

Human rights — Liberty of the person — European Convention on Human Rights, 1950, Article 5 — Territorial scope of the Convention — Detention of suspected insurgents by British forces during conflict in Afghanistan — Whether Convention applicable — Whether detention justified by Security Council resolutions — Whether detention justified by international humanitarian law

International organizations — United Nations — Security Council — Multinational force authorized by the Security Council — Afghanistan — International Security Assistance Force (“ISAF”) — Scope of mandate — Whether authorized to detain suspects and for how long — Whether actions of British forces in ISAF attributable to the United Kingdom or the United Nations

Relationship of international law and municipal law — Act of State — Different doctrines of act of State — Act of foreign State — Crown act of State — Whether Crown act of State precluding justiciability of claim — Whether Crown act of State a defence to action in tort for acts performed pursuant to lawful government policy — Detention of suspected insurgents by British forces during conflict in Afghanistan — Action for damages in tort — Proper law the law of Afghanistan — Whether Crown act of State a defence — Whether Crown act of State applicable to claim under the Human Rights Act 1998

War and armed conflict — Non-international armed conflicts — International humanitarian law — Common Article 3 to the Geneva Conventions, 1949 — Additional Protocol II, 1977 — Whether authorizing detention of suspected combatants — Relationship between international humanitarian law and international human rights law — The law of England

MOHAMMED (SERDAR) *v.* MINISTRY OF DEFENCE¹

QASIM AND OTHERS (“THE PIL CLAIMANTS”) *v.* SECRETARY OF
 STATE FOR DEFENCE

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([2014] EWHC 1369 (QB))²

England, High Court, Queen's Bench Division. 2 May 2014

(Leggatt J)

SUMMARY: *The facts:*—United Kingdom armed forces operated in Afghanistan as part of a multinational force, the International Security Assistance Force (“ISAF”), under a mandate conferred by the United Nations Security Council in a series of resolutions. ISAF, together with forces of the Government of Afghanistan, became involved in a non-international armed conflict with insurgent forces known as the Taliban. On 7 April 2010, British forces, operating as part of ISAF, captured and detained Mr Serdar Mohammed (“SM”) following an extensive firefight. SM was accused of being a Taliban commander and of having participated as a combatant in the firefight, from which it was said that he was seen fleeing while discarding a rocket-propelled grenade launcher and ammunition. He denied the allegations. He was detained for a total of 110 days before being transferred into the custody of the Government of Afghanistan. SM contended that ISAF forces were permitted to detain suspects for no longer than 96 hours and that, accordingly, the remainder of his detention was unlawful. He claimed damages for his detention after the initial 96 hours. The claims of the PIL claimants were based on facts similar to those of SM.

Held:—SM’s detention after the initial 96 hours was unlawful.

(1) When a State Party to the European Convention on Human Rights, 1950 (“the Convention”) exercised through its agents physical control over an individual abroad, even in consequence of military action, it was required to do so in a way which complied with the Convention. The territorial scope of the Human Rights Act 1998 was the same as that of the Convention. Accordingly, both extended to the detention of SM by British forces in Afghanistan. SM had been detained in facilities within the complete control of the British forces. It would have been open to the United Kingdom to derogate from the Convention under Article 15, because the phrase “war or other public emergency threatening the life of the nation” should be interpreted as including, in the context of international peacekeeping operations, a war or other emergency threatening the life of the nation on whose territory the relevant acts took place. However, no derogation had been made (paras. 116-57).

(2) In capturing and detaining SM, the British armed forces were acting as agents of the United Kingdom and not, or at any rate not solely, as agents of

² This judgment forms part of a group of cases concerning the actions of United Kingdom forces in Afghanistan and Iraq. For the appeals in the present case, see below, p. 219 (Court of Appeal) and 366 and 414 (Supreme Court).

the United Nations. The United Kingdom Government was therefore responsible in law for any violation by its armed forces of rights guaranteed by the Convention. Although the United Nations Security Council had effective control and ultimate authority over ISAF, the detention of SM had not been authorized by the commander of ISAF (paras. 158-87).

(3) Article 5 of the Convention,³ which guaranteed the right to liberty, was not qualified or displaced in its application to the detention of suspected insurgents by British armed forces by the United Nations Security Council resolutions which conferred a mandate upon ISAF. The authorization to take “all necessary measures” to fulfil the mandate of assisting the Government of Afghanistan to improve security did not permit detention outside the Afghan criminal justice system for any longer than necessary to deliver the detainee to the Afghan authorities, nor did it authorize action which violated international human rights law, including the provisions of the Convention (paras. 188-227).

(4) International humanitarian law applicable to non-international armed conflicts did not provide a legal basis for the detention of SM. Neither common Article 3 to the Geneva Conventions, 1949, nor the Second Additional Protocol to those Conventions, authorized the detention of suspected enemy combatants in such an armed conflict. Nor could such a power of detention be derived from customary international humanitarian law. In these circumstances, it could not be said that international humanitarian law, as a *lex specialis*, either displaced or qualified Article 5 of the Convention (paras. 228-94).

(5) The detention of SM, after the initial period of 96 hours, was contrary to Article 5 of the Convention. The essential purpose of Article 5 was to prevent people from being deprived of their liberty except in accordance with the rule of law. Article 5 embodied three core principles: first, that there had to be a legal basis for depriving someone of liberty; secondly, that this basis had to be reasonably certain; and, thirdly, that the deprivation of liberty must be effected in accordance with judicial process (paras. 295-329).

(a) The detention policy of ISAF was that detainees could be held for up to 96 hours. That policy was compatible with Article 5, so that SM’s detention for the initial 96 hours was lawful (paras. 330-2).

(b) The detention of SM for a further 25 days for the purposes of interrogation fell outside the scope of ISAF policy and the mandate of the Security Council and was therefore unlawful (paras. 333-4).

(c) The detention of SM, after his interrogation was complete and for a further 81 days, was said to have been due to a lack of prison capacity on the part of the Afghan Government. That lack of capacity did not, however, provide justification for the purposes of Article 5 and his detention during this period was therefore unlawful (paras. 335-40).

(d) The review by United Kingdom officials of SM’s detention did not comply with Article 5 (paras. 341-2).

³ The text of Article 5 is set out at para. 295 of the judgment.

(e) None of the provisions of Article 5 justifying detention was applicable in SM's case (paras. 343-57).

(6) The law applicable to the question whether SM had suffered a legal wrong was the law of Afghanistan, since that was where the alleged tort had taken place. However, the English courts would not enforce a claim to compensation from the United Kingdom Government in circumstances where the detention was an "act of State", i.e. an act done pursuant to a deliberate policy of the United Kingdom Government involving the use of military force abroad. Accordingly, SM was not entitled to recover damages in the English courts based on the fact his imprisonment by British forces was illegal under Afghan law (paras. 358-408).

(7) The act of State doctrine was not, however, applicable to a claim under the Human Rights Act 1998 (paras. 409-16).

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INTRODUCTION AND SUMMARY

1. The important question raised by this case is whether the UK government has any right in law to imprison people in Afghanistan; and, if so, what is the scope of that right. The claimant, Serdar Mohammed (“SM”), was captured by UK armed forces during a military operation in northern Helmand in Afghanistan on 7 April 2010. He was imprisoned on British military bases in Afghanistan until 25 July 2010, when he was transferred into the custody of the Afghan authorities. SM claims that his detention by UK armed forces was unlawful (a) under the Human Rights Act 1998 and (b) under the law of Afghanistan.

2. As this is a long judgment which discusses many issues and arguments, I will summarise my conclusions at the start. This is, however, a bare summary only and the reasons for my conclusions are set out in the body of the judgment.

3. UK armed forces have since 2001 been participating in the International Security Assistance Force (“ISAF”), a multinational force present in Afghanistan with the consent of the Afghan government under a mandate from the United Nations Security Council. Resolutions of the Security Council have: (1) recognised Afghan sovereignty and independence and that the responsibility for providing security and law and order throughout the country resides with the government of Afghanistan; (2) given ISAF a mandate to assist the Afghan government to improve the security situation; and (3) authorised the UN member states participating in ISAF to “take all necessary measures to fulfil its mandate”.

4. ISAF standard operating procedures permit its forces to detain people for a maximum of 96 hours after which time an individual must either be released or handed into the custody of the Afghan authorities. UK armed forces adhered to this policy until November 2009, when the UK government adopted its own national policy under which UK Ministers could authorise detention beyond 96 hours for the purpose of interrogating a detainee who could provide significant new intelligence. This UK national policy was not shared by the other UN member states participating in ISAF nor agreed with the Afghan government.

5. SM was captured by UK armed forces in April 2010 as part of a planned ISAF mission. He was suspected of being a Taliban commander and his continued detention after 96 hours for the purposes of interrogation was authorised by UK Ministers. He was interrogated over a further 25 days. At the end of this period the Afghan authorities said that they wished to accept SM into their custody but did not have the capacity to do so due to prison overcrowding. SM was kept in detention on British military bases for this “logistical” reason for a further 81 days before he was transferred to the Afghan authorities. During the 110 days in total for which SM was detained by UK armed forces he was given no opportunity to make any representations or to have the lawfulness of his detention decided by a judge.

6. On the issues raised concerning the lawfulness of SM’s detention I have concluded as follows:

- (i) UK armed forces operating in Afghanistan have no right under the local law to detain people other than a right to arrest suspected criminals and deliver them to the Afghan authorities immediately, or at the latest within 72 hours. On the facts assumed in this case SM’s arrest was lawful under Afghan law but his continued detention after 72 hours was not.
- (ii) It is now clear law binding on this court: (a) that whenever a state which is a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) exercises through its agents physical control over an individual abroad, and even in consequence of military action, it must do so in a way which complies with the Convention; and (b) that the territorial scope of the Human Rights Act coincides with that of the Convention. Accordingly, the Human Rights Act extends to the detention of SM by UK armed forces in Afghanistan.
- (iii) In capturing and detaining SM, the UK armed forces were acting as agents of the United Kingdom and not (or at any rate not solely) as agents of the United Nations. The UK government is therefore responsible in law for any violation by its armed forces of a right guaranteed by the Convention.
- (iv) Article 5 of the Convention, which guarantees the right to liberty, was not qualified or displaced in its application to the detention of suspected insurgents by UK armed forces in Afghanistan either (a) by the United Nations Security Council Resolutions which authorised the UK to participate in ISAF or (b) by international humanitarian law. Further, the authorisation

given by the UN Security Council Resolutions to “take all necessary measures” to fulfil the ISAF mandate of assisting the Afghan government to improve security does not permit detention (a) outside the Afghan criminal justice system for any longer than necessary to deliver the detainee to the Afghan authorities nor (b) which violates international human rights law, including the Convention.

- (v) ISAF detention policy is compatible with Article 5 of the Convention and falls within the authorisation given by the UN Security Council. SM’s arrest and detention for 96 hours therefore complied with Article 5.
- (vi) However, his subsequent detention did not. The UK government had no legal basis either under Afghan law or in international law for detaining SM after 96 hours. Nor was it compatible with Article 5 to detain him for a further 25 days solely for the purposes of interrogation and without bringing him before a judge or giving him any opportunity to challenge the lawfulness of his detention.
- (vii) SM’s continued detention by the UK for another 81 days for “logistical” reasons until space became available in an Afghan prison was also unlawful for similar reasons and was not authorised by the UN Security Council. In addition, this further period of detention was arbitrary because it was indefinite and not in accordance with the UK’s own policy guidelines on detention.
- (viii) Accordingly, SM’s extended detention for a total of 106 days beyond the 96 hours permitted by ISAF policy was not authorised by the UN mandate under which UK forces are present in Afghanistan and was contrary to Article 5 of the Convention.
- (ix) In circumstances where his detention took place in Afghanistan, the law applicable to the question whether SM has suffered a legal wrong is Afghan law, which gives him a right to claim compensation from the UK government. However, the English courts will not enforce that claim in circumstances where SM’s detention was an “act of state” done pursuant to a deliberate policy of the UK government involving the use of military force abroad. SM therefore cannot recover damages in the English courts based on the fact that his imprisonment by UK forces was illegal under Afghan law.
- (x) However, this “act of state” defence does not apply to claims brought under the Human Rights Act for violation of a right guaranteed by the Convention. Article 5(5) of the Convention

gives SM an “enforceable right to compensation” which the courts are required to enforce.

- (xi) This decision will not come as a surprise to the MoD, which formed the view at an early stage that there was no legal basis on which UK armed forces could detain individuals in Afghanistan for longer than the maximum period of 96 hours authorised by ISAF. I have found that this view was correct. Nothing happened subsequently to provide a legal basis for such longer detention, either under the local Afghan law, international law or English law. UK Ministers nevertheless decided to adopt a detention policy and practices which went beyond the legal powers available to the UK. The consequence of those decisions is that the MoD has incurred liabilities to those who have been unlawfully detained.

7. The main body of this judgment is in 12 parts, as follows:

- I. The claim and the issues;
- II. The UK’s involvement in Afghanistan;
- III. Detention policy in Afghanistan;
- IV. The claim under Afghan law;
- V. The claim under Article 5;
- VI. The territorial scope of the Convention;
- VII. Responsibility for acts of UK armed forces in Afghanistan;
- VIII. United Nations Security Council Resolutions;
- IX. International humanitarian law;
- X. Alleged breaches of Article 5;
- XI. The “act of state” defence;
- XII. Conclusion.

I. THE CLAIM AND THE ISSUES

8. SM is an Afghan citizen. It is said that he does not know his date of birth but was probably born in or about 1988. In this action against the Ministry of Defence (“MoD”) he claims damages for (amongst other things) his allegedly unlawful detention by UK armed forces from 7 April 2010 until 25 July 2010.

9. According to the amended particulars of SM’s claim:

- (i) In the early morning of 7 April 2010 he was irrigating his family’s fields near his home in northern Helmand when British soldiers arrived by helicopter and arrested him.