Neutral Citation Number: [2020] EWHC 3458 (QB)

Case No: HQ09X03608

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2020

Before:

MR JUSTICE GARNHAM

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Between:

RANGZIEB AHMED	**Claimant**
- and -	
(1) DIRECTOR GENERAL OF SECURITY SERVICE **(2) CHIEF OF THE SECRET INTELLIGENCE SERVICE** **(3) SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS** **(4) SECRETARY OF STATE FOR THE HOME DEPARTMENT** **(5) HER MAJESTY'S ATTORNEY -GENERAL** **(6) CHIEF CONSTABLE OF GREATER MANCHESTER POLICE**	**Defendants**

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Richard Hermer QC and Joanna Buckley (instructed by **Bhatt Murphy**) for the **Claimant**
Rory Phillips QC and Dan Pawson-Pounds (instructed by **Government Legal Department**) for the **1st - 5th Defendant**
Anne Whyte QC instructed by (**Greater Manchester Police**) for the **6th Defendant**

Hearing dates: 27th & 28th October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and others, and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:00am on 16 December 2020.

Mr Justice Garnham:

Introduction

1. On 18 December 2008, in the Crown Court at Manchester, before Saunders J and a jury, Rangzieb Ahmed was convicted of a series of terrorist offences. Those offences included directing a terrorist organisation contrary to s.56 of the Terrorism Act 2000, membership of a terrorist organisation contrary to s.11 of that Act, and possession of terrorist articles contrary to s.57. The following day he was sentenced to life imprisonment with a minimum term to be served of 10 years.

2. Rangzieb Ahmed, the defendant in those criminal proceedings, is the Claimant in this civil action. I will refer to him as "the Claimant" or as Mr Ahmed in this judgment.

3. On 12 August 2009, eight months after his conviction, the Claimant issued proceedings against the Director General of MI5 and five other defendants claiming damages for false imprisonment, assault, battery, misfeasance in public office, negligence and breach of the Human Rights Act 1998 ("the 1998 Act"), all of which claims arose out of his alleged treatment in the custody of the Pakistani Inter-Services Intelligence Agency ("ISI") in Pakistan. He also sought a declaration that his rights under Articles 3 and 5 of the ECHR had been breached, contrary to the 1998 Act.

4. By applications dated 9 March 2012 respectively, the Sixth Defendant, the Chief Constable of Greater Manchester Police, and the First to Fifth Defendants seek orders striking out the Claimant's Statement of Case pursuant to CPR Part 3.4(2)(b) on the grounds that the case is an abuse of the process of the Court. The Defendants contend that, by these civil proceedings, the Claimant is seeking "to re-litigate issues that have been decided against him by Mr Justice Saunders, sitting as a judge of the Crown Court, and the Court of Appeal Criminal Division".

5. • I heard argument, on 27 and 28 October 2020, from Mr Rory Phillips QC on behalf of the First to Fifth Defendants, Ms Anne Whyte QC for the Sixth Defendant and Mr Richard Hermer QC on behalf of the Claimant. I am grateful for their assistance.

In Camera Evidence and Hearings

6. On 18 September 2008, in the course of the criminal trial, Saunders J gave a ruling, partly in OPEN and partly *in camera*, on an application by the Claimant, to stay the criminal proceedings on the grounds that they were an abuse of process.

7. On 9 October 2012, Beatson J made an order in the present proceedings that:

> "subject (a) to consent being given by the Crown Court and the Court of Appeal Criminal Division to vary the 'in camera' orders made by them in the criminal proceedings against the Claimant; and (b) to the making of an order governing the use of the 'in camera' material in this action by the Queen's Bench Division (QBD), the Defendants do provide to the Claimant disclosure and inspection in respect of the 'in camera' material identified in the first sentence of paragraph 6 of the particulars of claim".

8. The necessary order was made by Saunders J on 7 March 2013, and by Hughes LJ on behalf of the CACD, on 14 March 2013. On 2 April 2013, Master Eastman made an order that "disclosed material" identified in his order should be dealt with in private pursuant to CPR 39.2(3)(b). He further ordered that that material should be kept confidential by the parties. The disclosed material included redacted rulings of the Crown Court on the claimant's abuse of process application before Saunders J on 18 September 2008, the disclosure provided by the Crown Prosecution Service ("CPS") to the Claimant's legal representatives in the Crown Court proceedings, transcripts of evidence and submissions which were subject to the *in camera* order of Saunders J, and skeleton arguments prepared for the hearing in the Crown Court and the Court of Appeal which referred to such material.

9. Master Eastman's order also contained a provision that the Court would "ensure that any court staff who were present at or dealing with issues arising from the private hearings together with those who handled the disclosed material have appropriate security clearance" and that the disclosed material should be "withheld from the public in proceedings before the Court and shall be prohibited from being published whether in connection with these proceedings or otherwise according to s.11 of the Contempt of Court Act 1981 and s.12 of the Administration of Justice 1960". Master Eastman gave liberty to apply to a Judge of the Queen's Bench Division to vary or discharge that order. No such application has been made whether by a party, a representative of the media, or anyone else.

10. On 12 March and 2 December 2019, the Lord Chief Justice, exercising the powers of a judge of the Court of Appeal Criminal Division ("CACD") and a judge of the Crown Court, amended the orders referred to above so as to permit those presently acting for the Claimant in these proceedings to have sight of the disclosed material. The Lord Chief Justice did not otherwise amend the orders as to the handling of the disclosed material, which accordingly, remain in force today.

11. At the beginning of the present application, I heard from Ms Beth Grossman, Counsel, on behalf of various media organisations, who invited me to direct that the whole of this application, alternatively as much of it as possible, be heard in public. Having heard submissions from Counsel for the parties, I made an order in the latter, but not the former, terms. As matters turned out it was possible to hear the bulk of the application in public. However, I did hear briefly from all three parties *in camera*.

12. Attached to this judgment is a confidential annex which is disclosed only to the parties. In that annex, I summarise the *in camera* judgment of Saunders J on the abuse of process application he decided. I also include in that annex a short passage which I have redacted from this OPEN judgment which deals with CLOSED evidence.

The History

13. In addition to the procedural history set out above, it is necessary to say a little about the factual background to this case.

14. The Claimant is a British citizen of Pakistani origin who was born in Lancashire on 23 August 1975. He spent large parts of his childhood and young adult life living in Pakistani Kashmir.

15. On 16 January 2006, he travelled from the UK to Pakistan. Between approximately 20 August 2006 and 7 September 2007 he was detained in Pakistan. Some three weeks into that period, on or about 12 September 2006, the Claimant says he was seen by agents of either the First or Second Defendants, MI5 or MI6.

16. A year later, on 7 September 2007, the Claimant was deported to the UK. He was arrested and charged with a number of terrorist offences. As noted above, he was convicted in December 2008. He appealed that conviction to the CACD but that appeal was dismissed on 25 February 2011. Permission to appeal to the Supreme Court was refused on 23 June 2011.

The Claimant's case before the criminal courts

17. The Claimant's case before Saunders J was articulated in his pre charge statement, his Defence Case Statement and in his evidence in the voir dire. In the pre-charge statement he alleged, that whilst in custody in Pakistan, he was blindfolded, beaten around the head multiple times during his initial interrogation, beaten during subsequent interrogations, subject to inappropriate handcuffing, beaten with a tyre and stick and/or wire, deprived of sleep, provided with poor food, and subjected to inhumane conditions and, most appalling of all, the pulling out of three of his fingernails.

18. There was reference in the Claimant's Defence Case Statement to repeated beatings (including using a rubber lash attached to a stick) and the removal of fingernails; to his being held in a cold and barely furnished cell in solitary confinement; and being subject to sleep deprivation, blindfolding, hooding and shackling. This mistreatment was said to be confined to the first 13-14 days.

19. The Claimant repeated these assertions in detail when giving evidence during the voire dire in support of the application for an order staying his prosecution as an abuse of process. The Claimant described how he had been detained by the Pakistani security services on 20 August 2006. He described the circumstances of his detention explaining how he was locked in a cell without daylight or furniture while handcuffed and shackled. He said he was deprived of sleep and fed badly. He was not told the reason for his arrest, not allowed access to a lawyer and was not able to inform his family of his whereabouts. He described how he was beaten with sticks on his feet, with pieces of tyre attached to a handle, and whipped on his back and neck with folded strands of coated wire. His trousers were removed so that his private parts were exposed.

20. He said that on days 7, 9 and 11 of his detention, his fingernails were forcibly removed with pliers. He said that thereafter he was given a painkilling injection and his fingers were bandaged. He said that whenever he was removed from his cell, he was both hooded and blindfolded. He said that he continued to be held in dreadful conditions, handcuffed and shackled for the first 12 days or so of his detention.

21. He said that the day after the third fingernail was removed, he saw officers from the British security services. He did not complain of his treatment during the interview but says that he told the British officers that he had been badly treated. He said his fingers were still bandaged at the time, although he did not report what had happened to the British officers. He said that the British would have known perfectly well what had

gone on. That was the only occasion when he was seen by the British; subsequently he was seen regularly by American officers.

22. The witness statement provided to the CACD reiterated these allegations.

The judgments of Saunders J

23. On 18 September 2008, Saunders J gave his OPEN and *in camera* judgments on Mr Ahmed's application to stay the proceedings against him. They were, if I may say so, careful and detailed judgments. The transcript of the OPEN judgment runs to 41 pages.

24. The Judge began by setting out the relevant legal principles. He said that the application had been made on the basis that to allow the proceedings to continue would be an abuse of the process of the Court. He said:

> "In general terms, the abuse alleged is that the UK has connived in the unlawful treatment and torture of Rangzieb Ahmed by the Pakistan authorities while he was detained in Pakistan, and in his unlawful deportation from Pakistan to the United Kingdom."

25. He referred to the relevant authorities, namely *R v Horseferry Road Magistrates Court ex parte Bennett* [1994] 1 AC 42, *R v Latif* [1996] 1 WLR 104, *R v Mullen* [1993] 3 WLR 777, *R v Khyam & Ors* [2008] EWCA 1612, *A v SSHD (No. 2)* [2005] UKHL 71. He said it was clear from the authorities that the mere fact that the alleged offence is serious cannot justify the misuse of power in bringing the case to trial. He said that the allegations of misconduct made against the UK authorities were extremely serious, as were the allegations against the Claimant. "There are, as in any case like this, competing public interests". He said that his concern was restricted:

> "to an investigation of whether the process of the court is being abused. The process of the court includes…the means used to get a defendant within the jurisdiction…the means employed to obtain evidence for use in a prosecution…(and) the deliberate failure to observe legal professional privilege.…The power of a criminal court only extends to the control of the process of the criminal trial with which it is at the time concerned…In order to protect the lives of its citizens, the UK may exchange information with countries whose record on human rights you may rightly or wrongly regard as inferior to ours. That can only be the concern of the criminal courts and the subject of an abuse application if it impinges on the trial process"

26. He said he would need to consider the circumstances of the Claimant's arrest and any involvement of the UK in that process; what happened to that Claimant while he was detained in Pakistan; how the UK believed he would be treated; what the UK knew of his treatment in Pakistan; how any of that impinges on the trial process, if at all; whether the Claimant's deportation was illegal; whether, if it was, the UK connived with Pakistan in that illegal deportation; whether the UK officials knew that the Claimant was being illegally deported, if he was; and how, if at all, this impinges on the trial process. He went on to explain that having reached his conclusions as to the facts "I shall then have to carry out the balancing exercise described in the authorities. The

gravity of any misconduct by the authorities that I find to be proved will be very significant."

27. He then turned to deal first with the question whether the Claimant's deportation was unlawful and if so whether the UK played a part in that deportation. The Judge concluded on the evidence that he was satisfied that the Claimant was not a Pakistani citizen and that the Pakistani authorities had the right to deport him. Nonetheless, the Judge held that even if there had been evidence to support the contention that Mr Ahmed was a Pakistani citizen:

> "I would still not have ordered a stay because there is, in my judgment, no evidence at all that the UK authorities knew that his deportation was unlawful or believed his deportation was unlawful or were complicit in any way in any unlawful removal of Mr Ahmed to this country."

28. The Judge referred to evidence from a senior officer in the Greater Manchester Police ("GMP") and said there was no doubt that the GMP wished Mr Ahmed to be deported from Pakistan because he was suspected of having committed serious offences for which they wanted him tried. He said, however, that there was "simply no evidence that the Greater Manchester Police or the British authorities took any part in the decision by Pakistan to deport Rangzieb Ahmed legally or illegally". He went on to say that he was satisfied "on the balance of probabilities that there was no misconduct by the Greater Manchester Police in relation to the deportation."

29. He then turned to deal with whether Mr Ahmed was subject to ill treatment and torture at the hands of the Pakistani authorities and whether, if he had been, there was complicity on the part of the UK authorities in that abuse. Part of that judgment was given in open court and part *in camera*. He said that Mr Ahmed made serious accusations of ill treatment and torture against Pakistani intelligence officers. He pointed out that he had not heard any evidence from those officers. He summarised the evidence he had heard from the Claimant to the effect summarised above.

30. Expert evidence was called on behalf of the Claimant. Professor Rehman asserted that his arrest and detention were unlawful but agreed that, after an appearance before a review board in December 2006, his detention would have become lawful. Also called to give evidence were a Mr Saeed Hassan, a senior researcher for Human Rights Watch. He gave evidence that torture was endemic in Pakistan and was used regularly by the Pakistani intelligence services to obtain confessions and information. He said that the treatment of which Mr Ahmed complained was typical of the behaviour of ISI and others in Pakistan. Evidence was also given by Mr Imran Khan, a leading politician in Pakistan, who spoke of the many complaints of torture that he had received. Saunders J said that that evidence was supported by a number of reports from well-respected bodies which would have been well known to UK authorities.

31. Saunders J also heard medical evidence from a Dr Evans and a Dr Carey going to the question as to whether, and if so when, Mr Ahmed's fingernails had been torn out.

32. The Judge then turned to set out his conclusions. He said that he was satisfied on the basis of the evidence of Professor Rehman and Mr Ahmed that Mr Ahmed's detention by ISI in August 2006 was unlawful. He said he was also satisfied that Mr Ahmed was

kept in inhuman conditions and may have also been deliberately deprived of sleep. He went on:

> "however, I am not satisfied that he suffered physical injury in the first 14 days or thereabouts of his detention, although he may have done later. In particular, I am not satisfied that he suffered traumatic removal of fingernails in those early days of his detention. That is partly because of evidence heard *in camera* and partly as a result of the evidence of Dr Carey and Shaukat Malik who gave evidence in open court…
>
> It may be that Rangzieb Ahmed suffered physical injury at the hands of the agents of the Pakistanis at a later stage including the removal of fingernails, but for very good reason the focus of this inquiry has been on the early stages of his detention. While I accept Rangzieb Ahmed's allegation to the extent set out above, I specifically reject the allegations that the British authorities were outsourcing torture. I simply have found no evidence to support that suggestion."

33. Saunders J ended his judgment with the following:

> "My final conclusion for reasons largely given in camera is that - and I hope I chose my words carefully - I am not satisfied that the British authorities assisted or encouraged the Pakistanis to unlawfully detain and or ill-treat Rangzieb Ahmed in such a way so as to amount to an abuse of the process of the court and, accordingly, I dismiss the application for a stay on this ground as well."

34. As noted above, the closed Annex to this judgment includes a summary of the material points emerging from the *in camera* judgment of Saunders J.

The CACD

35. The CACD heard the Claimant's appeal over four days in November and December 2010. Hughes LJ gave the judgment of the Court on 25 February 2011, ([2011] EWCA Crim 184). He explained that the gist of the case against the Claimant and his co-accused was that they were active members of Al Qaeda and that they were heavily involved in general terrorist planning and the coordination of agents or sympathisers in the UK.

36. At [4], Hughes LJ explained that at the trial, Rangzieb Ahmed applied to the judge to stop the prosecution:

> "He contended that it would be an abuse of the process of the court to try him, whether he was guilty or not. The reason why that was said was because some time after the offences charged were alleged to have been committed, he had been arrested in Pakistan and held in custody for just over a year. During that time, it was his case that he had been tortured by the Pakistani

> authorities (and/or on the authority, he asserted, of the USA). Founding upon that allegation, it is said on his behalf that the UK authorities had sufficient connection with that detention to amount to "complicity" in torture and that if so, no prosecution of him could properly be allowed to continue without affronting the fundamental principle of international law which outlaws torture."

37. The Court summarised Saunders J's conclusions at [5]:

> "The judge heard evidence about what had happened and did not believe important parts of what Rangzieb said. But in any event, he held, putting it in the briefest terms, that the test of whether a prosecution should or should not be stayed was whether any torture or ill treatment, if there had been any, impacted upon the trial. If it did, then that would provide a reason for staying the trial. If it did not, then whatever may be the legitimate debate about the rights and wrongs of what had or had not been done, it had nothing to do with the trial and provided no reason for not deciding according to the ordinary rules of evidence whether Rangzieb was guilty of the terrorism charged, or was not. The judge held that whatever may have happened in Pakistan, it formed no part of the evidence at the trial and had had no impact upon it. Accordingly, there existed no reason for his not being tried according to English law in order to discover whether or not he was proved to have committed any offence against our law."

38. Hughes LJ explained at [14-15] that although Rangzieb Ahmed did not give evidence before the jury, he did so in the voire dire:

> "14. He asserted that after arrest on 20 August 2006 he been (i) held incommunicado, without charge, without access to lawyers or contact with any person outside the prison until December when he was taken to court and allowed to speak although unrepresented, (ii) kept, at least initially, handcuffed and shackled in a cell without daylight or furniture, (iii) deprived of sleep and fed poorly, (iv) beaten with sticks, a piece of tyre on a handle and electric wire and further that (v) on each of days 7, 9 and 11 his captors had removed one fingernail from his left hand by use of pliers. On one occasion only during his year of captivity, he said that he had been seen and questioned by British officers; that, he said, was on day 12.
>
> 15. There was no suggestion that the British officers had ill-treated him in any way, nor that their questions had been other than courteous, nor that he had said anything to them that he did not wish to say. He said that he had complained to them about his treatment, although he had not mentioned his fingernails; on enquiry, the reason he offered for not doing so was that he said he still had bandages on his hand and he assumed that everyone

> would have known what was being done to him. But the judge was invited to stay the prosecution on the grounds that the British authorities were complicit in the torture of Rangzieb, in that they had condoned it, indeed had effectively "outsourced" it to a foreign State. Additionally, the judge was asked to stay the prosecution on the grounds that the British authorities had connived in Rangzieb's unlawful return to the UK."

39. He explained at [16] that the Court had reviewed the Judge's decision and found "it was reached on the basis of proper material and the exercise of his judgment is unimpeachable". Like the Judge, the Court heard a part of the argument on the appeal in camera, although it was able to give its judgment in open court.

40. At [17], Hughes LJ held that there were no grounds for not accepting the Judge's findings of fact:

> "The judge accepted point (i) of Rangzieb's evidence. There was ample support for his account that his initial detention prior to production in court (or at least prior to his case being put before the court in his absence if that had occurred) had been unlawful by Pakistani law. He also accepted that Rangzieb was held in the conditions asserted, that is to say he accepted point (ii), and he accepted that he may have been deprived of sleep deliberately."

41. The Court considered in some detail the Judge's conclusions on the allegation that the Pakistani authorities had pulled out three of the claimant's fingernails with pilers. He concluded at [19]:

> "The combination of these independent pieces of evidence, together with some evidence perforce heard in camera, led the judge to conclude that Rangzieb was not telling the truth when he asserted that the nails had been pulled out before the occasion when he said he had been visited by British officers. Nor did the judge believe Rangzieb's evidence of beatings or of any physical injury, at least in the early days of captivity prior to any visit by British officers. What had happened to Rangzieb's fingernails could not reliably be determined. The judge left open the possibility that he may have suffered fingernail removal much later on, some months after any visit by British officers, but that was not the period on which the voire dire was focussed."

42. At [20], Hughes LJ dealt with the allegation of outsourcing torture:

> "The judge expressly rejected the suggestion of outsourcing torture by British authorities; there was, he found, simply no evidence that they had assisted or encouraged the Pakistani detainers to detain him unlawfully or to ill-treat him in any way, whether amounting to torture or not. Further, he found that no part of any product of questioning in Pakistan (by anyone) was relied on in the trial before the judge, nor had the prosecution case against Rangzieb or Habib been informed by any material

> emanating from such questioning. At the request of the appellants we have reviewed his findings of fact. We are quite satisfied that there are no grounds for impugning them. We have also looked, at the request of the appellants, at some additional material on the basis of which it is contended that questions asked of Rangzieb when in Pakistan informed actions in relation to other suspects. Whether that is so or not, it does not affect the judge's conclusions that there was simply no connection between Rangzieb's questioning in Pakistan and this trial."

43. The conclusion on the allegations of ill-treatment is at [21]:

> "21. Therefore the result of the judge's enquiry was that torture had not been demonstrated to have occurred, and had been demonstrated not to have occurred before the sole occasion when Rangzieb said he had been seen by British officers. Even if it had occurred later, it had no impact direct or indirect upon the trial."

44. Hughes LJ then considered the test the Judge applied in determining the application before him that the prosecution was an abuse of the process of the Court. Hughes LJ set out the challenge to the test adopted by the Judge at [23]:

> "23. In this appeal, the critical submission made on Rangzieb's behalf by Mr Bennathan QC is that the judge applied the wrong test and ought to have stayed this prosecution. He should have done so, it is submitted, on either or both of two grounds:
>
> a) the UK authorities were complicit in an unlawful rendition of Rangzieb to this country; what occurred under the form of deportation was in fact a disguised extradition; and/or
>
> b) the prosecution was tainted by torture in which the UK authorities were complicit."

45. The Court rejected the first limb of that challenge and held at [25] that it was clear that there had been no unlawful rendition. As to the second limb, Hughes LJ set out the argument advanced on the claimant's behalf:

> "i) The prohibition upon torture is an entrenched part of public international law binding all nations.
>
> ii) This international law prohibition extends not only to the practice of torture by a State, but also to complicity by State A in torture by State B.
>
> iii) Such complicity is demonstrated (inter alia) where State A has any settled practice of information- or intelligence-sharing with State B which is known or believed to use torture.
>
> iv) Wherever such complicity by settled practice is demonstrated and information has been shared in respect of a man prosecuted in England who has been interrogated in State B

> under conditions involving torture, there is a sufficient connection between the complicity and the trial for it to be right to stay the prosecution, whether or not the trial will involve any use of the product of any interrogation under torture, and whether or not any information derived from the torture is to be used in, or otherwise underlies, the trial.
>
> v) The judge therefore applied the wrong test; had he applied the correct one, he ought to have stayed this prosecution."

46. Between [27] and [48] the Court considered those arguments. At [27], Hughes LJ accepted Step 1 was accurate. The remainder of the argument was rejected in the subsequent paragraphs. Notably at [40-41] Hughes LJ said:

> "40. Torture is wrong. If it had occurred there could be no excuse for it, not even if Rangzieb was a suspected terrorist who might kill people. But the question was not whether it is wrong, but what consequences flow from it if it occurred. Mr Bennathan rightly accepted before us that it is not, and cannot be, the law that every act of torture has the consequence that the tortured person becomes immune from prosecution in every country and for all time, whatever crime he may commit. He contended that there must be a connection between the torture and the prosecution. The issue is the nature of the connection. For the reasons given, we are satisfied that the necessary connection exists where the torture has an impact on the trial, but not otherwise. Even if there had been torture whilst Rangzieb was in Pakistan, it had no bearing on the trial and there was no reason why the question of whether or not he was guilty of an antecedent crime in England should not be decided according to law.
>
> 41. Whilst that is sufficient to resolve this aspect of the appeal, we should record that it is not possible to treat as established law the extended concept of "complicity in torture" which is an essential plank of the appellant's argument at steps (iii) and (iv)."

47. The "extended concept of complicity" was advanced by the Claimant's counsel by reference to reports of the UN Special Rapporteur and the Joint Parliamentary Committee on Human Rights. That argument was addressed at [43] onwards. At [48] Hughes LJ concluded:

> "The wider concepts of complicity advanced in these two documents are not based upon either treaty or customary law, which are the two principal sources of public international law as stated in Article 38 of the Statute of the International Court of Justice, nor are they founded upon any decision of an international tribunal. They certainly represent significant extensions to the Torture Convention. Nor can it be said that they represent general principles of law recognised by civilised nations, a further recognised source of public international law. They may or may not be desirable developments (on that,

> opinions amongst States clearly differ), but it is impossible to say that they have at present the necessary general international acceptance amongst States to have achieved the status of binding law, still less of entrenched ius cogens. So far as an English court is concerned, they are also contrary to the opinions of the House of Lords in its judicial capacity in A v Home Secretary (No 2)."

48. For those reasons, the CACD concluded that "the judge was right to refuse to stay the prosecution against Rangzieb" and his appeal was dismissed.

The Amended Particulars of Claim

49. The consequences of the court orders, described above, is that those acting for the Claimant in the civil proceedings obtained access to the unredacted ruling of Saunders J, the materials disclosed by the CPS to the Defendant in the criminal proceedings and the transcripts and written submissions which referred to *in camera* material. In the light of that disclosure, those acting for the Claimant drafted Amended Particulars of Claim (dated 24 July 2020) which make significant changes to the case first pleaded in January 2012.

50. No formal application to amend was made before me. Sensibly, however, the Defendants do not object to the Claimant's wish to rely on the proposed amendments and I have considered the Defendant's application in the light of the proposed amendments to the Particulars of Claim.

51. The Amended Particulars of Claim, like the Particulars of Claim before it, is a long, discursive document containing an amalgam of evidence, concessions and averments. It provides no precise analysis of the case against the different defendants; that is particularly regrettable as regards the Sixth Defendant whose position is materially different from the other five and who is separately represented. It is not easy to identify the precise allegations being advanced in respect of any individual defendant.

52. The Claimant alleges that he was subjected to torture and inhuman and degrading torture at the hands of the Pakistani authorities in the first two weeks of his detention in Pakistan in August and September 2006. He says that included physical beatings, beatings with a tyre fixed to a stick, beatings with a piece of wire, forcible removal of fingernails, slaps to the face, sleep deprivation, minimal rations, constant hand-cuffing, use of hoods and blindfolds, threats to his life, and being held incommunicado. He says he was made to lie handcuffed on the bare floor of an underground cell in extreme heat without air conditioning, furniture or daylight.

53. He accepts, in the Amended Particulars of Claim that he cannot go behind the ruling of Saunders J as regards the first four of the incidents summarised above.

54. The Claimant further alleges, that in the period from September 2006 to September 2007, he was subject to arbitrary detention during which period he was denied consular access.

55. The Claimant alleges that each of the six Defendants are liable, for the treatment summarised in the preceding paragraphs, as a result of the complicity of officers of one or more of them in that treatment in the following respects:

(i) Facilitating his arrest on about 20 August 2006 in Haripur, Pakistan.
(ii) Complicity in his torture, ill-treatment and arbitrary detention by (i) supplying questions to be asked after he was detained in Pakistan; (ii) visiting him in non-official places of detention in Pakistan in order to interrogate him; (iii) supplying intelligence to the US authorities that it was known would be used by US interrogators to question him.
(iii) Failing to obtain ex post facto assurances about access to court or lawyers when it was known or ought to have been known that he was exposed to a serious risk of torture, ill-treatment and arbitrary detention.

56. He alleges that by reason of that complicity "the said officers" committed the following torts against the claimant: false imprisonment; assault and battery; misfeasance in public office; negligence; and conspiracy. Each of those alleged torts is founded on the same allegations of complicity in the ill treatment described above.

The Abuse of Process jurisdiction – Hunter v Chief Constable of the West Midlands Police

57. CPR 3.4 (2) provides that:

> "The court may strike out a statement of case if it appears to the court…
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceeding."

58. CPR 3.4(2) is the successor provision to RSC 18 r19. It was on that provision that the Chief Constable relied in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, the decision of the House of Lords which is the foundation of this jurisdiction.

59. *Hunter* concerned the trial of those accused of the Birmingham pub bombings. At the trial, the defendants challenged the admissibility of their confessions on the grounds that they had been induced by violence and threats. On the trial-within-a-trial, the Judge, Bridge J, as he then was, was satisfied that the confessions were voluntary and ruled them admissible. The defendants challenged their voluntariness again before the jury, and the Judge directed the jury that if the allegations of violence of threats might reasonably be true, the confessions were worthless. The defendants were convicted and sentenced to life imprisonment. They then issued proceedings against the police and the Home Office, claiming damages for the assaults which they had alleged at their trial.

60. In a speech with which the other members of the judicial committee agreed, Lord Diplock described the case (at p536C) as one concerning:

> "abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse

> of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

61. Three points of importance emerge from that passage:

(i) The fundamental principle is that the Court is entitled to prevent misuse of its procedure in a way which would be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute;
(ii) The House was not laying down precise limits to the circumstances in which that inherent power might be deployed;
(iii) What is required by a court is an exercise of judgment rather than an exercise of discretion.

62. Having considered the facts, at p541B, Lord Diplock set out the particular abuse at which the exercise of the power was directed in the case before the House:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made. "

63. At 542D, Lord Diplock considered the significance of the fact that the central question had been decided both in the voir dire and by the jury:

> "In the instant case the relevant final decision by a competent court in which the identical question sought to be raised has been already decided is the ruling of Bridge J., on the voir dire in the murder trial, that Hunter's confession was admissible … The fact that the whole matter of the circumstances in which the confession was obtained was gone into a second time before the jury and that the jury, in view of the judge's direction to them, must clearly also have been satisfied beyond reasonable doubt that Hunter's account of the assaults upon him by the police was a fabrication does not affect the finality of the judge's ruling, though it would exacerbate the public scandal to the administration of justice that would be involved if Hunter, by changing the form of the proceedings to a civil action, were to be permitted to set up in that action the same case that must have been decided against him not only once but twice…"

64. From those passages it can be seen that where a final decision had been made by a criminal court of competent jurisdiction it is a general rule of public policy that the use

of a civil action to initiate a collateral attack on that decision is an abuse of the process of the Court.

65. Lord Diplock had made clear (at 541H) that a collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms:

> "It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the instant case. But the principle applicable is, in my view, simply and clearly stated in those passages from the judgment of A. L. Smith L.J. in *Stephenson v. Garnett* [1898] 1 Q.B. 677, 680-681 and the speech of Lord Halsbury L.C. in *Reichel v. Magrath* (1889) 14 App. Cas. 665, 668 which are cited by Goff L.J. in his judgment in the instant case. I need only repeat an extract from the passage which he cites from the judgment of A. L. Smith L.J.:
>
> ".. . the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court.""
>
> The passage from Lord Halsbury's speech deserves repetition here in full:
>
> ".. . I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."

66. At p545A in his speech in *Hunter*, Lord Diplock considered the circumstances in which fresh evidence might be admissible in proceedings such as these. He said:

> "There remains to be considered the circumstances in which the existence at the commencement of the civil action of "fresh evidence" obtained since the criminal trial and the probative weight of such evidence justify making an exception to the general rule of public policy that the use of civil actions to initiate collateral attacks on final decisions against the intending plaintiff by criminal courts of competent jurisdiction should be treated as an abuse of the process of the court. I can deal with this very shortly, for I find myself in full agreement with the judgment of Goff L.J. He points out that on this aspect of the case Hunter and the other Birmingham Bombers fail in limine because the so-called " fresh evidence " on which they seek to rely in the civil action was available at the trial or could by reasonable diligence have been obtained then. He examines also the two suggested tests as to the character of fresh evidence which would justify departing from the general policy by permitting the plaintiff to challenge a previous final decision against him by a court of competent jurisdiction, and he adopts as the proper test that laid down by Earl Cairns L.C. in *Phosphate*

> *Sewage Co. Ltd. v. Molleson* (1879) 4 App.Cas. 801, 814, namely that the new evidence must be such as "entirely changes the aspect of the case." This is perhaps a little stronger than that suggested by Denning L.J. in *Ladd v. Marshall* [1954] 1 W.L.R. 1489, 1491 as justifying the reception of fresh evidence by the Court of Appeal in a civil action, viz., that the evidence".. . would probably have an important influence on the result of the case, though it need not be decisive..." The latter test, however, is applicable where the proper course to upset the decision of a court of first instance is being taken, that is to say, by appealing to a court with jurisdiction to hear appeals from the first-instance court and whose procedure, like that of the Court of Appeal (Civil Division), is by way of a rehearing. I agree with Goff L.J. that in the case of collateral attack in a court of coordinate jurisdiction the more rigorous test laid down by Earl Cairns is appropriate."

67. In those circumstances, two issues arise on this application. First, do these proceedings amount to an illegitimate collateral attack on the decisions of the criminal courts? Second, if they do, ought the Defendants' applications be refused because fresh evidence is available and admissible which entirely "changes the aspect of the case". I address each in turn.

The Competing Contentions on *Hunter*

68. All parties provided detailed and helpful skeleton arguments.

69. On behalf of the First to Fifth Defendants, Mr Phillips argued that the case that has now been pleaded amounted to a collateral attack on a previous final decision adverse to the Claimant of a court of competent jurisdiction. He says that the essence of the Claimant's case is that the Defendants knowingly and deliberately exposed the Claimant to the risk of unlawful detention and mistreatment; they were accordingly complicit in that unlawful detention and mistreatment.

70. Mr Phillips argues that to succeed in the present claim the Claimant must establish core allegations of fact which were the basis of his abuse of process argument in previous criminal proceedings and which were rejected, after full consideration, by both Saunders J and the CACD. He refers to the House of Lords' decision in *Arthur JS Hall and Co v Simons* [2002] AC 615 and the Appeal decision in *Kamoka v Security Service and Ors* [2017] EWCA Civ 1665. He relies heavily on the Court of Appeal's decision in *Amin v Director General of the Security Service and Ors* [2015] EWCA Civ 653, which he says is remarkably similar on its facts to the present case. I will consider those authorities further below.

71. Mr Phillips says that each cause of action advanced by the Claimant requires the claimant "to establish the basic premise of his claim", namely the Defendants' complicity in his mistreatment, a premise rejected by the criminal court.

72. Ms Whyte, for the Sixth Defendant, adopts Mr Phillips' arguments and adds discrete submissions on points directed towards GMP. She says that GMP's liability is said to arise from its complicity in the torts of individual Security Service and Secret

Intelligence Service officers committed in the purported performance of their duties as well as in the act and omissions of its own officers. She complains about vagueness in the pleading of the case against her client and the Claimant's failure to distinguish between Defendants when asserting complicity.

73. She says that paragraphs 12 and 14 of the Amended Particulars of Claim alleged that the Claimant was allowed to travel to Pakistan in 2006 despite the fact that he was already suspected of terrorist activity by GMP. She points out that the Judge made findings to the effect that the UK authorities had not encouraged or assisted in the Claimant's unlawful detention and ill treatment and argues that he is simply seeking to relitigate these issues.

74. She says that the essential allegations of fact made in the particulars of claim were set out in the Defence Case Statement in the criminal proceedings. She points out that Saunders J rejected the suggestions that the Claimant was unlawfully detained with the encouragement, assistance or complicity of the UK. She says the Judge also rejected the suggestion that the Claimant was subject to ill treatment as a result of the encouragement, assistance or complicity of the UK.

75. In response, Mr Hermer says it is important, first, to identify precisely the test governing the Defendants' applications. It is, he says, whether the determination of the Claimant's pleaded case in substance undermines his convictions. He says, second, that that test cannot be satisfied when, as here, the Claimant's primary case that the Defendant facilitated his mistreatment was held to be irrelevant to the criminal proceedings. That, he says, is why the abuse argument before Saunders J failed. That being so, argues Mr Hermer, there is nothing in the pleaded case which could cast doubt on the safety of the conviction.

76. Mr Hermer says that the proposed amendments to the Particulars of Claim have been made to take account of the minor respects in which Saunders J's ruling determined particular issues. He says he does not seek to go behind the finding that the Claimant showed no sign of injury when he claims he was visited by officers of the First or Second Defendants, nor the finding that he had not been tortured or sustained injury prior to any visit of the British officers. But that, he argues, leaves undetermined all the other allegations of ill treatment.

Discussion: The application of the Hunter principle

77. *Hunter* establishes that the essential consideration for the Court on an application of this sort is whether it would be manifestly unfair for a party to be exposed to the second claim, and whether permitting the new claim to proceed would bring the administration of justice into disrepute.

78. *Hunter* has been the subject of consideration in a number of Court of Appeal and House of Lords' authorities.

79. It was considered by the Court of Appeal in *Walpole v Partridge & Wilson* [1994] QB 106, in which the plaintiff was convicted by justices of an offence of obstructing a vet in the execution of his duty. His appeal to the Crown Court was dismissed. Four months later he retained solicitors to advise him on the merits of an appeal from the Crown Court. He subsequently issued a writ alleging negligence in the carrying out of their

instructions, and failure, despite counsel's advice, to lodge an appeal by way of case stated. The firm applied for the claim to be struck out as an abuse of process, as amounting to a collateral attack upon a final decision of a court. It is to be noted that would have been the point of law which formed the ground of appeal. Furthermore, the Court held that the right of appeal was part and parcel of the criminal process.

80. The Court of Appeal held that although the initiation of proceedings which amounted to a collateral attack on a final decision of a court of competent jurisdiction which the plaintiff had had a full opportunity to contest might be an abuse of the process of the Court, the bringing of an action in which the plaintiff alleged that his legal adviser had failed in breach of duty to advance in earlier proceedings an appeal on a point of law which might have caused a decision adverse to the plaintiff to be set aside was not an abuse of process since it did not amount to re-litigation of an issue decided in the earlier proceedings. It was held that there was no absolute rule that an unreversed conviction was a bar to such a claim; and that, accordingly, since it was conceded that the point of law which the plaintiff would have advanced on appeal from the Crown Court was arguable and the Defendants had in any event failed to show that the decision of the Crown Court was a final decision given the possibility of appeal, it would be manifestly unfair to deny him the opportunity to have his case tried on its merits, and the action should be allowed to proceed to trial.

81. At 1I6A, Ralph Gibson LJ said that:

> "The decision of their Lordships in *Hunter's case*, however, was, in my judgment, not that the initiation of such proceedings is necessarily an abuse of process but that it may be. The question whether it is so clearly an abuse of process that the court must, or may, strike out the proceedings before trial must be answered having regard to the evidence before the court on the application to strike out. There are, in short, and at least, exceptions to the principle."

82. It follows from *Walpole* that commencing civil proceedings which amount to a collateral challenge to an earlier criminal decision is not automatically an abuse of process, but it may be so.

83. I received detailed submissions on four other cases where *Hunter* has been applied.

84. First, in *Smith v Linskills* [1996] 1 WLR 763, the plaintiff had been convicted, on his plea, of aggravated burglary at the Crown Court. His application for leave to appeal against his conviction was refused on paper and, on its renewal, by the CACD. After his release from prison he began proceedings against his solicitor in the criminal proceedings for negligence and breach of contract, alleging that his negligent preparation of the defence had led to the conviction. On the defendant's application the action was struck out by the District Judge as an abuse of process but, on the plaintiffs appeal, trial was ordered of a preliminary point of law, namely, whether, if the plaintiff had been convicted because of the defendant's negligence, the plaintiffs case was sustainable in law. The Judge, having examined the fresh evidence on which the plaintiff sought to rely, concluded that the action fell within the rule precluding the use of civil proceedings to initiate a collateral attack on a final decision by a criminal court

of competent jurisdiction. He accordingly determined the preliminary issue in the defendant's favour.

85. At 768H, Sir Thomas Bingham MR said:

> "(Counsel) for Mr. Smith, argues that the issue in the present proceedings is not the same issue as was decided in the Crown Court. To an extent this is so. In the Crown Court the question was whether, applying the criminal standard of proof, Mr. Smith was shown to have committed the crime with which he was charged. In the present proceedings the issue is whether his former solicitor handled his defence negligently. It is, however, plain that the thrust of his case in these proceedings is that if his criminal defence had been handled with proper care he would not, and should not, have been convicted. Thus the soundness or otherwise of his criminal conviction is an issue at the heart of these proceedings. Were he to recover substantial damages, it could only be on the basis that he should not have been convicted. Even if he were to establish negligence, he could recover no more than nominal damages at best if the court were to conclude that even if his case had been handled with proper care he would still have been convicted. It follows, in our judgment, that these " proceedings do involve a collateral attack upon the decision of the Crown Court. We understand Lord Diplock, by "collateral," to have meant an attack not made in the proceedings which gave rise to the decision which it is sought to impugn; not, in other words, an attack made by way of appeal in the earlier proceedings themselves. It was not, as we understand, the intention of the House in the Hunter case to lay down an inflexible rule to be applied willy-nilly to all cases which might arguably be said to fall within it."

86. It follows from those observations that the rule is not an inflexible one and that the issue in the earlier case does not have to be the same as that in the latter to justify a conclusion that the latter is an abuse. What matters is a comparison of the "thrust" of the two cases. If the soundness of the criminal conviction is a central issue in the civil case, that would be an example of the type of abuse which would justify the exercise of this jurisdiction.

87. Second, in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, one of the principal reasons why the Court of Appeal and then the House of Lords decided it was no longer necessary as a matter of policy to maintain the immunity of advocates from professional negligence actions was the power (perhaps more accurately, the duty on the court) to prevent abuse of process arising from re-litigation.

88. Giving the judgment of the Court of Appeal, Lord Bingham CJ said, at [38]:

> "As recognised by the Court of Appeal in the *Walpole case* [1994] QB 106, 116 and *Smith v Linskills* … the House of Lords did not decide in the *Hunter* case that the initiation of later proceedings collaterally challenging an earlier judgment is necessarily an abuse of process but that it may be. In considering whether, in any given case, later proceedings do constitute an abusive collateral

> challenge to an earlier subsisting judgment it is always necessary to consider with care (1) the nature and effect of the earlier judgment, (2) the nature and basis of the claim made in the later proceedings, and (3) any grounds relied on to justify the collateral challenge (if it is found to be such). In considering (1), the nature and effect of the earlier judgment, it would in our view be fallacious to treat all judgments as of equal weight. We are satisfied that for reasons given in the *Hunter* case and *Smith v Linskills*, a collateral challenge in civil proceedings to a subsisting criminal conviction, particularly a conviction upheld or not challenged on appeal, and whether the defendant was convicted on his own admission or on the verdict of a court or jury, must always be the hardest to justify. Nothing short of fresh evidence satisfying the *Phosphate Sewage* test will ordinarily suffice."

89. In the judgments of the House of Lords, at 684H, Lord Browne-Wilkinson said:

> "Therefore, if the removal of the advocate's immunity in criminal cases would produce these conflicting decisions, I would have no doubt that the public interest demanded that the advocate's immunity be preserved.
>
> But in my judgment the law has already provided a solution where later proceedings are brought which directly or indirectly challenge the correctness of a criminal conviction. *Hunter* … establishes that the court can strike out as an abuse of process the second action in which the plaintiff seeks to re-litigate issues decided against him in earlier proceedings if such re-litigation would be manifestly unfair to the defendant or would bring the administration of justice into disrepute….in my judgment where the later civil action must, in order to succeed, establish that a subsisting conviction is wrong, in the overwhelming majority of cases to permit the action to continue would bring the administration of justice into disrepute. Save in truly exceptional circumstances, the only permissible challenge to a criminal conviction is by way of appeal."

90. At 702H, Lord Hoffman said:

> "I, too, would not wish to be taken as saying anything to confine the power within categories. But I agree with the principles upon which Lord Diplock said that the power should be exercised: in cases in which relitigation of an issue previously decided would be "manifestly unfair" to a party or would bring the administration of justice into disrepute. It is true that Lord Diplock said later in his speech, at p 541, that the abuse of process exemplified by the facts of the case was: "the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made." But I do not think that he meant

> that every case falling within this description was an abuse of process or even that there was a presumption to this effect which required the plaintiff to bring himself within some exception. That would be to adopt a scheme of categorisation which Lord Diplock deplored. As I shall explain, I think it is possible to make some generalisations about criminal proceedings. But each case depends upon an application of the fundamental principles. I think that Ralph Gibson LJ was right when, after quoting this passage, he said in *Walpole v Partridge & Wilson* [1994] QB 106, II6 A that *Hunter's case* [1982] AC 529 decides "not that the initiation of such proceedings is necessarily an abuse of process but that it may be"."

91. From *Arthur JS Hall & Co* I extract the following principles:

(1) It is always necessary to consider the nature and effect of the earlier judgment, the nature and basis of the claim made in the later proceedings, and any grounds relied on to justify the collateral challenge.
(2) The crucial issue is whether the issue sought to be raised in the civil claim has been already decided by a competent court in the criminal proceedings. That will be so where the later civil action must, in order to succeed, establish that a subsisting conviction is wrong.

92. The third case is the one closest on the facts to the present case and it will be necessary to consider it at a little length. *Amin v Director General of the Security Services and others* [2015] EWCA Civ 653 was an appeal against an order of Irwin J. striking out the Claimant's claim against the same parties as appear in the present case for damages for personal injury caused by ill-treatment during his detention and interrogation by the Inter-Services Intelligence Agency in Pakistan. Lord Justice Moore-Bick, Vice President of the Court of Appeal, Civil Division ("the VP") gave a judgment with which Tomlinson and Underhill LJJ agreed. He explained the background at [3-4]:

> "In the course of his interviews the appellant said that during his detention in Pakistan he had been tortured by agents of ISI with the complicity of officers of the Security Service and the Secret Intelligence Service ("British officers"). He says that as a result he made a number of false confessions. It is not alleged that anything he had said under interrogation in Pakistan formed any part of the prosecution case against him, which was based principally on the confessions he had made in the course of his interviews in this country. However, at the trial the appellant contended that as a result of his experiences in Pakistan he had become extremely vulnerable to questioning and psychologically unable to resist giving answers which he thought the interviewing officers wanted. He said that as a result much of what he had said in his interviews was false.
>
> Before the trial began the appellant applied to have the indictment stayed on the grounds that the complicity of the British officers in his interrogation and torture in Pakistan and his subsequent removal to London amounted to an abuse of

> executive power of sufficient gravity to render the prosecution an abuse of process."

93. The VP said that the question before Irwin J, and then before the Court of Appeal:

> "was not whether the appellant was tortured while in detention in Pakistan or, if so, whether British officials were complicit in that torture. Rather, it is whether he is entitled to pursue those allegations again in these proceedings despite the fact that they have already been considered and rejected both in the course of his trial in the Crown Court and on his subsequent appeal."

94. The VP referred to *Hunter, Walpole v Partridge and Wilson, Smith v Linskills, Arthur JS Hall* and other authorities, and then considered the findings of Sir Michael Astill, the trial judge in the criminal proceedings. He summarised those finding as follows:

i) the appellant surrendered voluntarily to ISI, but at some point, was detained against his will;
ii) the appellant was threatened by the Pakistani interrogators and was subjected to treatment of a kind that would constitute oppression for the purposes of section 76 of PACE, but he was not tortured and did not suffer ill-treatment of the severity he had described;
iii) there is no evidence that British officers were complicit in his detention, the circumstances in which he was detained or the manner of his treatment;
iv) the United Kingdom authorities were not complicit in the appellant's return to London; and
v) the appellant's ability to give truthful answers to questions put to him in interviews in this country was not undermined by his experiences in Pakistan.

95. He compared those finding with the allegations in the Particulars of Claim which he summarised (at [32-33]). Those allegations were lengthy and markedly wider in range than the issue determined by the trial judge. They included that during his detention he was hooded and handcuffed and placed in a room from which he could hear the screams of other prisoners being tortured; that he was subjected to dazzling light which he could not control and was prevented from sleeping; that he was beaten with two rubber lashes on his head, back, shoulders, arms and thighs and subjected to aggressive swearing and accusations of lying; that he was subjected to violent interrogations over many months, during which he was beaten with lashes, slapped and punched, that he was threatened with being sent to Guantanamo Bay, with being skinned alive, and with being sexually assaulted with the wooden handle of a lash and that he was kept in a small, dark cell with no furniture other than a bed roll in extremes of heat and cold, with bad food and no opportunity for exercise.

96. As the VP notes at [34], the appellant alleged that British officers were well aware that ISI detained suspects unlawfully and subjected them to torture of the kind described, but despite that they had involved themselves in his detention and ill-treatment in a number of ways including

i) by failing to seek any protection for him and by failing to procure, or by actively preventing, consular access to him, which would have led to his early release;
ii) by providing information and suggesting lines of questioning to the Pakistani interrogators;
iii) by participating in several interviews in the presence of a Pakistani interrogator at times when the appellant's legs were shackled;
iv) by collaborating closely with the Pakistani interrogators (as evidenced, he says, by the fact that on one occasion they questioned him in premises displaying the flags of both the United Kingdom and Pakistan), sharing information and pursuing lines of enquiry which they knew the Pakistani interrogators had initiated;
v) by suggesting lines of questioning to United States agents for use in their joint interrogations with Pakistani agents, even after becoming aware that grave threats had been made against the appellant on such occasions, and by conducting one joint interrogation with United States agents.

97. In dismissing the appeal, the VP said this at [44-46]:

> "44. I agree that the question whether subsequent proceedings amount to an abuse of process is to be determined objectively ... However, I am unable to accept that in cases where the former decision was made in criminal proceedings it is appropriate simply to compare the particular issues, whether of fact or law, which arise in the subsequent proceedings with those that arose in the former... Even in cases where the former decision was made in civil proceedings the approach of the courts is not as mechanistic as that, requiring, as Lord Bingham said in *Johnson v Gore Wood*, a broad merits-based approach. If the former decision was made in criminal proceedings leading to a conviction, it is proper to focus attention on the question whether the later proceedings, if successful, would in substance undermine the conviction. The differences between civil and criminal proceedings, to which Lord Hoffmann drew attention in *Arthur J S Hall & Co v Simons*, explain the difference in approach. Accordingly, although I accept that many of the individual issues to which the particulars of claim give rise are different from those which the judge had to decide on the voire dire, I consider that it is necessary to take a broader view of the matter.
>
> 45. (Counsel for the Claimant) submitted that Sir Michael Astill's findings, especially his finding that the appellant was subjected to treatment that amounted to oppression, are not sufficiently explicit to exclude ill-treatment of a relatively modest kind that would be sufficient to support liability in tort. The appellant should therefore be allowed to pursue his claim so that more detailed findings can be made. However, in my view that is to view the matter too narrowly. Two central allegations

lie at the heart of the present claim: (i) that the appellant was detained against his will and tortured (no lesser word will do); and (ii) that British officers and the respondents were in one way or another complicit in his detention and torture by procuring it, encouraging it or failing to take steps that would have prevented or curtailed it. However one defines "complicity" in the context of the different causes of action, unless both allegations are established the claim will fail. As Irwin J. pointed out, save for the claim for false imprisonment the appellant must prove ill-treatment and complicity in order to found a claim for damages; and even in relation to false imprisonment he must establish complicity on the part of the respondents or those for whom they are responsible. In order to determine the applications before him it was necessary for the judge to make findings about the detention of the appellant and the treatment to which he had been subjected. The judge accepted that the appellant had been detained and subjected to some threats, but found that he had not been tortured. He also found that British officers had not been complicit in the detention of the appellant. As a result, the indictment was not stayed, the trial proceeded, the appellant's confessions (which constituted almost the entirety of the evidence against him) were admitted in evidence, his attempt to undermine them by giving evidence of ill-treatment in Pakistan was rejected by the jury and he was convicted.

46. Viewed objectively, whatever the appellant's actual motivation, his attempt to establish that he was detained and tortured in Pakistan with the complicity of British officers does in my opinion constitute a collateral attack on his conviction. It is unnecessary and inappropriate for this purpose to debate the nuances of the judge's findings in the light of the disclosure material. What matters is whether the essential elements of the case which the appellant now seeks to pursue were adjudicated upon. If his evidence that he had been tortured with the complicity of the British officers had been accepted by the judge it is possible, perhaps even likely, that the judge would have been satisfied on the balance of probabilities that British officers had also been complicit in returning him to the United Kingdom. In those circumstances the court might have concluded, as in *R v Horseferry Road Magistrates' Court Ex parte Bennett* [1994] A.C. 42 and *R v Mullen* [1999] 2 Cr. App. R. 143, that the indictment should be stayed. Similarly, if the appellant had persuaded the judge that he had been, or might have been, tortured in Pakistan in the manner he described, the judge would have had to consider whether he could be sure that the confessions were not rendered unreliable as a result, since, if he could not be sure of that, he would have had to rule them inadmissible. Accordingly, although success in the current proceedings would not lead to the conclusion that the outcome of the trial must inevitably have been different, it would seriously

> undermine the reliability of both rulings and thereby the safety of the appellant's conviction. In my view that is sufficient to render the present proceedings an abuse of process in accordance with the principle in Hunter's case. That is all the more so given that the appellant has already had an opportunity to challenge the judge's ruling on appeal and has done so."

98. At [49] he said:

> "The judge rejected the submission that the concessions made by the Crown amounted to an acceptance of complicity in unlawful detention and ill-treatment of the appellant and in my view he was right to do so. I accept that, because the appellant now seeks to establish liability on the part of the respondents in respect of acts committed by persons other than themselves, these proceedings inevitably give rise to issues of law which did not arise in the criminal proceedings, for example, those relating to the principles of joint liability in tort. However, for the reasons I have given I do not think that provides an answer to the respondents' argument. What ultimately matters is whether the present proceedings are properly to be viewed as constituting an impermissible collateral challenge to the appellant's conviction; or, to put it more bluntly, whether it is an improper use of the court's process for the appellant to attempt in these proceedings to obtain findings about the circumstances of his detention and alleged ill-treatment which are contrary to those made in the criminal proceedings...In my view it was correct, because the allegations of detention and torture and of the complicity of British officers in them were fundamental to the applications made and rejected in the criminal proceedings, just as they are fundamental to the present civil proceedings. The question which the judge posed in paragraph 65 of his judgment as to whether, if the action succeeded, there was anything to prevent the appellant from claiming that his conviction was tainted by mistreatment in which British officers were complicit, is properly to be regarded as part of his reasoning rather than as a test for the existence of abuse of process."

99. I draw the following conclusions of principle from those passages:

(i) The question whether subsequent proceedings amount to an abuse of process is to be determined objectively [44]

(ii) Where the former decision was made in criminal proceedings it is not appropriate simply to compare the particular issues, whether of fact or law, which arise in the subsequent proceedings with those that arose in the former [44];

(iii) It is necessary to take a broader view than simply asking whether the individual issues to which the Particulars of Claim give rise are different from those which the Judge had to decide on the voir dire [44];

(iv) It is necessary to consider the central allegations in the latter action with the findings made by the trial judge [45]; what matters is whether the

essential elements of the case which the Applicant now seeks to pursue were adjudicated upon [46];

(v) It is not necessary that success in the current proceedings would mean that the outcome of the trial ought to have been different, if it would nonetheless seriously undermine the rulings at the criminal trial and thereby the safety of the conviction [46];

(vi) What matters is whether the present claim is an improper use of the Court's process by the applicant to seek findings about the circumstances of his detention and alleged ill-treatment which are contrary to those made in the criminal trial [49].

100. Finally, I was taken to *Kamoka v Security Services* [2017] EWCA Civ 1665, an appeal against a decision striking out the appellant's claims for damages for their unlawful detention pending deportation and for the unlawful use of control orders on the grounds of abuse of process. The appellants submitted that their claims, based on new evidence, were not an abuse of process because they were not an attack on the earlier decisions of SIAC. The Court of Appeal allowed the appeal holding that the Judge had erred in finding an abuse of process. The essence of an abuse of process was the mounting of a collateral attack upon a final decision in earlier proceedings. However, the claims by the first, third and fourth appellants could not be an abuse of process because they had never had their SIAC appeals heard, so it could not be said that they were harassing the respondents a second time.

101. This was factually a very different case from the present, but it is to be noted that the Court of Appeal cited *Amin* with approval (see for example [69]) and confirmed the essential nature of the *Hunter* principle. So, for example, at [58] Flaux LJ held:

> "Whilst it is important to emphasise the flexibility of the doctrine, one factor which will, in many cases, be indicative of an abuse of process is where the proceedings in question involve a collateral attack…on the decision in earlier proceedings. The most obvious example of this is the collateral attack on a criminal conviction in earlier proceedings, as in *Hunter* itself or *Amin* , but the abusiveness of a collateral attack is by no means limited to criminal convictions. "

102. Applying the principles emerging from all those authorities, I reach the following conclusions.

103. The mere fact that Mr Ahmed has commenced a civil action which covers some similar territory to that canvassed in the criminal proceedings does not necessarily entitle the Defendants to an order that the former is an abuse of the process of the Court. It is necessary instead to reach a judgment as to whether the same question or the same issues arise in both proceedings; in other words, whether the thrust of the claim in the one case goes to the heart of the other. In order to do that it is necessary to compare the nature and effect of the decisions in the criminal case with the nature and basis of the civil claim.

104. It was the conclusion of the CACD, both on reviewing Saunders J's decision and after considering material not before the Judge, that the Judge's conclusions were unimpeachable; that torture had not occurred before the one occasion when the

Claimant said he had been seen by British officers; that there was no evidence the British were out-sourcing torture; and that there was here no basis for a finding of complicity in torture.

105. At its heart, the civil claim consists of an allegation of complicity on the part of the British authorities in the unlawful detention, torture and ill-treatment of the Claimant. He alleges that he was subjected to torture and inhuman and degrading treatment at the hands of the Pakistani authorities in the first two weeks of his detention in Pakistan in August and September 2006. He alleges that, in the period from September 2006 to September 2007, he was subject to arbitrary detention during which period he was denied consular access. He says that the Defendants are liable for his torture, ill-treatment and arbitrary detention because they, or their officers, were complicit in those actions by supplying questions to the Pakistan authorities, visiting him in Pakistan in order to interrogate him; supplying intelligence to the US authorities and failing to obtain ex post facto assurances about his treatment and detention.

106. *A passage four paragraphs long is redacted and appears in the confidential annex.*

110. It is plain that the issues of fact and law that arise in the civil proceedings are different, wider and cover a longer period than those that attracted attention in the criminal proceedings. The focus of the criminal proceedings was inevitably different. There, the central issue was whether the matters of which complaint was made had any impact, direct or indirect, on the trial. But it is in cases where the challenge in subsequent proceedings is directed against decisions of the criminal courts that this Court will be most assiduous in considering whether to permit the civil case to proceed would bring the administration of justice into disrepute.

111. Following *Amin*, I must take a broader view than simply asking whether the issues raised by the particulars of claim are the same as those decided in the criminal proceedings. What matters is whether the essential elements of the case which the Claimant now seeks to pursue were adjudicated upon in the criminal trial. In my view, it is plain that they are.

112. In order to make good his application in the criminal proceedings, the Claimant set out to show three things; first that, as matter of fact, he had been subject to unlawful detention, ill-treatment and/or torture in Pakistan; second that the British authorities were complicit in that conduct; and third, that those events had an impact on his trial. He failed on the last two counts. The criminal court, and the CACD decided the central issue of British complicity in unlawful rendition and mistreatment against the claimant. The fact that they also found for the prosecution on the third issue, that the events had no impact on the criminal trial, in no way diminishes the importance and significance of their finding that the British authorities were not complicit in his ill-treatment.

113. In my view, the *Hunter* principle applies and to permit the present case to proceed would bring the administration of justice into disrepute. The civil action would amount to a collateral attack on the decisions of Saunders J and the CACD in the criminal proceedings.

114. It is no answer, in my judgment, to say that the criminal courts were concerned solely with the question whether the alleged ill-treatment would impact on the criminal trial; to get to the point of deciding that question the Crown Court and Court of Appeal had

first to decide whether there was complicity in wrong-doing of the type now alleged in the civil proceedings. The criminal court's findings that the allegations of ill-treatment would not impact upon the trial is *not* the obverse of the civil courts' requirement that those proceedings should not undermine the safety of the conviction. The prior issue in the criminal case was resolution of the factual question whether the mistreatment occurred and whether the British were complicit in that mistreatment. Those factual finding are sound in both contexts.

115. Nor is it an answer to show that there might be a difference as to the periods of ill-treatment, or the precise details of mistreatment or misconduct, or the intensity of mistreatment. The issues of complicity in wrongdoing that were fundamental to the applications made and rejected in the criminal proceedings are those that are fundamental to the present civil proceedings.

116. As was the case in *Amin,* it can be said that the trial judge's findings do not "necessarily exclude ill-treatment of a relatively modest kind that would be sufficient to support liability in tort." There are examples of such wrongdoing in both the OPEN and *in camera* material. But, as Moore-Bick LJ concluded in *Amin*, "that is to view the matter too narrowly". At the heart of the present claim are contentions that the Claimant was detained unlawfully, ill-treated and tortured, and that British officers were complicit in that conduct by procuring it, encouraging it or failing to take steps that would have prevented or curtailed it. That also was the position in the voir dire.

117. Nor does the Claimant improve his position by conceding in the Amended Particulars of Claim (albeit in somewhat qualified terms) that he cannot pursue in these proceedings those aspects of the claim advanced before the amendment that are frankly contradicted by the judgment of Saunders J. That attempt to massage the allegations against the Defendants does nothing to disguise the fact that the effect of the civil claim, were it successful, would undermine one of the essential foundations of the decision of the criminal court.

118. Nor does it matter precisely what the Claimant's motivation is in bringing the civil proceedings, whether it is to enable him to suggest that the conviction was unsafe or to recover damages. What matters is the effect that pursuing the civil claim would have on the criminal proceedings; in my judgment it is plain that the effect would be seriously to undermine the Judge's ruling and the verdict of the jury.

Fresh Evidence: The Competing Submissions

119. If his primary argument on the application of *Hunter* to the facts of the present case were to fail, Mr Hermer seeks to rely on fresh evidence which, he says, amply satisfies the *Phosphate* test referred to by Lord Diplock in *Hunter*. He says none of the material could, with reasonable diligence, have been obtained by the time of Saunders J's ruling or the judgment of the Court of Appeal. And he argues that taken together, that fresh evidence changes the aspect of the case as required by *Phosphate*.

120. He refers first to the findings outlined in the open version of the Intelligence and Security Committee of Parliament ("ISC") Report on Detainee Mistreatment and Rendition 2001-2010 published in June 2018. He refers, in particular, to a letter from the ISC to the Prime Minister dated 17 March 2009 concerning the unlawful detention and ill treatment of Binyam Mohamed.

121. Mr Hermer also refers to the detailed findings of the ISC report including its reference to:

i) 232 cases where it appears the UK personnel continued to supply questions or intelligence to liaison services after they knew or suspected (or should have suspected) that a detainee was or had been mistreated;

ii) 198 cases where UK personnel received intelligence liaison services obtained from detainees who they knew had been mistreated or should have suspected had been mistreated;

iii) findings that the US authorities and others were mistreating detainees to the knowledge of UK agencies;

iv) findings that UK agencies were financing individual rendition operations by others, and supporting US rendition programs in other ways.

122. Mr Hermer refers to the apology issued by Her Majesty's Government in Parliament in relation to the UK's involvement in facilitating the rendition and ill treatment of Abdul Hakim Belhaj and his family by, at least, sharing information with foreign states and the alleged involvement of the First and Second Defendants in the mistreatment of Ismail Kamoka.

123. He says those findings are directly relevant to Saunders J's conclusion, accepted by the CACD, that "while I accept the Claimant's allegation to the extent set out above, I specifically reject the allegations that the British authorities were outsourcing torture. I simply have found no evidence to support that suggestion." He says it is now apparent that the material before Saunders J was insufficient properly to demonstrate the First and Second Defendant's involvement in the mistreatment of detainees in foreign states.

124. He submits that there was a wider policy or practice by the First to Fifth Defendants of complicity in torture. He says this evidence is relevant because it demonstrates that the Defendants were aware of the risks to the claimant at the relevant time and makes it more likely that the Defendants acted in the manner alleged.

125. In response, Mr Phillips contended that the claimant's approach is internally inconsistent; that the *Phosphate* exception only applies where there is a collateral attack on a previous decision. He said that the material on which the Claimant relies is not truly fresh evidence that could not have been obtained in time to be put before the criminal court.

126. Mr Phillips submits that Saunders J made clear his findings, in his *in camera* ruling as to the Defendants' knowledge of the risk of ill-treatment and, as he puts it, "therefore the context of any engagement with the claimant". Saunders J addressed the actions of the Defendants in that context. He says the CACD addressed "the hypothetical scenario" of state A sharing information with state B when state B is known or believed to use torture.

127. In any event, he says this material does not change "the aspect of the case", a term Mr Phillips suggests should be interpreted as meaning "transforms the case".

Fresh evidence: Discussion

128. The expression used in *Phosphate Sewage Co. Ltd. v. Molleson* (1879) 4 App. Cas. 801, 814, and adopted by the House of Lords in *Hunter,* namely that the new evidence must be such as "entirely changes the aspect of the case" is not an easy one to understand, at least to modern ears. However, it is apparent from the context in which it is used in *Phosphate* itself, and the subsequent cases to which I have referred, that it means a very substantial change to the essential basis of the claim. Mr Phillips submits that an accurate interpretation of that expression is that the new evidence must be such as to *transform* the case. Mr Hermer did not seek to suggest that that would be an unfair reading of *Phosphate*. I agree that "transform" captures the essence of the *Phosphate* test.

129. I reject Mr Phillips' submission that the Claimant's stance on fresh evidence is inconsistent with his primary case. In my judgment, there is no inconsistency in running the *Phosphate* argument in addition to that primary case on *Hunter*. This former argument was always put in the alternative. The fact that it is only available if the primary case fails does not, in itself, reduce its potency.

130. Furthermore, I accept Mr Hermer's submission that none of the particular material on which he seeks to rely was available, with reasonable diligence, prior to the hearing before Saunders J.

131. The question therefore is whether this material "transforms" the case. In my judgment, it does not. What this fresh material amounts to is additional evidence to similar, if weightier, effect to that considered by Saunders J and the CACD.

132. It is correct that recent years have produced cases in which serious allegations have been made against the British intelligence services in respect of their co-operation with foreign agencies allegedly engaged in serious mistreatment of those in their custody. Her Majesty's Government ("HMG") issued apologies in the case of Belhaj and Boudchar following their unlawful detention and rendition to Libya. Although without admission of liability, HMG paid substantial damages in the case of Sami al-Saadi following his rendition to Libya. The report of the ISC, of June 2018, referred to many cases of co-operation with foreign intelligence agencies and rendition in which it was said (in the conclusion to the report), that UK agencies "*acted inappropriately or failed to take action*". None of this material relates directly to the Claimant's case, but it is said to be relevant to the likelihood of the British authorities acting in a similar way in this case.

133. It is plain, however, that evidence to this effect and of this type was available to the criminal courts. It enabled Saunders J and the CACD to draw proper conclusions on the relevant issues raised in the case before them. As noted above, Saunders J heard evidence from a researcher from Human Rights Watch, a well-known NGO working in this field, about the "endemic" use of torture in Pakistan, and from Mr Imran Khan about complaints concerning the conduct of the ISI. Saunders J noted that that evidence was supported by a number of reports from well-respected bodies and that that would have been well known to UK authorities. It is apparent he had had drawn to his attention NGO reports supporting the type of allegations being made by the Claimant. Further, given the date of the respective judgments, the Court of Appeal would have been aware

of *R (Binyam Mohammed) v SSFCA* [2008] EWHC 2048 (admin) and the allegations against the security and intelligence services made there.

134. It is apparent from his OPEN and *in camera* rulings that Saunders J was able to make findings, or at least assumptions favourable to the Claimant, about the conduct of the Pakistani authorities for the purpose of the case before him. He was able to make findings about the Defendants' knowledge of the risks of ill-treatment and about the Defendants' actions in response. The fresh material might strengthen the case as it was presented before Saunders J but it does not *transform* it, (or "*change the aspect of the case*"). The present claim retains the essential features of the case advanced before Saunders J and the CACD, strengthened as it might be by more recent evidence to similar effect. It is particularly of note that the CACD in the Claimant's case was not just aware of arguments about complicity of the agents of one state in the mistreatment by those in other states, they directly addressed them.

135. In my view, this material does not get close to transforming the case. Accordingly, I would not admit the fresh evidence.

Conclusions

136. Given my conclusions on these arguments, it is unnecessary to consider further the additional points made on behalf of the GMP. The case against the sixth Defendant must be struck out on the same basis as is the case against the other five.

137. In those circumstances, the applications by the Defendants for an order striking out the Claimant's Statement of Case must succeed. There will be judgment for all six Defendants against the Claimant.