Case No: C1/2005/2251

Neutral Citation Number: [2006] EWCA Civ 327
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
DIVISIONAL COURT
Moses and Richards JJ
[2005] EWHC 1809 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 29th March 2006

Before :

LORD JUSTICE BROOKE
Vice-President, Court of Appeal (Civil Division)
LORD JUSTICE MAY
and
LORD JUSTICE RIX

- -

Between :

THE QUEEN (on the application of HILAL ABDUL-RAZZAQ ALI AL-JEDDA)	**Claimant/ Appellant**
- and -	
SECRETARY OF STATE FOR DEFENCE	**Defendant/ Respondent**

- -

(Transcript of the Handed Down Judgment of
Smith Bernal WordWave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Keir Starmer QC, Richard Hermer, Christine Chinkin and Felicity Williams (instructed by **Public Interest Lawyers**) for the Appellant
Christopher Greenwood QC, Philip Sales and Jonathan Swift (instructed by **the Treasury Solicitor**) for the Respondent
JUSTICE intervened with a written submission

- -

Judgment

Summary

(This Summary forms no part of the Judgment)

This is an appeal by Mr Al-Jedda from an order made by the Divisional Court (Moses and Richards JJ) dismissing his application for judicial review of his detention by British forces in Iraq. Mr Al-Jedda has dual British and Iraqi nationality, He was detained in October 2004 while on a visit to Iraq. He brought these proceedings to challenge the lawfulness of his continued detention by British forces in Iraq and the refusal of the Secretary of State to return him to the United Kingdom. The Divisional Court decided that he was not entitled to the protection of Article 5(1) of Schedule 1 to the Human Rights Act 1998 ('HRA') because his rights under Article 5 were qualified by United Nations Security Council Resolution ('UNSCR') 1546. His appeal was based on human rights law and on English common law grounds.

By the present judgment, the Court of Appeal has unanimously dismissed Mr Al-Jedda's appeal. Lord Justice May and Lord Justice Rix agreed with Lord Justice Brooke and did not deliver judgments of their own.

Lord Justice Brooke's judgment is in nine parts.

Parts 1 and 2 (paras 1-12) set out the main factual background to the appeal, including the circumstances in which Mr Al-Jedda was detained.

Part 3 (paras. 13-35) starts the analysis of the human rights aspect of the claim. The argument revolves around the question whether (and if so to what extent) UNSCR 1546 qualifies Mr Al-Jedda's rights under international human rights treaties, through the operation of Article 103 of the Charter of the United Nations ('the UN Charter'). This part considers the background to the involvement of the UN in Iraq from May 2003 onwards, traces the origins of UNSCR 1546 (and its predecessor UNSCR 1511), and states the provisions of Iraqi law promulgated by the Coalition Provisional Authority ('CPA'). It also refers to further UNSCRs passed since the Divisional Court's judgment. The Court concludes that as a matter of Iraqi law the Multi-National Force ('MNF') were lawfully entitled to conduct themselves pursuant to the provisions of UNSCR 1511 and subsequent Security Council ('SC') Resolutions (para 32).

Part 4 (paras 36-47) considers the relevant provisions of international humanitarian law. It refers to Part III of the Hague Regulations, in particular Articles 42 and 43, and the Fourth Geneva Convention ('Geneva IV'). As Mr Al-Jedda is a British national he could not be a protected person for the purposes of Geneva IV (para 40). This part considers the powers of occupying forces under Geneva IV and the associated protections provided to internees. The Court concludes that Article 43 of the Hague Regulations empowers an occupying power to intern anyone it considers to be an immediate threat to security within the occupied territory, whatever their nationality (para 46). This embodies a rule of customary international law.

Part 5 (paras 48-54) describes the development of international human rights law, from Articles 55 and 56 of the UN Charter as an agenda for future action, via the 1948 Universal Declaration of Human Rights to the European Convention on Human Rights ('ECHR') in

1950 and the International Covenant for Civil and Political Rights in 1976. ECHR Article 5 is relied upon by Mr Al-Jedda.

Part 6 (paras 55-87) contains the Court's central analysis in relation to the overriding effect of a Security Council Resolution, as contended for by the Secretary of State. It identifies the powers of the SC as deriving from Chapter V of the UN Charter. The relevant SC Resolutions in Iraq were made under Chapter VII, in particular Article 42 (para 59). Under Article 103 of the UN Charter obligations upon Member States created by the Charter prevail over their obligations under any other international agreement (para 62). The Secretary of State contended that the effect of this Article was that the state's obligations under UNSCR 1546 prevailed over obligations under the ECHR. Mr Al-Jedda contended that Article 103 had no application because (1) UNSCR 1546 placed no obligation on the UK; and (2) Article 103 did not apply when two obligations created by the Charter (i.e. UNSCR 1546 and the human rights provisions in the Charter) were in conflict. The Court refers (paras 69-71) to academic literature supporting the proposition that under Article 103 all obligations under the UN Charter (including those created by a SC Resolution in the form of UNSCR 1546) prevailed over any other international obligations. The Court concludes that there was nothing in the Charter creating a parallel obligation to give effect to Mr Al-Jedda's human rights (paras 77-79), and therefore the Secretary of State was correct when he argued that UNSCR 1546 qualified obligations under human rights conventions in so far as it was in conflict with them (para 80-81). There was no doubt that UNSCR 1546 authorised the internment of persons for imperative reasons of security, irrespective of their nationality (para 86).

Part 7 (paras 88-99) considers Mr Al-Jedda's argument to the effect that whatever the outcome of any application to Strasbourg, the HRA created free-standing rights which could not be affected by developments at international level. The Court analyses the decision of the House of Lords in *R (Quark Fishing Ltd) v Foreign Secretary* [2005] UKHL 57, which was delivered after the decision of the Divisional Court (paras 89-94). The Court concludes that if, for any reason, one or more of the Articles under the ECHR did not have effect for the time being in relation to the UK, those Articles could not create Convention rights that could be relied on under the machinery of the HRA. Mr Al-Jedda's claims would fail in Strasbourg, and it would defeat the purpose of the HRA if he could get a better remedy at home. The Court refers to the case of *The Queen (on the application of Al-Skeini) v Secretary of State for Defence* [2005] EWCA Civ 1609, as supporting that conclusion. The Secretary of State reserved the right to argue in the House of Lords that that case was wrongly decided, in so far as it held that a claimant like Mr Al-Jedda, who was detained by British forces in Iraq, could have a remedy under the HRA.

Part 8 (paras 100-110) considers Mr Al-Jedda's arguments on common law grounds. His contention that the detention was unlawful under English law depended on the premise that English law should be applied to his case. The Court considers the choice of law provisions in sections 11-12 of the Private International Law (Miscellaneous Provisions) Act 1995. In order for English law to be applied it must be 'substantially' more appropriate than Iraqi law. The Court concludes that the considerations favouring the application of English law were not sufficient to displace the normal rule (para 106-107). The Court also supported the Divisional Court's decision that the Secretary of State was not acting irrationally by declining to order the return of Mr Al-Jedda, and explicitly approved the Divisional Court's reasoning on that issue (para 109).

Part 9 (paras 111-112) contains an addendum to the judgment which considers emergency legislation enacted in the Second World War concerning powers of internment similar to those at issue in this case.

INDEX

Lord Justice Brooke:

1. Introduction

1. This is an appeal from a judgment of the Divisional Court (Moses and Richards JJ) whereby it dismissed an application by Mr Al-Jedda for judicial review in relation to his detention by British forces in Iraq. He is an Iraqi who made a successful claim for asylum in the United Kingdom in the 1990s and now holds dual British and Iraqi nationality. He was detained in October 2004 on a visit to Iraq. In these proceedings he challenges the lawfulness of his continued detention by British forces in Iraq and the refusal by the Secretary of State to return him to the United Kingdom.

2. The primary contention advanced on his behalf is that his detention is in breach of his rights under Article 5(1) of Schedule 1 to the Human Rights Act 1998 ("the 1998 Act"). The essence of the Secretary of State's case is that Mr Al-Jedda's detention is authorised by United Nations Security Council Resolution 1546 of 8th June 2004 ("UNSCR 1546 (2004)") and that the effect of the resolution is to qualify his rights under Article 5. Mr Al-Jedda also relies on his rights at common law. On the hearing of the appeal we also received some powerful written submissions from Shaheed Fatima, instructed by JUSTICE, whom we permitted to intervene in support of the appellant's case. We have taken these submissions into account in the preparation of this judgment.

2. Factual background

3. Mr Al-Jedda was born in Iraq in May 1957 and is now 48 years old. He was a distinguished basket-ball player, and as a young adult he spent time in the United Arab Emirates ("the UAE") and then in Pakistan, before he moved to this country with his first wife in 1992. He made a claim for asylum and was granted indefinite leave to remain. He was subsequently granted British nationality. All four of his children by his first wife are British citizens.

4. In the four years leading up to his detention in Iraq in October 2004 he travelled quite widely in Arab countries. During this period he was detained for 11 months in Syria in 2000-1 before being released. After his release, he and his first wife were divorced. He then married a second wife in Jordan in 2001. He also took another wife, a Jordanian national who grew up in Baghdad and still lives there. He has a son by each of his new wives.

5. Prior to September 2004 his home base was in London, where he drew incapacity benefit and income support. The reasons he gave for his trip to Iraq, via Dubai, in September 2004 are set out in the judgment of the Divisional Court (*R (Al-Jedda v Secretary of State for Defence* [2005] EWHC 1809 (Admin) at [5] - [6]) and it is unnecessary to repeat them here. It appears that from time to time he had bought cars in Dubai for resale in Baghdad. On this visit UAE intelligence officers detained and

interrogated him in Dubai for 12 hours while he was waiting for another of these cars to be repaired in a garage there.

6. He then decided to delay no further although the repairs to the car were not complete. He sailed with his children from Dubai to Basra, asking his friend to send the car on when it was ready. It appears that the car was sent on to him in Basra. In any event he drove with his children from Basra to Baghdad, arriving there on about 28th September. He stayed in Baghdad in his parents' house.

7. Mr Al Jedda's evidence is to the effect that on 10th October, while he was visiting his sister, US troops accompanied by Iraqi national guards surrounded and entered his parents' house, searching for him. They then moved on to his sister's house, where they found him and arrested him. The evidence on behalf of the Secretary of State is that the arrest was effected by UK troops as part of an operation undertaken by UK troops. In any even it is common ground that Mr Al Jedda was, thereafter, taken by helicopter to Baghdad airport and was taken on from there in a British military plane to Basra. In Basra he was taken to the Shaibah Divisional Temporary Detention Facility, a detention centre operated by British forces, where he still remains.

8. The reason for his arrest and detention was that he was suspected of membership of a terrorist group involved in weapons smuggling and explosive attacks in Iraq. There are said to be reasonable grounds for believing that he has been personally responsible for:

> (i) recruiting terrorists outside Iraq with a view to the commission of atrocities in Iraq;
>
> (ii) facilitating the travel into Iraq of an identified terrorist explosives expert;
>
> (iii) conspiring with that explosives expert to conduct improvised explosive device ("IED") attacks against coalition forces in the areas around Fallujah and Baghdad; and
>
> (iv) conspiring with that explosives expert and members of an Islamist terrorist cell in the Gulf to smuggle high tech IED detonation equipment into Iraq, for use in attacks against coalition forces.

He was therefore detained on the basis that his internment was necessary for imperative reasons of security in Iraq.

9. He maintains that he has not been involved in any terrorist activities, but he does not seek in these proceedings to suggest that there were no rational grounds for his detention. It is therefore unnecessary to say anything about the lengthy records of his interrogations and other material that were placed before the court by the Secretary of State. On the other hand, although he has been detained for "imperative reasons of

security", he has not been charged with any offence, and the Secretary of State acknowledges that, as matters stand, there is not enough admissible evidence against him to support the bringing of criminal charges in a court of law. He is therefore being detained simply on a preventative basis.

10. His detention has been subject to periodic reviews, and at each review the conclusion was reached that his continued detention was necessary. Major-General Rollo, who commanded the Coalition's multi-national division in South-Eastern Iraq in October 2004, conducted the first review. He told the court that there was no doubt in his mind that Mr Al-Jedda represented an imperative threat to the security of Iraq (*sic*), and that his internment was necessary for that purpose. He added that he took his responsibility for authorising internment extremely seriously, and was determined to drive down the numbers interned to the minimum necessary. His successor, Major-General Riley, told the court that he did not simply rubber stamp the recommendation he received to the effect that Mr Al-Jedda's internment should be continued. He said that there was a substantial weight of intelligence material (more than existed for anyone else in custody at that time). This was consistent and from a range of sources, and he was completely satisfied there were reasonable grounds for suspecting Mr Al-Jedda of the matters alleged against him. Although the Divisional Court criticised certain aspects of the review procedure, these have now been corrected and nothing turns on them on this appeal.

11. Mr Al-Jedda seeks to secure both his release from detention in Iraq and his return to this country. He says that he will undertake to co-operate with a voluntary return, notwithstanding that he recognises that if he does return he may be liable to prosecution under the Terrorism Act 2000 or to stringent measures of control under the Prevention of Terrorism Act 2005.

12. As I have said, his case is based both on human rights law and on English common law grounds.

3. The human rights claim: the Security Council resolutions and Iraqi law

13. I will address the human rights arguments first. The Secretary of State accepted that for the purposes of the appeal to this court we were bound to consider that as a person detained by British forces in Iraq, Mr Al-Jedda had the benefit of the rights available to him (if any) under both the 1998 Act and the European Convention on Human Rights ("ECHR") (see *R (Al-Skeini) v Secretary of State for Defence* [2005] EWCA Civ 1609), although he reserved his position in relation to the 1998 Act in the event that this matter is considered by the House of Lords. In this part of the case the argument revolves around the ability of UNSCR 1546 (2004) to qualify Mr Al-Jedda's rights under international human rights treaties through the operation of Article 103 of the Charter of the United Nations ("the UN Charter"). Mr Starmer QC, who appeared for Mr Al-Jedda, maintains that Article 103 does not have this effect in all the circumstances of the present case, and that his client is entitled to enjoy the

benefit of the rights afforded to him by Article 5(1) of the ECHR. There is no appeal against the Divisional Court's ruling that Article 5(4) is not in play.

14. In order to understand how the point arises it is necessary to say something about the involvement of the UN Security Council in the affairs of Iraq from May 2003 onwards. For the purposes of this case it can be taken that the period between 1st May 2003 and 28th June 2004 was a period when the belligerent Coalition forces were in occupation of Iraq. As such they enjoyed all the benefits and bore all the burdens attributable to occupying powers under international humanitarian law. The Coalition Provisional Authority ("CPA") exercised governing authority in Iraq during this period. On 28th June 2004 an Iraqi interim government assumed sovereign power, so that sovereignty was vested in an Iraqi government three months before Mr Al-Jedda's arrest. This is important, because from 28th June 2004 onwards what was called the "Multinational Force" ("MNF"), which was largely dominated by US forces, were now performing their functions at the request of the Iraqi interim government (as the sovereign power), as opposed to being the military arm of the occupying powers.

15. It is well known that the Coalition Forces invaded Iraq in the spring of 2003 after the abandonment of the efforts to obtain a further Security Council resolution which would give immediate backing to what the Coalition states wished to do if Saddam Hussain did not comply with the Council's demands. These demands related to the identification of the weapons of mass destruction Iraq was at that time believed to possess. On 8th May 2003 the permanent representatives of the United States and the United Kingdom wrote a letter to the President of the Security Council in which they outlined the Coalition's plans for the immediate and long term future. They referred to the creation of the CPA, and they identified the Coalition's goal as being the transfer of responsibility for administration to representative Iraqi authorities as early as possible. At the start of this letter they gave the following assurance:

> "The States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq."

16. On 22nd May 2003 the Security Council adopted UNSCR 1483 (2003). It noted the letter of 8th May and determined that the situation in Iraq, although improved, continued to constitute a threat to international peace and security. It was therefore acting under Chapter VII of the UN Charter (as it did with the later resolutions to which I will refer). UNSCR 1483 (2003) called on member states to assist the people of Iraq in their efforts to reform their institutions and rebuild their country. Particular emphasis was laid by Mr Starmer on paras 4 and 5 of that resolution, whereby the Council:

> "4. Calls upon [the CPA], consistent with [the UN Charter] and other relevant international law to promote the welfare of the Iraqi people through the effective administration

> of the territory, including in particular working towards the restoration of conditions of security and stability ....
>
> 5. Calls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."

Para 8(g) of the resolution imposed on the UN special representative for Iraq an obligation, in co-ordination with the CPA, to assist the people of Iraq through, among other things, promoting the protection of human rights.

17. In the discussion that followed the adoption of UNSCR 1483 (2003) the President of the Security Council said that under the UN Charter the powers delegated by the council under this resolution were not open-ended or unqualified:

> "They should be exercised in ways that conform with 'the principles of justice and international law' mentioned in Article 1 of the Charter, and especially in conformity with the Geneva Conventions and the Hague Regulations, besides the Charter itself."

I will return to features of the UN Charter in paras 56-61 below.

18. So far as the law of Iraq was concerned, CPA Regulation No 1, dated 16th May 2003, contained the following provisions:

> "1(1) The CPA shall exercise powers of government temporarily...
>
> (2) The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant UN Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator.
>
> ....
>
> 2 Unless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA."

19. CPA Memorandum No 3 ("CPA Memo 3") was concerned with criminal procedures. Section 1 stated that the purpose of the memo was to establish procedures for applying criminal law in Iraq. Section 7 referred to the standards, "consistent with the Fourth Geneva Convention" ("Geneva IV"), which were to apply to all persons who were detained by coalition forces when necessary for imperative reasons of security. These included an internee's right of appeal against an internment decision and the requirement for a review of such a decision by a competent body not later than six months after the detention commenced. They also prescribed that the operations, condition and standards of any internment facility should comply with Section IV of Geneva IV.

20. On 16th October 2003 UNSCR 1511 (2003) was adopted. This resolution recognised the creation of the new interim governing council of Iraq and gave Security Council blessing to the activities of the MNF. I would refer in particular to paras 4, 13, 14 and 16, whereby the Council:

> "4. Determined that the Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the state of Iraq during the transitional period until an internationally recognised, representative government is established and assumes the responsibility of [the CPA].
>
> ....
>
> 13. Determines that the provision of security and stability is essential to the successful completion of the political process....and authorizes a multi-national force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq....
>
> 14. Urges Member States to contribute assistance under this [UN] mandate, including military forces, to the multi-national force referred to in paragraph 13 above....
>
> ....
>
> 16. Emphasises the importance of establishing effective Iraqi police and security forces in maintaining law, order and security and combating terrorism consistent with paragraph 4 of resolution 1483 (2003)."

In the preamble to this resolution the Security Council reaffirmed its previous resolutions on Iraq and on threats to peace and security caused by terrorist acts, and made special reference to UNSCR 1373 (2001) "and other relevant resolutions". Mr Starmer observed that the agreements and conventions on terrorism which UNSCR 1373 (2001) required member states to implement all contained a requirement that counter-terrorism measures must comply with international human rights norms.

21. Six months later, on 16th April 2004, the US permanent representative on the Security Council, Mr Negroponte, gave the Council an up-to-date briefing on the situation in Iraq. It appears that 155,000 US troops were then stationed in Iraq, together with about 24,000 other personnel from 30 different Coalition countries. The combined force constituted the MNF. He said that threat elements continued to challenge all who were working for a better Iraq. They had witnessed ambush and mutilation, riots and attacks. These were perpetrated by insurgents (including former regime loyalists), terrorists who had infiltrated Iraq, and militias affiliated with radical elements. The violence had been terrible and the losses great. In fulfilling the mandate contained in para 13 of UNSCR 1511 (2003) the MNF had conducted the full spectrum of military operations. The operations he listed included "the detention of those who are threats to security".

22. It was against this background that new provision was made during June 2004 at both Security Council level and in Iraq itself to provide for the position after the new interim Iraqi government assumed power at the end of that month. On 3rd June 2004 the Iraqi Foreign Minister told the Security Council:

> "We seek a new and unambiguous draft resolution that underlines the transfer of full sovereignty to the people of Iraq and their representatives. The draft resolution must mark a clear departure from Security Council resolutions 1483 (2003) and 1511 (2003) which legitimised the occupation of our country.
>
> …
>
> However, we have yet to reach the stage of being able to maintain our own security and therefore the people of Iraq need and request the assistance of the multinational force to work closely with Iraqi forces to stabilize the situation. I stress that any premature departure of international troops would lead to chaos and the real possibility of civil war in Iraq. This would cause a humanitarian crisis and provide a foothold for terrorists to launch their evil campaign in our country and beyond our borders. The continued presence of the multinational force will help preserve Iraq's unity, prevent regional intervention in our affairs and protect our borders at this critical stage of our reconstruction."

23. UNSCR 1546 (2004) was adopted on 8th June 2004. The relevant recitals to the resolution refer to the Council:

> "[1] *Welcoming* the beginning of a new phase in Iraq's transition to a democratically elected government, and *looking forward* to the end of the occupation …
>
> [5] *Recognising* the importance of international support…for the people of Iraq in their efforts to achieve security and

> prosperity, and *noting* that the successful implementation of this resolution will contribute to regional stability …
>
> [10] Affirming the importance of the rule of law ... respect for human rights ... fundamental freedoms and...
>
> [12] *Recognising* that international support for restoration of stability and security is essential to the well being of the people of Iraq as well as to the ability of all concerned to carry out their work on behalf of the people of Iraq, and *welcoming* Member State contributions in this regard under resolution 1483 (2003) of 22 May 2003 and resolution 1511 (2003),
>
> [13] *Recalling* the report provided by the United States to the Security Council on 16 April 2004 on the efforts and progress made by the multinational force,
>
> [14] *Recognising* the request conveyed in the letter of 5 June 2004 from the Prime Minister of the Interim Government of Iraq to the President of the Council, which is annexed to this resolution, to retain the presence of the multinational force,
>
> [15] *Recognising* also the importance of the consent of the sovereign Government of Iraq for the presence of the multinational force and of close co-ordination between the multinational force and that government,
>
> [16] *Welcoming* the willingness of the multinational force to continue efforts to contribute to the maintenance of security and stability in Iraq in support of the political transition, especially for upcoming elections, and to provide security for the United Nations presence in Iraq, as described in the letter of 5 June 2004 from the United States Secretary of State to the President of the Council, which is annexed to this resolution,
>
> [17] *Noting* the commitment of all forces promoting the maintenance of the security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law, and to co-operate with relevant international organisations …."

24. The operative part of the resolution refers, in para 7(b)(iii), to a requirement that relevant UN authorities should, among other things, promote the protection of human rights. It also provides that the Security Council:

> "9. *Notes* that the presence of the multinational force in Iraq is at the request of the incoming interim Government of Iraq and therefore *reaffirms* the authorization for the multinational force under unified command established under resolution 1511 (2003) having regard to the letters annexed to this resolution;

> 10. *Decides* that the multinational force shall have all the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism, so that, inter alia, the United Nations can fulfil its role in assisting the Iraqi people as outlined in paragraph seven above and the Iraqi people can implement freely and without intimidation the timetable and programme for the political process and benefit from reconstruction and rehabilitation activities; ….
>
> 12. *Decides further* that the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution, and that this mandate shall expire upon the completion of the political process set out in paragraph four above, and *declares* that it will terminate this mandate earlier if requested by the Government of Iraq."

25. Two letters (referred to in paras 9 and 10 of the resolution: see para 24 above) were annexed to the resolution. The first was a letter from the Prime Minister of the Interim Government of Iraq. He observed that security and stability were essential to the political transition. He asked for the support of the Security Council and the international community in that endeavour "until we are able to provide security for ourselves". He continued:

> "We seek a new resolution on the Multinational Force (MNF) mandate to contribute to maintaining security in Iraq, including through the tasks and arrangements set out in the letter from the Secretary of State Colin Powell to the President of the United Nations Security Council."

26. The other was a letter from the US Secretary of State. He confirmed that the MNF was prepared to continue to contribute to the maintenance of security in Iraq, and continued:

> "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 … *internment where this is necessary for imperative reasons of security in Iraq….*
>
> In order to continue to contribute to security, the MNF must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their

> mission, and in which the contributing states have responsibility for exercising jurisdiction over their personnel and which will ensure arrangements for, and use of assets by, the MNF. The existing framework governing these matters is sufficient for these purposes. In addition, *the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions*" (emphasis added).

27. On 27th June 2004, the day before the CPA ceased to function, some significant changes were made to CPA Memo 3. The preamble to the revised memo referred now to UNSCR 1546 (2004) and contained these paragraphs:

> "Acting pursuant to the mandate for [the MNF] set out in [UNSCR 1511 and 1546] to take all necessary measures to provide security in Iraq,
>
> Determining that the relevant and appropriate provisions of [Geneva IV] constitutes an appropriate framework consistent with the mandate in continuance of measures previously adopted..."

28. Section 1 of the revised memo recognised that the effective administration of justice had to consider

> "the ongoing process of security internee management in accordance with the relevant and appropriate standards set out in [Geneva IV] which shall be applied by the MNF as a matter of policy in accordance with its mandate."

29. Section 6 contained rather fuller provisions for what was now called "the MNF Security Internee Process" than were contained in the original Memo 3. Paragraph 1 provides:

> "(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 ... shall, if he is held for a period longer than 72 hours, be entitled to have a review of the decision to intern him."

There follow provisions for reviews, and a requirement that the operation, conditions and standards of any MNF internment facility is to be in accordance with Geneva IV. Special provision was now made for the continuation of any period of internment beyond an initial period of 18 months, and for access facilities to be granted to the Iraqi Prisons and Detainee Ombudsman as well as to official delegates of the International Committee of the Red Cross.

30. On the same day CPA Order No 17 (revised) made provision for the status of personnel of the MNF. Section 2, headed "Iraqi Legal Process", provided that:

> "(1) Unless provided otherwise herein, the MNF ... their Personnel, property, funds and assets ... shall be immune from Iraqi legal process.
>
> (2) All MNF ... Personnel ... shall respect the Iraqi laws relevant to those Personnel...
>
> (3) All MNF ... Personnel ... shall be subject to the exclusive jurisdiction of their Sending States."

Section 5 emphasised that immunity of MNF personnel from Iraqi legal process was not for the benefit of the individuals concerned and that it might be waived pursuant to that section. Section 9 made special provision for the facilities used by the MNF, which were to be subject to the exclusive control and authority of the MNF.

31. Finally, on 8th March 2004 the CPA had promulgated a law for the administration of the state of Iraq during the transitional period until a duly elected government, operating under a permanent and legitimate constitution, was to come into being. Chapter Two of this law made express and detailed provision for fundamental rights. These included provision for personal liberty comparable to that contained in ECHR Article 5 (see Article 15) and the entrenchment in Iraqi law of the rights contained in the International Covenant for Civil and Political Rights ("ICCPR") (Article 23). Chapter Three was concerned with the Iraqi Transitional Government. It contained this provision:

> "26. (A) Except as otherwise provided in this Law, the laws in force in Iraq on 30 June 2004 shall remain in effect unless and until rescinded or amended by the Iraqi Transitional Government in accordance with this Law.
>
> ...
>
> (C) The laws, regulations, orders and directions issued by [the CPA] 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."

32. Chapter Nine, entitled "The Transitional Period", contained the following provisions:

> "59. (B) Consistent with Iraq's status as a sovereign state, and with its desire to join other nations in helping to maintain peace and security and fight terrorism during the transitional period, the Iraqi Armed Forces will be a principal partner in [the MNF] operating in Iraq under unified command pursuant to the provisions of [UNSCR 1511] and any subsequent relevant resolutions...

> (C) Upon its assumption of authority ... the elected Iraqi Transitional Government shall have the authority to conclude binding international agreements regarding the activities of [the MNF] operating in Iraq. … Nothing in this Law shall affect rights and obligations under these agreements or under [UNSCR 1511] and any subsequent relevant [UN Security Council] resolutions which will govern the [MNF's] activities pending the entry into force of these agreements."

It follows that as a matter of Iraqi law, in the absence of any specific agreements of the type referred to in (C) above (of which there was no evidence), the MNF were lawfully entitled to conduct themselves pursuant to the provisions of UNSCR 1511 and any subsequent relevant UN Security Council resolutions.

33. This, then, was the position when Mr Al-Jedda arrived in Baghdad in September 2004, two months after the transfer of power to the interim government of Iraq. It appears that he was arrested at the behest of British intelligence services, so that it is not surprising that he was transferred to the custody of British forces in south-east Iraq, particularly as he is a British citizen.

34. The Divisional Court heard this case in July 2005, and we have been shown three further UN Security Council resolutions that were adopted between August and November 2005 which touch on the measures taken to resist terrorism in general and the situation in Iraq in particular. It is unnecessary to cite passages from UNSCR 1618 (2005) or UNSCR 1624 (2005). In UNSCR 1637 (2005), adopted on 11th November 2005, the Security Council welcomed the assumption of full governmental authority by the interim government of Iraq on 28th June 2004, the direct democratic elections of the Transitional National Assembly on 30th January 2005, the drafting of a new constitution for Iraq, and the recent approval of the draft constitution by the people of Iraq on 15th October 2005. Letters from the Iraqi Prime Minister and the US Secretary of State were annexed to this resolution, which extended the mandate of the MNF until 31st December 2006. In his letter the Prime Minister wrote:

> "... Iraq is still confronted by forces of terrorism that incorporate foreign elements which carry out horrific attacks and terrorist acts in an attempt to thwart political and economic development in Iraq. The Iraqi security forces ... need more time to fill out their ranks... Until such time as the Iraqi security forces assume full responsibility for Iraq's security, we need the continued support of the international community, including the participation of the MNF, in order to establish lasting peace and security in Iraq."

35. The other matter to note in relation to UNSCR 1637 (2005) is the paragraph of the preamble which refers to the Council:

> "*Affirming* the importance for all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law, and to co-operate with relevant international organisations, and welcoming their commitments in this regard."

4. The human rights claim: international humanitarian law

36. So much for Iraqi law and the relevant resolutions of the Security Council. I now turn to the relevant requirements of "international humanitarian law". Two passages from the preamble to the Hague Regulations 1907 set the scene:

> "According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.
>
> ....
>
> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples from the laws of humanity, and the dictates of the public conscience."

This passage reflects the early glimmerings of the thinking that was later to be articulated more precisely in the Universal Declaration of Human Rights ("UDHR") in 1948, and the ICCPR in 1976.

37. Section III of the Hague Regulations is entitled "Military Authority over the Territory of the Hostile State". Its first two articles read:

> "42. Territory is considered occupied when it is actually placed under the authority of the hostile army ...
>
> 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, *public order and safety*, while respecting, unless absolutely prevented, the laws in force in the country." (Emphasis added)

In the French text appear the words "l'ordre et la vie publics" for the words I have italicised.

38. In *Case Concerning Armed Activities on the Territory of the Congo* (2005, 19 December, General List No 116) the International Court of Justice was concerned to identify the obligations of the state of Uganda as an occupying power in the eastern part of the Congo. The court cited Article 43 of the Hague Regulations and said:

> "This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party."

Although Iraq was not a party to the Hague Convention, it was common ground that Articles 42 and 43 contained a statement of the relevant principles of customary international law.

39. Geneva IV, for its part, was expressly concerned with "the Protection of Civilian Persons in Time of War". It was expressed to apply to all cases of declared war or of any other armed conflict which might arise between two or more of the High Contracting Parties (Article 2). The persons protected by the Convention are those "who at a given moment and in any manner whatsoever find themselves, in case of a conflict or occupation, in the hands of a Party to the Conflict or Occupying Power of which they are not nationals" (Article 4). Article 4 continues:

> "Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral state who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."

40. I interpolate here to say that this means that Mr Al-Jedda, as a British national, could not qualify as a protected person within the meaning of Geneva IV. Nor would he if he had been detained by US forces at the time of the occupation of Iraq, since he would have been the national of a co-belligerent state with whom the United Kingdom had normal diplomatic regulations. This does not mean that he could not have been lawfully detained in Iraq pursuant to the powers and obligations vested in the occupying powers under Article 43 of the Hague Regulations (see para 37 above). This is a topic to which I will return. Article 6 provides:

> "In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations, however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the

> Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143."

41. Articles 41 and 42 of Geneva IV provide:

> "41. Should the Power, in whose hands protected persons may be, consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43.
>
> 42. The internment...of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary..."

Article 43 requires the reconsideration of an internment decision by an appropriate court or administrative board designated by the detaining power "as soon as possible", and thereafter periodically, and at least twice a year.

42. Articles 64 and 78-79 provide:

> "64. The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention...
>
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and ..."

> "78. If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.
>
> Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. 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 ….

> 79. The Parties to the conflict shall not intern protected persons, except in accordance with the provisions of Articles 41, 42, 43, 68 [which has no relevance in the present context] and 78."

43. Section IV (Articles 79-141) contain very detailed requirements about the humane way in which internees are to be treated. The sub-headings within this section, for example, are General Provisions; Places of Internment; Food and Clothing; Hygiene and Medical Attention; Religious, Intellectual and Physical Activities; Personal Property and Financial Resources; Administration and Discipline; Relations with the Exterior; Penal and Disciplinary Sanctions; Transfer of Internees; Deaths; Release, Repatriation and Accommodation in Neutral Countries.

44. Under the last sub-heading Article 133 provides that internment is to cease as soon as possible after the close of hostilities, and Article 134 obliges the High Contracting Parties to endeavour to ensure the return of all internees to their last place of residence, or to facilitate their repatriation, upon the close of hostilities or occupation (*sic*).

45. Nearly all the member states of the United Nations are now parties to Geneva IV. Iraq, however, is not a party to the Protocol to the Geneva Conventions which makes new provision for the periods in which the Protocol and the Conventions are to apply.

46. During the week before the hearing of this appeal the appellant took a new point, which was never argued before the Divisional Court, to the effect that the provisions of Geneva IV did not apply to him, since he was a British national and therefore not a "protected person" within the meaning of Geneva IV. This is of course correct. It is not at all surprising because an international treaty of this kind is concerned with the way in which an invading or occupying power should treat the nationals of other countries. How it treats its own nationals will be a matter for its national law, in which international law should play, at best, an indirect role. But I have no doubt whatever that Mr Greenwood QC, who appeared for the Secretary of State, is right when he contends that Article 43 of the Hague Regulations (see para 37 above) empowers an occupying power to intern anyone it considers to be an immediate threat to security within the occupied territory, whatever their nationality. In *Oppenheim's International Law, Vol II, Disputes, War and Neutrality* (Sixth Edition, Revised) this passage appears at p 343:

> "An occupant having military authority over the territory, the inhabitants are under his Martial Law, and have to render obedience to his commands. Their duty to obey does not, of course, arise from their own Municipal Law, nor from International Law, but from the Martial Law of the occupant to which they are subjected."

47. In *US Military Government v Ybabo* 16 AD 439 a US Military Government Court of Appeals referred to the Duke of Wellington's famous phrase "the will of the

commander", and said that the exercise of that will was often defined as martial law. In *US v List*, XI Trials of War Criminals 1230, a US Military Tribunal said at pp 1244-5:

> "The status of an occupant of the territory of the enemy having being achieved, international law places the responsibility upon the commanding general of preserving order, punishing crime, and protecting lives and property within the occupied territory. His power in accomplishing these ends is as great as his responsibility. But he is definitely limited by recognised rules of international law."

Article 43 of the Hague Regulations merely embodies the rule of customary international law that such a military commander is bound to take all the measures in his power to restore and ensure, as far as possible, public order and safety, and internment for imperative reasons of security is a tool available in his armoury for achieving that aim. What Geneva IV does is to prescribe the circumstances in which this power is to be used and exercised in relation to the people protected by that convention. It does not itself create the power.

5. The human rights claim: international human rights law

48. I will turn now from international humanitarian law to international human rights law. In a passage entitled "Historical Background" in *The Charter of the United Nations, a Commentary* (2nd edition) by Bruce Simma and other editors, Professor Riedel described the scene before the adoption of the UN Charter in 1945 (at p 919):

> "Under traditional international law, the legal position of citizens was supposed to be a matter within the domestic jurisdiction of their State: other States were only entitled to intervene on behalf of their own nationals because a violation of the rights of nationals also constituted a violation of the rights of the home State.
>
> Early forms of international standard-setting in the area of human rights were the prohibition of piracy, the prohibition of slavery at the Vienna Congress of 1815, the endeavours to improve the protection of war victims during the Hague Peace Conference of 1899 and 1907, the evolution of the protection of aliens with clearer delineations, the enhanced treatment of national minorities during the League of Nations period, and the early activities of the ILO. However, all these norms invariably were linked to implementation by States; only sovereign States were recognised as the bearers of rights and duties.
>
> After the experience of two World Wars and the cynical policies of totalitarian regimes, awareness generally grew that

> the classical sovereign State as the one and only guarantee of civil rights had dismally failed. A real break-through occurred with the establishment of the United Nations. ...
>
> The drafters of the UN Charter did not, however, succeed in elaborating a comprehensive human rights catalogue, which they could have incorporated into the text of the UN Charter. They did succeed at least to include in the text some human rights clauses in Article 55(c), in the Preamble to the Charter, in the aims and purposes section of Article 1(3), as well as in Articles 13(1), 56, 62(2), 68 and 76(c). These clauses gave to the main organs of the UN the power to address human rights questions and to elaborate a general obligation of the Organisation and of member States to show respect for and to observe human rights. Human rights reforms thus pervaded the UN Charter like a 'golden thread'."

49. I will return to the relevant parts of the Preamble and Article 1 of the Charter in para 75 below. It is sufficient for present purposes to quote from Articles 55 and 56. These articles are at the beginning of Chapter IX of the Charter, which is entitled "International Economic and Social Co-operation":

> "55. With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> a. higher standards of living ...
>
> b. solutions of international economic, social, health and related problems ...
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.
>
> 56. All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55."

50. This is clearly an agenda for future action rather than a statement of human rights and fundamental freedoms in itself. Indeed, in the summer of 1945 there was very little international agreement as to the content of such a statement, apart from those elements that were described as *ius cogens* in customary international law (for which see paras 64, 66 and 71 below). In this respect the breakthrough came in December 1948 with the adoption of the Universal Declaration of Human Rights. This in itself

represented a set of aspirations, but it did also identify a number of rights and freedoms, including the provision in Article 9 that

> "No one shall be subjected to arbitrary arrest, detention or exile."

51. Of the UDHR itself, Professor Ian Brownlie QC has written (*Principles of Public International Law*, Sixth Edition at pp 534-5):

> "The Declaration is not a legal instrument, and some of its provisions ... could hardly be said to represent legal rules. On the other hand, some of its provisions either constitute general principles of law or represent elementary considerations of humanity. Perhaps its greatest significance is that it provides an authoritative guide, produced by the General Assembly, to the interpretation of the provisions in the Charter. No doubt there is an area of ambiguity, but the indirect legal effect of the Declaration is not to be underestimated, and it is frequently regarded as a part of the 'law of the United Nations.'"

52. The UDHR was followed 18 months later by the ECHR. Article 5(1) of the ECHR, on which Mr Al-Jedda relies, provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

It is the infringement of this right of which Mr Starmer makes complaint.

53. Finally, in March 1976 the UN General Assembly adopted the ICCPR. Its preamble refers back to Article 55 of the UN Charter and to the ideals proclaimed in the UDHR. Article 9 provides:

> "9(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> (2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time."

Both Article 15 of the ECHR and Article 9 of the ICCPR provide procedures for derogating from these provisions, which are concerned with personal liberty, but it is common ground that there has in this case been no relevant derogation.

54. In these circumstances Mr Al-Jedda maintains that the 1998 Act entitles him, as a person within the jurisdiction of this country (see Article 1 of the ECHR and this court's decision in the *Al-Skeini* case), to the rights contained in Article 5(1) of the ECHR.

6. The human rights claim: the overriding effect of a Security Council resolution

55. In reply the Secretary of State contends that at international law UNSCR 1546 (2004) (and, now, UNSCR 1637 (2005)) qualified the rights contained in the ECHR through the operation of Article 103 of the UN Charter, and that the 1998 Act affords Mr Al-Jedda only those rights that would be acknowledged by the court at Strasbourg.

56. In order to understand the Secretary of State's submissions it is necessary to return to the UN Charter. Article 1(1) of the Charter identifies the two complementary roles of the UN Security Council which are set out in Chapters VI and VII:

> "1. The Purposes of the United Nations are:
>
> (1). To maintain international peace and security and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

57. The membership of the Security Council is prescribed in Chapter V (Article 23), as are its functions and powers: see in particular Articles 24 and 25, which provide:

> "24(1) In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
>
> (2) In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII....

> 25. The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

58. We are not concerned on this appeal with Chapter VI (which is concerned with the pacific settlement of disputes), VIII or XII. As I have said, all the relevant Security Council resolutions were made under Chapter VII, which is entitled "Action with respect to threats to the peace, breaches of the peace and acts of aggression". Article 39, with which this chapter begins, provides:

> "39. The Security Council shall determine the existence of any threat to the peace, breach of the peace or acts of aggression and shall make recommendations, or decide which measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

59. Article 40, which is concerned with provisional measures, and Article 41, which is concerned with measures not involving the use of armed force, are not material in this appeal. Article 42 provides:

> "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade and other operations by air, sea or land force of Members of the United Nations."

60. UNSCR 1546 (2004) and 1637 (2005) were made under this power. Article 43 made arrangements for armed forces and other facilities to be made available to the Security Council by UN members in accordance with a special agreement or agreements, but no such arrangements have ever been made.

61. Before moving on from Chapter VII it is pertinent to note that the United Nations Act 1946 furnished a mechanism by which measures required by the Security Council pursuant to Article 41 may be given legal effect in this country by an Order in Council made under the Royal Prerogative, thus obviating the need for primary legislation.

62. The only other provision in the UN Charter it is necessary to note is Article 103, which provides:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

63. Mr Greenwood submitted that at the level of international law Article 103 of the UN Charter had the effect that a state's obligations under a Security Council Chapter VII resolution prevailed over any obligation it might have under any other international agreement, such as the ICCPR or the ECHR, in so far as those obligations were in conflict. If and in so far as UNSCR 1546 (2004) obliged member states participating in the MNF to intern people in Iraq for imperative reasons of security in order to fulfil the mandate of the MNF, this obligation prevailed over the "no loss of liberty without due court process" obligations of a human rights convention or covenant.

64. He called in aid in support of this contention the recent judgment of the Court of First Instance of the European Court of Justice in *Kadi v Council of European Union* (Case T-315/01, 21st September 2005). In that case the court held (at paras 213-226) that the obligations of the members of the European Union to enforce sanctions required by a Chapter VII UN Security Council resolution prevailed over fundamental rights as protected by the Community legal order or by the principles of that legal order. The court also held that it had no jurisdiction to inquire into the lawfulness of a Security Council resolution other than to check, indirectly, whether it infringed *ius cogens*, "understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible" (see para 226). For a comparable example of the effect of a Security Council resolution, see *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (International Court of Justice, 14th April 1992, General List No 88, at para 39).

65. I do not consider that the fact that the European Court of Human Rights found it possible to decide the case of *Bosphorus v Ireland* (Application No 45036/98, 30th June 2005) without making a ruling on the Article 103 arguments that were addressed to it advances the claimant's case in any way. More to the point is the decision of that court in *Loizidou v Turkey* (1997) 23 EHRR 513 at paras 42-45, in which the court, basing itself on UNSCR 541 (1983) (which called on all member states of the United Nations not to recognise any Cypriot State other than the Republic of Cyprus), refused to attribute any legal validity to the Constitution of the Turkish Republic of North Cyprus, even though UNSCR 541 (1983) had not been adopted under Chapter VII. Mr Starmer drew our attention to para 43 of that judgment in which the court reminded itself of the ECHR's "special character as a human rights treaty" (see also, to similar effect, *Al Adsani v UK* (2002) 34 EHRR 11 at para 55), but the court was not there addressing the question of the supremacy of Security Council resolutions that is derived from Article 103 of the UN Charter.

66. Reverting to the question of *ius cogens*, the International Law Commission has said that the criteria for identifying peremptory norms of general international law are stringent (see *The International Law Commission's Articles on State Responsibility*, Crawford (2000) p 188). They suggested that those that were clearly accepted and recognized included the prohibitions of aggression, genocide, slavery and racial discrimination, crimes against humanity and torture, and the right to self-determination. In his Separate Opinion in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*

(International Court of Justice, 13th September 1993, General List No 91, at para 100) Judge *ad hoc* Lauterpacht said:

> "The relief which Article 103 … may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot - as a simple hierarchy of norms - extend to a conflict between a Security Council resolution and *ius cogens.*"

67. This is not in issue in the present case. Similarly, when in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)* (International Court of Justice, 21st June 1971, General List No 53), the International Court of Justice referred in para 68 to the maintenance of an apartheid regime as being a flagrant violation of the purposes and principles of the UN Charter, we are in the field of *ius cogens* (in addition to becoming involved in a question whether South Africa was in breach of an essential provision of its mandate over South West Africa), and I do not find that this passage advances Mr Starmer's case on the present appeal.

68. The reason why we are not concerned with the issue highlighted by Judge Lauterpacht (on which a national court would be wholly unqualified to express an opinion) was that in the present case Mr Starmer did not suggest that the rights conferred by Article 9 of the ICCPR or Article 5 of the ECHR constituted *ius cogens*. He relied on three main points in response to the Secretary of State's contentions:

i) UNSCR 1546 (2004) placed no obligation on the United Kingdom, so that Article 103 had no application;

ii) The UN Charter itself imposed obligations on every member state to protect human rights, and Article 103 had no application when two obligations created by the Charter itself were in conflict;

iii) In these circumstances since both the Charter itself and UNSCR 1546 (2004) highlighted an obligation on a member state to comply with its obligations under international law, the United Kingdom was bound by its obligations under Article 9 of the ICCPR and Article 5(1) of the ECHR unless it formally derogated from them.

69. On the first of these arguments, there is an illuminating commentary in the *Charter of the United Nations - A Commentary*, 2nd edition, ed Bruce Simma and others, at p 729:

> "Since the Security Council, due to lack of agreements under Article 43, does not itself dispose of military means, it has no choice but to rely on member states willing to act on its behalf. Accordingly in most cases of military enforcement action, the

> Security Council has authorised member States to implement its decisions by their own forces. This practice has been widely accepted, and, in this area, authorizations relieve the acting States from the prohibition on the use of force and create the same permissive effect as binding decisions. ... Such authorizations, however create difficulties with respect to Article 103. According to the latter provision, the Charter - and thus also Security Council resolutions - override existing international law only in so far as they create 'obligations'. One could conclude that in case (*sic*) a State is not obliged but merely authorized to take action, it remains bound by its conventional obligations. Such a result, however, would not seem to correspond with State practice at least as regards authorizations of military action. These authorizations have not been opposed on the ground of conflicting treaty obligations, and if they could be opposed on this basis, the very idea of authorizations as a necessary substitute for direct action by the Security Council would be compromised. Thus the interpretation of Article 103 should be reconciled with that of Article 42, and the prevalence over treaty obligations should be recognized for the authorization of military action as well."

70. This commentary on Article 39 is repeated in the commentary on Article 42 (at p 759) by the same two learned authors. The commentary on Article 103 by Professor Bernhardt, who is a former President of the European Court of Human Rights, does not touch on this issue, but it states the supremacy of the UN Charter (via Article 103) in uncompromising terms at p 1295:

> "Article 103 does not say that only the Charter shall prevail, but refers rather to obligations under the Charter (in the French text: 'obligations...en vertu de la présente Chartre'). It is clear that this formula includes all obligations which result immediately and directly from the Charter. ... However, Article 103 goes further. To the extent that the Charter provides for the competence of UN organs to adopt binding decisions, measures taken in accordance with such provisions can lead to obligations of the members that prevail under Article 103, notwithstanding any other commitments of the members concerned. This holds true for decisions and enforcement measures of the Security Council under Chapter VII. As far as members of the UN are bound by Article 25 'to accept and carry out the decisions of the Security Council in accordance with the present Charter', they are also bound, according to Article 103, to give these obligations priority over any other commitments."

A little later he adds (at p 1300):

> "In conclusion, it seems now to be generally recognized in practice that binding Security Council decisions under Chapter VII supersede *all other treaty commitments*." (Emphasis added)

71. There is no room here for any argument that human rights treaties fall into some special category. If the Security Council, acting under Chapter VII, consider that the exigencies posed by a threat to the peace must override, for the duration of the emergency, the requirements of a human rights convention (seemingly other than *ius cogens*, from which no derogation is possible), the UN Charter has given it power to so provide. The Security Council has primary responsibility for the maintenance of international peace and security, and one of the purposes of the United Nations, by which it is bound to act, is to take *effective* collective measures for the prevention and removal of threats to the peace (see para 56 above). There is no need for a member state to derogate from the obligations contained in a human rights convention by which it is bound in so far as a binding Security Council resolution overrides those obligations. If the Security Council is acting under Chapter VI, the principles of justice and international law (see para 55 above) are likely to weigh heavily with it in its search for the settlement of an international dispute by peaceful means, but we are not concerned with Chapter VI on this appeal.

72. Article 30(1) of the Vienna Convention on the Law of Treaties acknowledges the compelling force of Article 103 of the UN Charter. Article 53 makes the status of *ius cogens* explicit and provides a useful definition ("a peremptory norm of general international law", being "a norm accepted and recognized by the international Community of States as a whole as a norm from which no derogation is permitted..."). Article 31(3) provides that for the purposes of interpreting a treaty it is legitimate to take into account, "together with the context",

> "(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

73. I return to UNSCR 1546 (2004) against this background. It is a resolution of the Security Council under Article 42 of the UN Charter. That article (see para 59 above) empowers the Council to take such action by land forces as might be necessary to restore international peace and security. The 13th preamble to the resolution referred explicitly to the report about contemporary conditions in Iraq which I have summarised in para 21 above. That report included the sentence "The violence had been terrible and the losses great", and referred to the "detention of those who are threats to security" as one of the operations then being performed by the MNF. The 16th preamble to the resolution welcomed the willingness of the MNF to continue its efforts to contribute to the maintenance of security and stability in Iraq, as described in the US Secretary of State's letter (see para 26 above). This letter included, among the broad range of tasks the MNF stood ready to undertake, "internment where this is necessary for imperative reasons of security in Iraq".

74. Para 10 of the resolution explicitly authorised the MNF to take all necessary measures to contribute to the maintenance of Iraq in accordance with the Secretary of State's letter. By the practice of the members of the United Nations, a state who acts under such an authority is treated as having agreed to carry out the resolution for the purposes of Article 25 and as being bound by it for the purposes of Article 103. In view of what is written by the distinguished authors of the Commentary which I have cited in para 69 above about the practice of member states, it would in my judgment be quite wrong for a national court to indulge in an interpretative exercise of its own. For academic commentary to similar effect, see Vera Gowlland-Dabbas, *The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance* 11 EJIL (2000) 361, 371; and Danesh Sarooshi, *The United Nations and the Development of International Security* (1999), pp 150-1.

75. I should add that we have had the opportunity of reading some recent articles by academic commentators to the effect that things have now moved on and that the Security Council no longer has the power to make resolutions that prevail over human rights obligations that fall short of constituting *ius cogens*. These, however, are not arguments that a national court can entertain, and Mr Starmer made it clear that he was not inviting this court to assess the *vires* of any of the Security Council resolutions with which we are concerned in this case.

76. In these circumstances I am satisfied that this court should hold that in acting as a member of the MNF pursuant to the authority of UNSCR 1546 (2004) the United Kingdom must be taken as performing an obligation within the meaning of Article 25 that was imposed on it by that resolution for the purposes of Article 103.

77. I can see nothing in the Charter which created a parallel obligation to give effect to Mr Al-Jedda's rights under human rights treaties. I have already explained why I do not consider that Articles 55 and 56 contained any obligations in any way comparable to the positive obligations imposed by, say, Article 1 of the ECHR. Nor do I consider that the words of the Preamble to the Charter ("to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women and of nations large and small"), or of para 3 of Article 1, which identifies the purposes of the United Nations - "to achieve international co-operation in ... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" - go beyond the stage of the aspirational, setting strategic aims for the future without creating immediately enforceable obligations.

78. Although we were referred to Article 2, which sets out certain overriding principles of membership, I do not consider that its provisions take the argument any further. It is true that the International Court of Justice has said that "wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations" (see *Case Concerning United States Diplomatic and Consular Staff in Tehran* (24th May 1980, General List, No 64) at para 91), but I find that this very

general comment on the lawlessness of the Iranian treatment of the US diplomatic and consular staff in 1979-80 does not afford any great assistance in the present case.

79. We were also referred by Mr Starmer to the case of *Boudellaa and others v Bosnia and Herzegovina,* which was decided by the Human Rights Chamber for Bosnia and Herzogovina on 11th October 2002. In that case the Chamber found that the international fight against terrorism could not exempt the respondent parties from their obligation to ensure respect for the rights protected by the Human Rights Agreement set out in an annex to the General Framework Agreement for Peace in those two territories. Although UNSCR 1373 (2001) imposed certain mandatory obligations on member states in connection with the fight against terrorism, it does not appear to have expressly sanctioned the actions of which complaint was being made in that case. There is also no evidence that the Chamber was treated to any argument as to the overriding effect of Article 103 of the UN Charter had there been any question of a relevant binding obligation imposed by the Security Council.

80. It follows that Mr Greenwood was in my judgment correct when he argued that UNSCR 1546 (2004) qualified any obligations contained in human rights conventions in so far as it was in conflict with them. I use the word "qualified" deliberately. In so far as that resolution sanctioned the continued use of internment beyond the period contemplated by Geneva IV as a means of restoring peace to Iraq, the very essence of internment is inconsistent with the "due process" requirements of ECHR Article 5(1) or Article 9 of the ICCPR. But all the remaining requirements of those human rights conventions retained their vitality (in so far as they were not qualified by the Security Council resolution), and with the greater vigour because an internee's important right to liberty was being removed without the due process that is obligatory in less exceptional times. There was nothing in the resolution, for instance, to qualify the obligation resting on the members of the MNF not to torture any internees or otherwise subject them to inhumane or degrading treatment, or to deprive them of any other Convention right (or any other international law right) relevant to the regime and conditions of internment that was not qualified by the terms of the Security Council resolution.

81. Moreover the Security Council has not sanctioned indefinite internment. At present it has extended the MNF's mandate until 31st December 2006 (see para 34 above), but it would be open to it to terminate the mandate before that time, or to alter its terms, if it thought it appropriate to do so. In the meantime, if an internee continues to be detained, his case must be subjected to a review at least once every six months, and there is no power to continue his detention unless this is necessary for imperative reasons of security, which is a very demanding test. It would always of course be open to the British government to introduce an independent element into the reviewing process if it considered it appropriate to do so.

82. Mr Starmer had two further strings to his bow in this part of the case. First, he referred to a number of Security Council resolutions which contained "notwithstanding" clauses of a type which were absent from UNSCR 1546 (2004). Then he drew attention to the number of occasions on which that resolution and other

resolutions concerned either with the war on Iraq or on counter-terrorism measures referred explicitly to an obligation to comply with international law.

83. As to the first point, Professor Bernhardt described on p 1300 of his commentary on Article 103 in the Simma book the way that the Security Council has developed and adopted since 1990 a standard formula in many of its Chapter VII resolutions of the following type:

> "Calls upon all States ... to act strictly in conformity with this resolution, *notwithstanding the existence of any rights granted or obligations conferred or imposed by any international agreement*..." (Emphasis added)

He does not, however, suggest that this formula is always included, and although Mr Starmer showed us a large number of recent resolutions which contained the formula, he did not suggest that its inclusion was mandatory. He contended only that its absence might provide evidence of the Security Council's intentions.

84. I do not consider that a reference in a resolution to an obligation to observe international law can override the clear language of Article 103 of the Charter if an obligation in the Charter or in a Security Council resolution is clearly in conflict with an obligation in a human rights treaty. That obligation, although itself forming part of international law, has been qualified *pro tanto* by the terms of the resolution. This, in my judgment, is the position in the present case.

85. I summarise my conclusions in this part of the appeal in this way. The concept of internment for imperative reasons of security is a very familiar one in international law. It creates a high threshold test, and it is available in the ordinary way to a belligerent power both during a war and for up to a year during any period of occupation that follows the end of the war. International law obliges those states who are parties to Geneva IV to treat their internees in the humanitarian way prescribed by that Convention and to afford them the rights of review and appeal that are prescribed by Article 78. In the case of Iraq, it can be taken that UNSCR 1511 (2003), by authorising the MNF "to take all necessary measures to contribute to the maintenance of security and stability in Iraq", extended the power of internment beyond the original one-year term under Geneva IV. It is not open to this national court to hold that the Security Council had no power to do so.

86. UNSCR 1546 (2004) unquestionably gave the MNF the power to intern people for imperative reasons of security. I accept Mr Greenwood's submission that this power embraced people of every nationality whose internment was deemed necessary for imperative reasons of security. The dangerous lawlessness that was ever-present in Iraq in the first half of 2004 would have been known to the Security Council. We have been shown the text of the speeches delivered at the Council on 8th June 2004 after that resolution was adopted, and it is clear that every member of it was aware of the scale of the emergency that still existed in Iraq. There would have been no purpose in excluding nationals of the member states of MNF from liability to

internment if the imperative requirements of security so required, and there is nothing in the resolution itself or in the letters annexed to the resolution that referred to any such limitation. Although Article 2(7) of the Charter prescribes that nothing in the Charter authorises the United Nations to intervene in matters which are essentially within the jurisdiction of any state, it expressly provides that this principle is not to prejudice the application of enforcement measures under Chapter VII.

87. There is inevitably a conflict between a power to intern for imperative reasons of security during the course of an emergency, and a right to due process by a court in more settled times. In my judgment, Article 103 does give UNSCR 1546 (2004) precedence, in so far as there is a conflict. This is not to say that those whose task it is to determine whether internment is necessary for imperative reasons of security must not approach their duties with all due seriousness, when the right to personal liberty is in question. In particular they should ask themselves whether internment is a proportionate response to the threat to security posed by the internee. It has not been suggested that either of the major-generals who were concerned with the review decisions (see para 10 above) could be faulted in their approach (except as to the technical matters which the Divisional Court identified). The complaint is rather that despite the emergency that existed in Iraq, Mr Al-Jedda's right to due court process under Article 5(1) of the ECHR was not qualified by UNSCR 1546 (2004), and I would dismiss this ground of appeal for the reasons I have given.

7. The human rights claim: the assertion that the Human Rights Act 1998 has created rights even if they are not enforceable at Strasbourg

88. Mr Starmer's next point of challenge is the ruling of the Divisional Court to the effect that whatever might be the outcome of an application by his client to the European Court of Human Rights, he is entitled to rely on the rights accorded to him by the 1998 Act without any need to speculate on what might or might not happen in Strasbourg. This is not a case concerned with a treaty incorporated into English law. The draftsman of the 1998 Act deliberately created free-standing rights in Schedule 1 to that Act which cannot, Mr Starmer argues, be affected by activities at international level (such as the adoption of a Security Council resolution) which do not form any part of our national law.

89. Our task has been made easier than the task which faced the Divisional Court (who handled this issue in a masterly way in paras 33-74 of its judgment) because the House of Lords decided the appeal in *R (Quark Fishing Ltd) v Foreign Secretary* [2005] UKHL 57; [2005] 3 WLR 837 in October last year, two months after the Divisional Court's judgment. In their speeches the law lords explained the purpose of the 1998 Act with great clarity.

90. Thus Lord Bingham said (at para 25):

> "A party unable to mount a successful claim in Strasbourg can never mount a successful claim under sections 6 and 7 of the 1998 Act. For the purpose of the 1998 Act was not to enlarge

> the field of application of the Convention but to enable those subject to the jurisdiction of the United Kingdom and able to establish violations by United Kingdom public authorities to present their claims in the domestic courts of this country and not only in Strasbourg."

91. Lord Nicholls of Birkenhead said (at paras 33-34):

> "The purpose of the Act, as stated in its preamble, was 'to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights'. In colloquial terms, the Act was intended to 'bring rights home'. The Act was to provide a means whereby persons whose rights under the Convention were infringed by the United Kingdom could, in future, have an appropriate remedy available to them in the courts of this country. Persons who were victims of a violation of a Convention right within the meaning of article 34 of the Convention need no longer travel to Strasbourg to obtain redress.
>
> To this end the obligations of public authorities under sections 6 and 7 mirror in domestic law the treaty obligations of the United Kingdom in respect of corresponding articles of the Convention and its protocols. That was the object of these sections. … The Act was intended to provide a domestic remedy where a remedy would have been available in Strasbourg."

92. And Lord Hope of Craighead, after citing ss 1(1), 7(1) and 21(1) of the 1998 Act, said (at para 88):

> "These provisions show that a person cannot claim that an act of a public authority is made unlawful by section 6 of the 1998 Act unless the Convention right is one for which the United Kingdom would be answerable in Strasbourg."

93. All five members of the House of Lords (see *Quark* at paras 25, 32, 56, 87 and 97) placed emphasis on the definition of "the Convention" in s 21(1) of the Act. This definition needs to be read into s 1(1) in order to bring home its effect:

> "1(1) In this Act 'the Convention rights' means the rights and fundamental freedoms set out in Articles 2 to 12 and 14 of [the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 *as it has effect for the time being in relation to the United Kingdom*]…" (Emphasis added)

94. Thus, although those Articles of the ECHR are set out in Schedule 1 to the Act (see s1(3)), if for any reason one or more of them do not have effect for the time being in relation to the United Kingdom, then to that extent they do not create a Convention right that can be relied on through the machinery of the 1998 Act. Mr Al-Jedda's reliance on ss 6(1) and 7(1) in these proceedings is therefore nugatory because there is no breach of any Convention right in these circumstances.

95. It is not therefore a question whether Article 103 of the UN Charter is or is not incorporated into English law. It is rather that, by the express provision of an English statute, the ECHR rights as they operate under the 1998 Act in English law are only "brought home" to the extent that they operate in Strasbourg or have "effect for the time being in relation to the United Kingdom". There is therefore no need for derogation or amendment under the provisions of the 1998 Act (for which see ss 14 and 15 of that Act).

96. Mr Starmer submitted nevertheless that the phrase "for the time being" was to be contrasted with an expression such as "from time to time" (cf s 2(1) of the European Communities Act 1972), and that the purpose of using such a phrase was to preserve the content and incidence of the Convention rights as being exclusively represented by such rights as they were at the time of the enactment of the 1998 Act (subject to any subsequent amendment of that Act). However, s 1(1) is addressing the "effect" of the Convention rights, and it is clear from the context of this provision and from the observations of the members of the House of Lords in *Quark* that the phrase "for the time being" has, as I consider it can have, the same meaning as "from time to time".

97. For other examples where English law takes account of the impact of international law in the development of its own jurisprudence: see for instance the position of sovereign immunity at common law in *I Congreso del Partido* [1983] 1 AC 244; the relevance of the UN Charter and UN Security Council resolutions in the context of the question whether English law will recognise foreign statutes otherwise applicable as the *lex situs* in *Kuwait Airways Corporation v. Iraqi Airways Co (Nos 4 and 5)* [2003] UKHL 19, [2002] AC 883; and, most recently, in the context of the act of state doctrine, see *Republic of Ecuador v. Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [2006] 2 WLR 70.

98. This conclusion is a natural complement to the conclusion of this court in the recent *Al-Skeini* case. In that case the Secretary of State conceded in this court that the sixth claimant, Colonel Mousa, had rights on which he could rely in a complaint against this country in Strasbourg, and this court relied in part on Lord Nicholls's explanation of the purpose of the 1998 Act in *Quark* when it held that the Act enabled him to bring his claim in this country, too. By parity of reasoning, because Mr Al-Jedda would fail in Strasbourg, it would contradict the purpose of the 1998 Act, as explained in *Quark* (and in *Aston Cantlow PCC v Wallbank* [2003] UKHL 37 at [6]; [2004] 1 AC 546) if he could get a better remedy at home than he could achieve in Strasbourg, to adopt Lord Bingham's language in *R (Greenfield) v Home Secretary* [2005] UKHL 14 at [19]; [2005] 1 WLR 673, where he was also concerned with explaining the purpose of the Act.

99. I must make it clear that I have taken into account the submissions of JUSTICE to the extent that they supplement Mr Starmer's submissions on this point.

8. Mr Al-Jedda's claim on common law grounds

100. Finally, Mr Al-Jedda rested his claim on common law grounds. He maintained that the Secretary of State had no right as a matter of English law to detain him in Iraq. He also contended that the Secretary of State was acting irrationally in refusing to convey him back to England. He was willing to come here voluntarily even though he was aware he might face charges under modern anti-terrorism legislation. At the outset of the appeal Mr Starmer sought permission to introduce an application for *habeas corpus* into these proceedings for the first time. We considered this inappropriate, not only because *habeas corpus* relief is governed by a different procedural code but also, and more importantly, because the claim for judicial review which was before the Divisional Court would enable us to rule that Mr Al-Jedda's detention was unlawful if we were so persuaded.

101. The contention that the detention was unlawful was based on the premise that we should apply English law when considering its legal validity. We have already seen how as a matter of Iraqi law the MNF were entitled to intern people when this was necessary for imperative reasons of security (see paras 18-19, 27-29 and 31-32 above). For the reasons I have already set out, these powers, which derived ultimately from the UNSCR mandate, would have certainly included a power to intern Mr Al-Jedda, notwithstanding that he was a British national. Although Article 9 of the ICCPR was entrenched in Iraqi law, this, too, would have been qualified by the Security Council's resolutions. Mr Starmer's submissions therefore depend crucially on whether English law, rather than Iraqi law, should be applied.

102. Sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995 provide the route-map to the answer to this question. Section 11(1) provides:

> "11(1) The general law is that the applicable law is the law of the country in which the events constituting the tort ... in question occur."

Section 12 provides:

> "12(1) If it appears, in all the circumstances, from a comparison of -
>
> (a) the significance of the factors which connect a tort ... with the country whose law would be the applicable law under the general rule;
>
> and

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

103. The Law Commission, in their report *Private International Law, Choice of Law in Tort and Delict* (1990) Law Com 193, Scot Law Com 129, identified the mischief which they sought to remedy in these terms at para 2.7:

> "The exceptional role given to the substantive domestic law of the forum in the law of tort, apart from being almost unknown in the private international law of any other country, is parochial in appearance and 'also begs the question as it presupposes that it is inherently just for the rules of the English domestic law of tort to be indiscriminately applied regardless of the foreign character of the circumstances and the parties'."

The quotation is taken from an article by Mr Peter Carter "*Torts in English Private International Law*" (1981) 52 BYBIL 9, 24.

104. The threshold exclusion test which they chose, and which Parliament adopted, was that it should be *substantially* more appropriate for the applicable law to be other than the law of the country in which the events constituting the tort in question occurred. We have read the evidence given by the representatives of the Law Commission to the Special Standing Committee of the House of Lords (*HL Paper 36, Session 1994-5, Private International Law (Miscellaneous Provisions) Bill [HL], Proceedings of the Special Public Committee, with evidence and the bill (as amended)).* It is clear that the Commission intended the use of the word "substantially" to be taken seriously. Thus Dr Peter North, the distinguished scholar of private international law who was the moving force behind these proposals when he was a Law Commissioner, said at p 37:

> "The structure of Clauses 11 and 12 is to have as certain a rule as possible in 11 but in 12 to disapply that rule after a threshold has been overcome. The words that embody that threshold are the words in line 20 on page five of the Bill: "substantially

> more appropriate". I do not see any magic in those particular words but I do support the policy that you disapply the rules in clause 11 when some significant threshold has been reached embodied in Clause 12.
>
> ... I think the word "substantially" or a word like it ought not to be omitted because it is part of what Lord Wilberforce described as the striking of this balance. If you take the word "substantially" or a similar word out of Clause 12, you strike the balance more in favour of flexibility and further away from the certainty provided by clause 11."

I should explain that Lord Wilberforce was a member of the committee, and he said (at p 37) that for the rule of displacement to apply "it is a very rare case. *Prima facie* there has to be a strong case."

105. Mr Starmer submitted that there was no magic to be afforded to the words "substantially more appropriate" in s 12, and that the fundamental features of Mr Al-Jedda's imprisonment plainly demonstrated that it would be substantially more appropriate to apply English law. He said that it would be strange indeed for the English Court to apply Iraqi law to a claim by a British citizen against the British government in respect of activities on a base operated according to British law (and inviolable from Iraqi process) by British troops governed by British law (and immune from Iraqi law). (For the immunities see para 30 above).

106. I do not consider that these considerations are strong enough to displace the normal rule. As Waller LJ observed in *Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21 at [12]; [2002] 1 WLR 2304, "the general rule is not to be dislodged easily". See also *Harding v Wealands* [2004] EWCA Civ 1735; [2005] 1 WLR 1539. The emergency for which the powers of internment were required was in Iraq. The law of Iraq was adapted to include measures deemed necessary to combat the emergency. It was in Iraq that "ambush and mutilation, riots and attacks" were occurring (see para 21 above) and there was the risk of "chaos and the real possibility of civil war" (see para 22 above) if international troops were prematurely withdrawn. And it was in Iraq that the Security Council gave the MNF all the authority to take all necessary measures to contribute to the maintenance of security and stability, including internment where this was necessary for imperative reasons of security (see paras 24 and 25 above). Given that the laws of Iraq have been adapted to give the MNF the requisite powers, it would be very odd if the legality of Mr Al-Jedda's detention was to be governed by the law of England and not the law of Iraq.

107. Mr Starmer drew comfort from the fact that in *Bici v Ministry of Defence* [2004] EWHC 786 (QB) Elias J applied English law when giving judgment in a claim for damages for negligence and trespass to the person which was brought by two Kosovar Albanians arising out of a shooting incident in Pristina involving three British soldiers in a UN peace-keeping operation in Kosovo. However it appears that the parties had agreed that the liability of the Ministry should be determined according to English

law, so that the judge did not have to determine any dispute as to the applicable law. Mr Starmer also referred us to the treatment of this topic in *Dicey and Morris on The Conflict of Laws*, Vol 2 (13th Edition, 2000) at pp 1552-4 but I could see nothing there to suggest that it would be appropriate to displace Iraqi law as the governing law on the facts of the present case.

108. It is, of course, correct that the legality of Mr Al-Jedda's detention cannot be tested in an Iraqi court because of the immunity afforded to the MNF forces by Iraqi law. But these proceedings have shown that he is able to have it tested in an English court. He is not being arbitrarily detained in a legal black hole, unlike the detainees in Guantanamo Bay in the autumn of 2002 (see *R (Abbasi) v Foreign Secretary* [2002] EWCA Civ 1598 at [64]).

109. Finally, Mr Starmer renewed in this court his contention that the Secretary of State was acting irrationally when he declined to direct that Mr Al-Jedda be returned to this country. This was very much a matter for the Secretary of State to decide, even supposing that he had the consent of the Iraqi authorities to remove Mr Al-Jedda, who is an Iraqi national as well as being a British national, out of Iraq. I cannot better the reasons given by the Divisional Court (at paras 146-153) for rejecting this submission.

110. For all these reasons I would dismiss this appeal.

9. Addendum

111. As an addendum to this judgment it is worth noting that in the last great emergency imperilling this nation's legislation was enacted to confer powers of internment similar to those that are in issue in the present case. Section 1 of the Emergency Powers (Defence) Act 1939 created the rule-making power and Regulation 18B(1) of the Defence (General) Regulations 1939, whose terms are set out in a footnote in *Liversidge v Anderson* [1942] AC 206, 207, created the power of detention. Lord Denning describes in *The Family Story* (Butterworths, 1981) at pp 129-130 how that power was exercised in practice in 1940 and 1941 when in the *persona* of Alfred Denning QC he was the legal adviser to the regional commissioner for the North-East Region:

> "Most of my work in Leeds was to detain people under Regulation 18B. We detained people, without trial, on suspicion that they were a danger. The military authorities used to receive - or collect - information about any person who was suspected: and lay it before me. If it was proper for investigation I used to see the person - and ask him questions - so as to judge for myself if the suspicion was justified. He could not be represented by lawyers."

112. The equivalent arrangements, for the purposes of the emergency in Iraq, are described by General Rollo in his witness statement. Apart from the technical matters which the

Divisional Court put right there is no challenge to the appropriateness of the procedures adopted for internment in accordance with the Security Council's mandate. The issue is rather that Mr Al-Jedda should be permitted access to a court of law where he could answer a charge against him and test the evidence against him before an independent judicial tribunal. I am satisfied that he has no such entitlement.

Lord Justice May:

113. I agree.

Lord Justice Rix:

114. I also agree.