competent judge, if that judge did not display the qualities of independence, fairness and objectivity. This suggests that the reference to the judge is essentially a shorthand for those particular judicial qualities; requiring a judge to make a decision is the most reliable method of ensuring that the decision will be marked by these characteristics. Moreover, justice is more readily seen to be done where a judge is the decision maker.

151. However, as desirable as it is to require a judge to make these decisions, I do not consider that the involvement of a judge constitutes the essence of the rights conferred by Articles 15 and 37. In my judgment, the essence of the right lies in the characteristics encapsulated in the notion of a judicial decision. The removal of the

judge will no doubt make it more difficult to secure the essential qualities of independence, objectivity and good faith, but I do not accept that only judicial procedures can secure the essence of those requirements.

152. Indeed, it seems to me that non-judicial procedures may be capable of better serving a detainee than would judicial procedures, where the reason for the detention is the threat to security. Judges are not in the best position to assess whether national security is threatened or not. They will perforce have to show considerable deference to the views of those more expert and experienced in making security assessments. The key stage in any review will in practice be the stage where that evidence is considered and assessed. A rigorous and independently minded assessor, knowledgeable in security issues, may be more willing and more able than a judge effectively to question security material which is alleged to justify detention.

153. This conclusion is reinforced by the circumstances in which the constitution was passed in this case. First, it was not drafted in a vacuum; the draftsmen would inevitably have had in mind the prevailing situation in Iraq. As Underhill J pointed out, this included particularly grave security problems. Indeed, the need to combat the security threat from terrorist activity is recognised in the constitution itself: see Article 7(2) which provides that "the State shall undertake to combat terrorism in all its forms."

154. Second, it would have been fully appreciated by the draftsmen that the internment arrangements practised by the occupying forces did not include independent judicial scrutiny of the reasons for detention. Whilst I agree with Arden LJ that the mere fact that CPA 3 was kept in force when the constitution was introduced does not of itself demonstrate that it, or the procedures adopted in pursuance of it, were considered to be compatible with the constitution, nevertheless it seems to me to be of some relevance that nobody appears to have thought at the time that the procedures contravened the Constitution.

155. Third, in an emergency situation which may be declared in accordance with Article 61(9), or during a time of war, the Prime Minister is delegated the power to manage the affairs of the country. He cannot, however, adopt laws which contradict the constitution. It is, I think, unlikely that in such an extreme emergency situation it would be envisaged that detention of those considered to be a threat to the state could be lawful only if ordered by a judge. But that would necessarily follow if the appellant's argument is correct. In this context it is pertinent to note that even under the European Convention the rights conferred by Articles 5 and 6 may be the subject of derogation in time of war or other emergency under Article 15, provided the circumstances are sufficiently pressing.

156. This is not to say that review of detention by an administrative panel is the same as review by a judge. But that is not the issue; the question is whether the use of such a panel is capable of protecting the essence of a judicial review. In principle I think that it is; the central core is an independent and genuine assessment by someone other than the initial decision maker.

157. That still leaves the question whether the procedures actually adopted in this case were sufficiently independent and impartial as to meet the essence of a "judicial" determination. In my view they were. Both the procedures under subsections 3 and 6

of CPA 3 involved consideration of the case by a number of persons some of whom would not have been parties to the original decision, and some are unconnected with the British contingent. They did so on the basis of information available to them, and written submissions from the detainee or his representatives. In my judgment this met the basic standards inherent in the "essence" of the right.

158. This conclusion receives some support from the decision of the Divisional Court in the *Al Jedda No 1* case ([2005] EWHC 1809 (Admin); Moses and Richards JJ). They had to consider whether the procedure then in force, namely where the ultimate decision to detain was made by the Commanding Officer following a recommendation by the DIRC, was consistent with the obligations under Article 78 of the Geneva Convention.

159. This Article provided that a detainee was entitled to a right of appeal or else a periodic review by "a competent body." One of the issues before the court was whether a decision by the military commander alone could amount to compliance with that provision. The court accepted by analogy with other Articles of that Convention that in order to comply with Article 78 the decision to detain would have to be taken by an administrative board which offered the necessary guarantees of independence and impartiality.

160. The court rejected a submission by the Secretary of State that the Commanding officer was akin to an administrative board and would constitute a "competent body" within the meaning of Article 78; the decision of a single individual would not provide the necessary guarantee of fair treatment. The court continued:

> "Although the Commander and the panel do not have the qualities of independence and impartiality sufficient to meet the requirements of Article 6 ECHR, we do not think that complaint could properly be made of them in the context of Article 78 of Geneva IV. If, therefore, the decision had been taken jointly by the Commander and the panel, rather than by the Commander on the recommendation of the panel, the procedure would in our view have complied with Article 78."

161. Accordingly once their recommendation for a joint decision had been implemented, as it subsequently was, in the court's view the procedures complied with Article 78. It follows that in the court's opinion, although falling short of Article 6 standards, the procedures provided the necessary guarantees of impartiality and independence to satisfy the standards imposed under Geneva IV.

162. I agree with that analysis, and in my judgment whilst the procedures did not provide the full institutional independence and impartiality which a judicial procedure would establish, nonetheless compliance with Geneva IV was enough to provide the essence of those characteristics as required by Article 46 of the Iraq constitution.

163. It follows that for these reasons, and also for the reasons given by Sir John Dyson, whose judgment I have read in draft, in my view there is no breach of Iraqi law in this case. However, lest I am wrong in that conclusion, I will address the other issues.

CPA 17

164. The first submission relies on section 9(4) of the 1995 Act. This provides as follows:

> "The applicable law shall be used for determining the issues arising in a claim, including in particular the question whether an actionable tort or delict has occurred."

165. The applicable law, as the House of Lords held in *Al Jedda No 1*, adopting the conclusion of the Court of Appeal on this point, is the law of Iraq. That law must therefore be used for determining the issues arising in a claim. This includes in particular, the question whether an actionable tort has occurred. Mr Swift contends that this requires the court to ask whether or not civil liability would exist in Iraq. He focuses on the need for the tort to be "actionable". It cannot be an actionable tort, he says, if it cannot be enforced in the courts of Iraq. The MNF, which includes British forces, are immune from the Iraqi legal process as a result of CPA 17. This gives MNF personnel complete immunity from suit in the Iraqi courts. This is not, he submits, merely a procedural matter but involves a substantive modification of the obligations that would otherwise arise under Iraqi law.

166. I do not accept that submission. The applicable law simply identifies the set of rules which are to determine the issues arising in the claim; whether there is a claim under the applicable law should not be confused with whether that claim can be pursued before the courts of the state whose law is to apply. CPA 17 simply removes disputes of this nature from the Iraqi courts, not from all courts. Were it otherwise, section 2(3) of the CPA 17, which provides that the multi-national forces shall be subject to the jurisdiction of the sending State, would have nothing to bite on at all where the proper law of the issue was found to be Iraqi law (as it generally will be where the act in question occurs in Iraq).

167. Nor do I accept that the word "actionable" can bear the weight Mr Swift puts on it. It would no doubt mean that no claim could be advanced in the English courts if the limitation period under Iraqi law had elapsed since the claim would then have ceased to be actionable under the law of Iraq. But such a claim would not be actionable because the law would be incapable of enforcement in the courts of Iraq by anyone. In my judgment, the tort remains actionable within the meaning of section 9 where it can be pursued by an Iraqi citizen in the Iraqi courts.

168. Mr Swift relies upon a passage in Dicey & Morris, paragraph 35/04-046, in which the authors state that in general a defendant may rely on any substantive defence available under whichever law is applicable to the tort concerned.

169. I do not dispute that principle, but CPA 17 does not, in my judgment, provide a substantive defence to the claim. The Secretary of State is confusing a procedural bar with a substantive defence. Mr Swift also submits that it would be strange if liability which has been carefully excluded from the Iraq courts could be asserted in a different jurisdiction. I do not see why. As Lord Mance pointed out in *R (on the application of Smith) v Secretary of State for Defence* [2010] UKSC 29, para. 189:

> "CPA Order No 17 reflected the general principle of state immunity, under international and common law, precluding civil suits in one state against a *foreign* state or its servants in respect of sovereign activities of that foreign state."

170. I do not accept that in passing a law designed to give effect to that well established principle it can reasonably be inferred that the activities of British forces should not be held accountable in any courts at all. That is in essence what Mr Swift is contending. In my judgment, CPA 17 is merely determining which system of courts is to determine the legal issues in question; it is not intended to defeat the right to bring a claim in any court.

Public Policy.

171. The public policy argument is based upon section 14(3)(a) of the 1995 Act, which is as follows:

> "Without prejudice to the generality of sub-section (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) would give effect to such penal revenue or other public laws as would not otherwise be enforceable under the law of the forum."

172. This provision precludes the English courts from enforcing or recognising a foreign law which is manifestly contrary to the principles of public policy as enunciated in English law. The core of Mr Swift's submission under this head is that it will be contrary to public policy to apply the foreign law if it is inconsistent with international law obligations binding upon the United Kingdom.

173. In support of this proposition Mr Swift cites *Kuwait Airways Corporation v Iraqi Airways Company (Nos. 4 & 5)* [2002] 2 AC 883. The issue in that case was whether the UK court should give effect to a confiscatory degree promulgated by the Iraq Government in the wake of its invasion and purported annexation of Kuwait. It had seized aircraft from the Kuwait Airways Corporation. Lord Nicholls of Birkenhead (with whose judgment Lords Steyn, Hoffmann and Hope agreed) said this (para 18):

> "When deciding an issue by reference to foreign law, the courts of this country must have a residual power to be exercised exceptionally and for the greater circumspection to disregard a provision in the foreign law when to do otherwise would affront basic principles of justice and fairness which the court seek to apply in the administration of justice in this country. Gross infringements of human rights are one instance and an

> important instance of such a provision but the principle cannot be confined to one particular category of unacceptable law. That would be neither sensible nor logical. Laws may be fundamentally unacceptable for reasons other than human rights violations."

174. The question is, therefore, whether the requirement imposed by the law of Iraq which is allegedly infringed by the Secretary of State in this case, is "fundamentally unacceptable" and affronts basic principles of justice and fairness. The law in issue is one which requires judicial oversight of the detention of any person. In my judgment that law does not remotely begin to engage the public policy principle. Plainly, if this provision were part of the law of the United Kingdom it is inconceivable that it could be said to be contrary to public policy. The purpose of the particular provision is to ensure that basic human liberties are properly protected. It is impossible to contend that it is an affront to fundamental principles of fairness and justice.

175. Mr Swift's contention is that it becomes unacceptable and contrary to public policy because the UN resolution which authorises internment for imperative reasons of security ought to take priority over an Iraqi law which seeks to regulate the manner in which that detention is to be exercised. However, that argument is not, in my judgment, properly characterised as a public policy argument at all. Rather it is that in the hierarchy of legal rules, when resolving any dispute before the courts of the United Kingdom, the requirements of the resolution of the Security Council should take precedence over any inconsistent foreign law. If the argument is correct, it does not need section 14(3) of the 1995 Act to make it good.

176. In my judgment, there is no basis for the assertion that international law should be given priority over contrary principles of national law, even if such a principle were desirable. That would not be the position under UK law and I am aware of no authority which supports the proposition that in the field of conflicts of laws, the courts should refuse to apply the applicable national law where it conflicts with international law..

177. In *Al Jedda No 1* it is true that the House of Lords held that a United Nations resolution would take precedence over the European Convention on Human Rights, but that case was concerned with the relationship between two international obligations. Article 103 of the UN Charter provided that in the event of a conflict between the obligations of a member state under the Charter *and under any other international instrument,* the former should prevail.

178. So the issue for their Lordships was whether this gave the UN resolutions in issue in that case priority over any obligations imposed by the European Convention. They held that it did. However, their Lordships were not concerned with the relationship between UN resolutions and the domestic law of a member state. It is firmly established that international obligations do not become part of UK law unless specifically incorporated, and there would seem to be no basis for asserting that the UK courts should refuse to give effect to the national law of another state on the grounds that they are incompatible with international obligations undertaken by the UK.

179. Mr Hermer submitted that in any event the premise underpinning this submission is false. He contended that a provision requiring judicial oversight of the detention of someone who is alleged to be jeopardising the security of the State is not inconsistent with the power conferred on the British Forces to intern such individuals. The two rules can happily sit together.

180. Underhill J considered that this submission could not be right in view of the decision of their Lordships' House in *Al Jedda No 1*. In that case their Lordships held that there was an inconsistency between the safeguards in Article 5 of the European Convention and the terms of the resolutions obliging detention where national security is imperilled. Hence the need for the court to determine which right took priority. If the obligations under Article 5 of the Convention could not be reconciled with the obligation to intern on national security grounds, nor could the procedures of the law of Iraq requiring judicial determination.

181. I do not think that the two situations are the same. The reason why there was a conflict between an obligation to intern under the UN Resolutions and Article 5 was that the latter only allows detention on certain specified grounds which do not include internment for security reasons. But in my judgment, there is no reason why that conflict arises where the only question is which body is to determine whether the conditions of internment are met.

182. Arguably, security may be jeopardised if someone who threatens security is not locked up immediately; so to that extent it may be inconsistent with the UN resolution to require judicial safeguards at that initial stage. But I do not see why security is jeopardised if, having been locked up and put out of potential harm's way, the justification for continued detention is made subject to judicial control. That is the position of this appellant. Accordingly, I accept the submission that at least so far as continuing detention is concerned, there is no inherent conflict between the requirements of the UN resolutions and the law of Iraq.

183. For these reasons, therefore, I do not accept that a public policy defence is available to the Secretary of State.

Non-justiciability.

184. The Secretary of State submits that the analysis of Iraqi law is in this case bound up with the interpretation of the Constitution. It involves considering whether CPA 3 remained an existing law once the Constitution was brought into effect; if so, whether it was inconsistent with certain articles of the Constitution; and if it was inconsistent, whether it could be saved by Article 46 on the basis that it still protected the essence of the right conferred by the Constitution.

185. Mr Swift contends that the resolution of these questions by a domestic court would involve a breach of comity between friendly nations. Moreover, he submits that there is no proper basis which would enable the English court to rule on this matter. He cites in particular the case of *Buck v Attorney General* [1965] Ch. 745.

186. In that case the plaintiffs sought to challenge an Order in Council which set up the Constitution of Sierra Leone. An Act of Independence established Sierra Leone as an independent constitutional state and after that Act came into force, proceedings were

taken to challenge the terms of the constitution and to contend that the Order in Council which created it was *ultra vires*.

187. The Court of Appeal (Harmer, Diplock and Russell LJJ) held that the case failed on the merits but that in any event the issue was not justiciable because it would call into question the terms of a constitution of a foreign sovereign state. A declaration declaring the constitution unlawful in some way would be of no effect and to issue it would be incompatible with the comity between two sovereign states. The Order in Council could have been challenged prior to independence being conferred, but once that had occurred, the British courts were not the appropriate forum for resolving the dispute.

188. In the course of giving judgment, Lord Justice Diplock said this (p.770):

> "The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law containing its constitution. The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction, as, for instance, the validity of a foreign law might come in question incidentally in an action upon a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is about nothing else. This is a subject-matter over which the English courts, in my view, have no jurisdiction.
>
> … For the English court to pronounce upon the validity of a law of a foreign sovereign state within its own territory, so that the validity of that law became the res of the res judicata in the suit, would be to assert jurisdiction over the internal affairs of that state. That would be a breach of the rules of comity. In my view, this court has no jurisdiction so to do."

189. In my judgment, the reasons given in that case for refusing to exercise jurisdiction simply do not apply here. The purpose of this litigation is not to determine the validity of the foreign constitution; that is not what the claim is about. It is to determine whether the appellant has been lawfully detained or not. In resolving that issue it is necessary to interpret certain provisions in the law of Iraq, and that includes its Constitution. To use Lord Diplock's words, that issue comes in incidentally in proceedings in which the court plainly does have jurisdiction. The domestic law is simply interpreting the constitution as a necessary step in determining the legal claim before it. The ruling, of course, has no effect at all on the courts of Iraq. They are not in any sense bound by the judgment. But the legal issues arising under Iraq law need to be resolved in order to decide a dispute which is properly before the courts.

190. As to the submission that it would infringe comity for the court to hear this claim, Mr Swift effectively sold the pass on this submission when he conceded that the position might be different if there were authorities from the courts in Iraq which had already provided an interpretation of these various provisions of the Constitution. He says that in those circumstances there would be a solid basis to enable the court to make a

considered analysis of the relevant principles. However, if the underlying contention is that the need to respect comity should bar the court from questioning the terms of a foreign constitution, that justification does not change depending upon whether there are judicial authorities from the courts in Iraq to guide the British court.

191. A related argument was that the court simply has no proper standards with which to assess the dispute before them. Reliance is placed on certain observation of the House of Lords in *Buttes Gas and Oil Company v Hammer (Nos 2 and 3*) [1982] AC 888. In that case their Lordships held that the facts, which concerned the relationship between four sovereign states, raised issues of international law and inter-state issues in circumstances where the court, in Lord Wilberforce's words (p.938) "had no judicial or manageable standards" to judge the issues before them. Suffice it to say that in my judgment this case is very far removed from the issues in dispute there. The courts are well able, with the assistance of expert evidence, to make findings on the meaning of foreign law, including its constitution. It is something they do all the time. The lack of any authorities on the point does not alter matters.

Act of state.

192. The significance of the Secretary of State successfully pleading an act of state is that the court's jurisdiction to consider the claim is removed. As Lord Wilberforce summarised it in *Nissan v Attorney General* [1970] AC 179,

231E:

> "it prevents British municipal courts from taking cognisance" of certain acts."

193. The act of state defence raises issues of some considerable complexity. We heard highly truncated argument about it and I suspect that it raises more questions than were directly developed before us. In view of that, and given that I have found that Iraqi law was not infringed in any event, my conclusions on this aspect of the case are necessarily tentative. Moreover, for reasons I develop below, I have considerable doubts whether it is legitimate for the Secretary of State to raise the matter for the first time now, when he did not do so in the earlier *Al Jedda* litigation. However, if the argument is one which the Secretary of State can properly advance, then in my judgment it would not be an answer to the claim in the circumstances of this case. I shall briefly indicate why.

194. The argument as advanced by both counsel concerned two issues. First, was the act of detention an act of state? Second, if it was, could it be pleaded against Mr Al Jedda, notwithstanding that he was a British subject? Both counsel drew heavily on the decision of the House of Lords in *Nissan* to make good their competing contentions. Mr Swift submitted that the case supported his view that detention was an act of state and that it was immaterial that Mr Al Jedda was a British subject. Mr Hermer submitted that the case established the contrary; it demonstrated that the act of detention was not an act of state and even if it otherwise could be so described, it

could not be pleaded against a British subject. Underhill J resolved both issues in favour of the Secretary of State, and Arden LJ has agreed with his conclusions.

195. As to the question whether the internment was an act of state, in my judgment it did fall into that category, essentially for the reasons given Underhill J and which Arden LJ supports. By this I mean that it would have removed the jurisdiction of the courts to question the detention of a foreign subject. I will not, therefore, address that issue any further.

196. Assuming that be right, the question is whether, in the present stage in development of the common law, this defeats the ability of the courts to question its legality even when the liberties of a British subject are at stake.

197. Lying at the heart of this question is the relationship between the Crown (more accurately now, executive government) and the courts. To what extent and in what circumstances should the courts refuse to hold the executive to account in its dealings with foreign states or its handling of foreign relations? Is it even a material factor that the interests of a British subject are affected by the act in question?

198. There is no question that if the appellant as a British subject had been detained within the jurisdiction, the courts would have been obliged to hear his claim and no act of state defence could have been run. Ever since the great case of *Entick v Carrington* (1765) 19 St.Tr. 1029 it has been established that a plea by the executive of state necessity cannot provide a defence to the otherwise unlawful interference with the liberty of the subject. Indeed, an act of state cannot even be asserted against friendly aliens on British soil: see *Johnstone v Pedlar* [1921] 2 A.C. 262(HL). So is the position otherwise when the act in question takes place outside the jurisdiction?

199. Mr Swift contends that there is no reason why the nationality of the person affected should be of any relevance to the question whether an act of state removes the jurisdiction of the courts. Once the act in question bore the quality of an act of state, it could be relied against anyone. The test is one of geography and not nationality or citizenship. Mr Hermer submits that there is no reason why geography should have any relevance where the rights of the subject are involved. Whatever the position of foreigners, British subjects owe allegiance to the Crown and the courts must ensure that the executive acts lawfully towards them.

200. The House of Lords left the point open in *Nissan*. Lord Reid analysed the authorities and concluded that act of state could never be enforced against a British subject. He gave a ringing endorsement of the importance of the traditional role which the courts have played in protecting the liberty of the subject (p. 208B):

> "But it would, in my view, be a strange result if it were found that those who have struggled and fought through the centuries to establish the rights of the subject to be protected from arbitrary acts of the King's servants have been completely successful with regard to acts done within the realm, but completely unsuccessful in gaining any legal protection for British subjects who have gone beyond the territorial waters of the King's dominions".

201. Lord Wilberforce considered much the same authorities as Lord Reid but concluded that they did not support Lord Reid's conclusion. He does not take the opposite pole to Lord Reid asserting that act of state can always be pleaded against a British subject; he rejects a blanket rule that it never can (p.235E):

> "In this state of authority and doctrine it appears to me to be impossible to accept the broad proposition that in no case can the plea of act of state, in the sense that a particular act by the Crown is not cognisable by a British court, be raised against a British subject. On the contrary, as regards acts committed abroad in the conduct of foreign relations with other states, the preponderance of authority and of practice seems to me to be the other way. No doubt the scope of the Crown's prerogative, and the consequent non-justiciability of its acts, is uncertain – as uncertain as such expressions as "the conduct of foreign relations" or "in the performance of treaties". This is why I am with the Privy Council in *Walker. v Baird* in thinking that caution in the stating of general propositions is required."

202. Lord Pearce appears to have leant towards Lord Reid's position. At one stage in his speech he said this:

> "The Crown contention is that this right of the subject whereby he cannot be shut out from the courts by the barrier of an act of state applies only to matters done within the realm. For when a subject is abroad he lives under the local law and relies on that, so that vis-á-vis the executive of his nation he is in the same position as a foreigner. The difficulty of applying this geographical test is that, if it be right, a subject loses his rights against the executive as soon as he is outside the three mile limit. This would be an odd and undesirable result.
>
> Although there is no legally enforceable duty to protect subjects in foreign parts (*China Navigation Co*. [1932] 2 K. B. 197), it would be a novel concept to hold that a government owes no duty at all to help or protect or refrain from injuring them. And there seems little logical justification for saying that although a country owes some measure of protection to its subjects when they are outside the realm, yet it may treat them as if they were mere aliens whenever it chooses to impinge upon their personal rights. Also it must be remembered that aliens abroad can rely upon their own governments to make representations through diplomatic channels and obtain redress from our government if they are injured by its acts of state. But if our government can injure its subjects abroad without remedy in the courts, there are no diplomatic channels open to them."

203. However, since it was not necessary to decide the point (because he held that the act in question was not an act of state), Lord Pearce reached no concluded view on the matter.

204. Lords Morris and Pearson also considered it unnecessary to answer the question. However, each noted that the application of a principle that act of state could never be pleaded against a British subject could lead to curious results where the act in question impinged on many persons whose nationality was unknown, but one of whom happened to be a British citizen.

205. It is, therefore, possible to plunder the speeches in *Nissan* to find support for the proposition that act of state can be pleaded against a British subject and that it cannot - which is precisely what both counsel did.

206. It is important to bear in mind that *Nissan* was decided over forty years ago, and many of the authorities on which it draws were from the nineteenth century. There have been striking developments since *Nissan* which have fundamentally altered the relationship between the courts and the executive. One is the development of sophisticated principles of administrative law; another is the growing importance given to the protection of human rights.

207. Of particular importance in this context is the way in which the court has extended its jurisdiction to control the exercise by the Crown of prerogative powers. For centuries the conventional jurisprudence was that the courts could determine the scope of prerogative powers but not the manner of their exercise. That traditional approach changed with the *GCHQ* case where the House of Lords held that these common law powers of the Crown are in principle subject to judicial review in a similar way to its statutory powers (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374).

208. In practice a significant limitation on the ability of the courts to control the prerogative is that the nature of some of these powers makes judicial control inappropriate. Some examples were given by Lord Roskill in the *GCHQ* case itself, and he included the making of treaties and the defence of the realm. The courts could not usurp the role of Parliament to hold the government accountable for such acts, and indeed the court would have no criteria under domestic law with which to judge their legality. But the courts can more comfortably question the exercise of other prerogative powers, and *GCHQ* provided an example.

209. Acts of state are akin to prerogative powers in that they both involve the exercise of common law powers conferred on the Crown. Indeed, acts of state are sometimes described as the exercise of prerogative powers in relation to foreign affairs. But there is potentially an important distinction between the state in litigation relying on act of state or the exercise of a prerogative power. Where the State relies upon the exercise of a prerogative power to justify interfering with private rights, it is asserting that it is acting lawfully and has a defence against the legal claim against it. When the oil fields in Burma were destroyed during the war by retreating British troops to prevent them falling into the hands of the Japanese, it was accepted that this was a lawful exercise of a prerogative power, notwithstanding the interference with private rights. The only issue was whether the conditions under which that particular prerogative could be exercised required compensation to be paid, and by a bare

majority their Lordships held that it did: *Burmah Oil Co Ltd v Lord Advocate* [1965] A.C. 75.

210. By contrast, acts of state involve the exercise of sovereign power which may or may not be lawful, but the point of asserting act of state is that, if the claim is successful, it removes the power of the courts to consider the issue. The legality of the act is immaterial because the domestic court has no jurisdiction to question it. This is not because the nature of the act renders control inappropriate, although that may sometimes be the case.

211. Even where the character of the act would in principle be amenable to the jurisdiction of the court, the theory is that courts can only determine whether the act in issue is an act of state. If they determine that it is, thereafter they must remain silent. For example, in *Buron v Denman* (1848) 2 Exch. 167 the act of state relied upon involved the taking by Captain Denman of the claimant's property in the course of eliminating the slave trade. Determining the legality of that seizure would obviously have been within the court's competence, yet act of state was successfully claimed to bar the claim against the Captain.

212. Why does the court defer to the executive even in areas where the issue in dispute would be amenable to judicial review? The basis for this appears to be a recognition that where the state through the executive government asserts that its actions are intended to protect interests of state, and the court accepts that this is so, the courts ought not thereafter to undermine that executive action by questioning further its legality. Court and Crown should speak with one voice.

213. Whatever the merits of that principle in a case where the act in question is a high act of policy, I do not think that it ought to carry much weight in a case where the act in question is specifically directed at a particular individual and deprives him of his liberty. It is difficult to see how even the interests of state can justify the arbitrary and uncontrolled internment of a British subject. A vital role of the courts has been to protect the individual against the state, as Lord Reid's judgment in *Nissan* recognises; at the very least it seems to me that the courts ought to scrutinise the act to ensure that the rights of the individual have been properly protected.

214. In this context I respectfully agree with Lord Pearce that the argument that British subjects owe allegiance to the Crown and the Crown owes them protection is of some moment. It reflects an important relationship, even if the language is somewhat arcane. British subjects may be subject to obligations which foreigners would not have to face. For example, certain statutory duties may be imposed on them solely by virtue of their British nationality: see the discussion by Lord Rodger in *R (Al Skeini) v Secretary of State for Defence* [2008] 1 AC 153, paras 44-50. Further, as Lord Pearce pointed out in *Nissan*, those whose principal allegiance is to the Crown will not have another state to plead their case for them.

215. Accordingly, in my judgment the better view is that the courts ought not to defer to the executive in a case of this nature. Whatever the merits of the argument that act of state can never be pleaded against a British subject, I am satisfied that we should not accept the plea with respect to the particular act in issue here. The difficulties posed by Lords Morris and Pearson in *Nissan* do not arise.

216. This is not a case where the claimant is one of many, some foreigners and some British subjects, affected by the same act. I think the courts would be failing in their constitutional duty if they were to leave the executive with unfettered powers to intern British citizens merely because there the act of internment occurred abroad. The shield of *Entick v Carrington* ought to protect a British citizen at least in a case of this nature, where his personal liberty is at stake, even if foreign nationals would not be similarly protected. (This does not mean that foreign nationals will be without any remedy in the domestic courts. As *Al Jedda No. 1* demonstrates, in an appropriate case they may have claims under the Human Rights Act. If they are EU nationals, there may be rights emerging from their status as EU citizens; and their own states may take diplomatic action if the UK government has acted in breach of other provisions of international law.)

217. However, it is one thing to say that the courts should not refuse to exercise jurisdiction in a case of this nature. It is another to determine what form that jurisdiction should take. The argument advanced before us, entirely in line with traditional theory, was that either the act of state can successfully be pleaded, in which case the court cannot exercise jurisdiction to determine the claim, or it cannot, in which case the court hears the case as a tort action to which the usual conflicts of law rules apply. Faced with that dichotomy, I find in favour of the latter conclusion.

218. However, I am not persuaded that this necessarily exhausts the options available. An alternative approach, more in line with current concepts of the relationship between courts and the Crown, may be to recognise that whilst the state in pursuance of its treaty obligations may have the power to detain as an exercise of prerogative power, nonetheless the court can question the way in which that power is exercised as it can any other exercise of prerogative power, at least where, as here, the act is in principle amenable to the court's jurisdiction. I see no reason in principle why the courts ought not to be able to review an act of the executive interfering with personal liberty in order to test whether its actions have been lawful by the appropriate application of traditional judicial review principles. The court could, for example, satisfy itself that detention is proportionate to the risks at stake, and ensure at least elementary principles of fairness in the detention process.

219. On this analysis, the jurisdiction of the court would not be entirely excluded even if the Secretary of State could plead act of state, in the sense of asserting that security interests of state justified the detention. The effect would be that the plea of act of state would not go to jurisdiction itself; rather the court would be holding that there was an exercise of a prerogative (in the sense of common law) power which is lawfully exercised provided the executive has acted in a proportionate and fair way in reconciling the interests of state on the one hand and individual liberty on the other.

220. Under the old conflict of laws principle which adopted the double actionability rule to impose liability for torts committed abroad (*Phillips v Eyre* (1870-71) L.R. 6 Q.B.1) that would be enough to defeat the claim. Once the act was lawful under British law, it was immaterial whether or not it was unlawful under the relevant foreign law. That is no longer so, however, under modern conflicts of laws principles enunciated in the 1995 Act (and indeed the courts were moving away from the double actionability rule even before then: see *Boys v Chaplin* [1971] AC 356.) Under those principles, the House of Lords in *Al Jedda No 1* has held that Iraqi law applies and that is of course the fundamental premise underlying this case.

221. That gives rise to a curious consequence. Once the courts claim that they can review the act of state to determine whether it has been lawfully exercised, the jurisdictional bar no longer applies. But once the courts are seized of jurisdiction on the claim, they are obliged to apply conflicts rules which in this case have identified Iraq law as the applicable law. The legality under British law is irrelevant. So a recognition that the court has some reviewing powers prevents them from applying the limited principles which the court may feel are appropriate for judging the executive act in question.

222. A possible solution to this problem would be for the courts to conclude that where an act of state is successfully relied on, the only jurisdiction they can exercise in such a case is to determine whether the act of state itself has been lawfully exercised according to British principles of public law, and that it has no jurisdiction to determine any other issue.

223. I appreciate that this analysis begins to trespass into the field of speculation and is removed from the particular submissions advanced before us. But I raise it both to demonstrate why I consider that the act of state issue advanced in this case may raise more complex issues than have been argued before us, and because this analysis bears on the question whether it is appropriate to allow the act of state defence to be raised at this juncture at all.

224. I have suggested that one possible answer to the plea of act of state in this case is that it is applicable but that the courts can review its exercise according to British principles of public law as with other prerogative powers. But I doubt whether that is a conclusion which would be open to this court in the light of the determination in *Al Jedda No 1* that Iraqi law applies. It is one thing for the court to conclude that whatever law applies, the effect of the successful plea of act of state is to remove the jurisdiction of the court to determine the claimant's rights in accordance with the appropriate law. Such a conclusion would not, I think, be at odds with the ruling of their Lordships' House. It is another to say that its effect is to allow the courts to review the act of the executive but according to a different set of legal principles than those which the House of Lords has held to be the appropriate principles to apply. My concern, therefore, is that the ruling already given that Iraqi law is the applicable law fetters the court from properly analysing the potential implications of the act of state defence.

225. There is a further reason why I have reservations about act of state being raised now. I would not entirely discount the possibility that if the Secretary of State had asserted in *Al Jedda No 1* that he was seeking to rely on act of state, with the potential constitutional significance which that lends to the act in question, this might have had a bearing on the court's determination whether, under section 12 of the 1995 Act, the general principle that the law of Iraq applied might have been displaced in favour of English law.

226. For these reasons I am doubtful whether the issue of act of state should be raised at all at this stage of the proceedings, but even if it can, in my view the defence fails.

Conclusion.

227. I dismiss the appeal for the sole reason that, in my judgment, the actions of the respondent did not infringe the law of Iraq.