



Neutral Citation Number: [2011] EWHC 2401 (Admin)

Case No: CO/10455/2010 AND CO/10200/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 October 2011

Before:

SIR ANTHONY MAY PRESIDENT OF THE QUEEN'S BENCH DIVISION
MR JUSTICE KEITH

Between:

**THE EQUALITY AND HUMAN RIGHTS
COMMISSION**

Claimant

- and -

**THE PRIME MINISTER
THE SECRETARY OF STATE FOR FOREIGN
AND COMMONWEALTH AFFAIRS
THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT
THE SECRETARY OF STATE FOR DEFENCE
THE ATTORNEY GENERAL**

Defendants

Interested Party

And Between:

ALAA' NASSIF JASSIM AL BAZZOUNI

Claimant

-v-

**THE PRIME MINISTER
THE SECRETARY OF STATE FOR DEFENCE
THE SECRETARY OF STATE FOR FOREIGN
AND COMMONWEALTH AFFAIRS
THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT
THE ATTORNEY GENERAL**

Defendants

Ben Emmerson QC, Philippe Sands QC and Dan Squires (instructed by **EHRC**) for the
Claimant

James Eadie QC, David Perry QC, James Strachan and Sam Wordsworth (instructed by
Treasury Solicitors) for the **Defendants and Interested Party**

Rabinder Singh QC and Iain Steele (instructed by **Public Interest Lawyers**) for the
Claimant

David Perry QC, James Eadie QC, James Strachan and Sam Wordsworth (instructed by
Treasury Solicitors) for the **Defendants**

Hearing dates: 28-30th June 2011

Approved Judgment

Sir Anthony May, President of the Queen's Bench Division:

This is the judgment of the Court.

Introduction

1. On 6th July 2010, the Prime Minister announced in Parliament his intention to establish an independent inquiry about the degree to which British intelligence officers working with foreign security services may have been implicated in the improper treatment of detainees held by other countries in the aftermath of the events of 11th September 2001. Also on 6th July 2010, the Prime Minister wrote to the Rt. Hon. Sir Peter Gibson thanking him for agreeing to lead an independent inquiry into United Kingdom involvement with detainees in overseas counter-terrorism operations. The purpose of the inquiry was that which the Prime Minister had described in Parliament.
2. At the same time, the Government published a document entitled *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees*. We understand that a document of this kind had previously been in existence, which had not been made public. The published document was issued by the Cabinet Office. It was accompanied by a *Note of Additional Information* from the three Secretaries of State who, with the Prime Minister and in one case the Attorney General, are defendants to these proceedings. We shall refer to the defendants as “the Government”.
3. In these joined judicial review proceedings, the Equality and Human Rights Commission (“the Commission”) and Mr Al Bazzouni as claimants each contend that in particular respects the published document is expressed in terms which are unlawful such that, if those to whom it is addressed were to act in compliance with its instructions, they could act unlawfully. The Commission initially advanced a number of contentions, but Mr Emmerson QC on their behalf confined the Commission's case at the hearing before us to the single question whether certain guidance in the document relating to torture and cruel, inhuman and degrading treatment was expressed in terms which were wider than the law would permit. He did not pursue other objections, recognising to that extent the force of the Government's submission that the court could not properly determine these matters in the abstract without the facts of one or more real cases to concentrate the inquiry. That submission is to an extent maintained for the issue which Mr Emmerson did pursue. Mr Al Bazzouni challenges the lawfulness, in the sense we have described, of one reference in the document to hooding of detainees.
4. On 21st December 2010, Ouseley J ordered that the claimants' respective applications for permission to bring their claims should be listed together, with substantive hearings to follow if permission is granted. He so ordered to preserve the Government's opportunity to argue that permission should be refused upon preliminary objections (a) that the claims raised academic questions which the court should not entertain and, optimistically, (b) that the claimants do not have sufficient standing.

5. On standing, the parties have covered much paper with their rival contentions. As to the Commission, it is a public body established by section 1 of the Equality Act 2006. By section 3, it is to exercise its functions with a view to encouraging and supporting the development of a society in which there is, among other things, respect for and protection of each individual's human rights. By section 30, the Commission has the capacity to institute judicial review proceedings relevant to a matter in connection with which it has a function; and may rely on section 7(1)(b) of the Human Rights Act 1998 (breach of Convention rights), but need not be a victim or potential victim of the unlawful act. That, in our judgment, is quite sufficient for the purpose of the Commission's standing in these proceedings. As to Mr Al Bazzouni, we are told that he is one of a number of people who allege that they were subjected to hooding by UK forces in Iraq. Although the challenge to the Guidance in these proceedings in its reference to hooding may well not postulate factual possibilities identical with those which Mr Al Bazzouni claims to have been subjected to, he is nevertheless, in our judgment, sufficiently representative of those who might have standing to bring his claim. Mr Eadie QC and Mr Perry QC, on behalf of the Government, did not strenuously argue otherwise at the hearing. In our view, *R (Al Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin) is not comparable.

The Guidance

6. Paragraph 1 of the Guidance provides:

“This consolidated guidance sets out the principles, consistent with UK domestic law and international law obligations, which govern the interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees. This guidance must be adhered to by officers of the UK's intelligence and security agencies, members of the UK's Armed Forces and employees of the Ministry of Defence ('personnel'). Personnel whose actions are consistent with this guidance have good reason to be confident that they will not risk personal liability in the future.”

Mr Emmerson emphasises that the Guidance is directory; that it proclaims that it is consistent with United Kingdom domestic law and international law so that those who act in accordance with it will not risk personal liability. He submits that if it is not consistent with the relevant law, this advice will not be correct so that the Guidance should be changed.

7. Paragraph 2 of the Guidance recognises a practical difference between the security and intelligence agencies (“the Agencies”) and the UK Armed Forces, who, unlike the Agencies, may have a power to detain individuals in overseas operations. This is of some significance to the argument, since, for the Armed Forces, there is a *Joint Doctrine Publication 1-10* concerning *Prisoners of War, Internees and Detainees* promulgated under the direction of the Chiefs of Staff. Nevertheless, the Guidance must also be adhered to by the UK Armed Forces and Ministry of Defence employees so far as it may apply.

8. Paragraph 3 of the Guidance notes that the Agencies need to work with a range of overseas security and intelligence services (“liaison services”). Paragraph 4 notes that the Ministry of Defence and the UK Armed Forces may also need to work with liaison services. They may need to detain and interview individuals in order to understand threats to Armed Forces Units.
9. Paragraphs 5 to 7 are under the general heading “Policy regarding torture and cruel, inhuman and degrading treatment or punishment” (“CIDT”). These are, of course, with the omission there of the word “cruel”, the matters absolutely prohibited by Article 3 of the European Convention on Human Rights in so far as it might apply. Paragraph 5 of the Guidance states that there is an absolute prohibition of torture in international law and a clear definition of what constitutes torture. There is also an absolute prohibition of CIDT but no agreed or exhaustive definition of what constitutes CIDT. Instances of CIDT could amount to torture if they are, for example, prolonged or coincide with other measures.
10. Paragraph 6 states that the UK Government’s policy is clear. “[We] do not participate in, solicit, encourage or condone the use of torture or cruel, inhuman or degrading treatment or punishment for any purpose. In no circumstance will UK personnel ever take action amounting to torture or CIDT.”
11. Paragraph 7 provides:

“When we work with countries whose practice raises questions about their compliance with international legal obligations, we ensure that our co-operation accords with our own international and domestic obligations. We take great care to assess whether there is a risk that a detainee will be subjected to mistreatment and consider whether it is possible to mitigate any such risk. In circumstances where, despite efforts to mitigate the risk, a serious risk of torture at the hands of a third party remains, our presumption would be that we will not proceed. In the case of cruel, inhuman or degrading treatment or punishment, this will cover a wide spectrum of conduct and different considerations and legal principles may apply depending on the circumstances and facts of each case. Our aim is to develop and promote human rights in those countries, consistent with the lead the UK has taken in international efforts to eradicate torture.”
12. As will appear, Mr Emmerson’s main submission concerns the expression “serious risk” of torture (which is in this paragraph). It is also suggested that the penultimate sentence implies that there may be circumstances in which CIDT may be condoned.
13. Paragraphs 8-11 of the Guidance are headed “Policy regarding the involvement of UK personnel with detainees overseas in the custody of a liaison service.” Paragraph 8 explains that some liaison services adopt a different approach and different standards from the UK. The extent to which they take account of UK views varies. Personnel need to be aware of tensions and “need to manage them in a manner that is consistent with the [UK’s] policy described ... in paragraph 6”.
14. Paragraph 9 provides:

“Before interviewing or seeking intelligence from detainees in the custody of a liaison service, or before soliciting an individual’s detention by a liaison service, personnel must consider whether the detainee or individual may have been or may be subjected to unacceptable standards of detention or treatment. Personnel should consider attaching conditions to any information to be passed governing the use to which it may be put (where applicable) and/or to obtaining assurances from the relevant liaison service as to the standards that have been or will be applied in relation to that detainee or individual to minimise any perceived risk in this regard. Personnel should feel free to raise any concerns with senior responsible personnel nominated personally by the head of their Agency or Department (“senior personnel”).”

15. Paragraph 10 then says that *the table* referred to in paragraph 11 gives details of what officers should do when considering whether to proceed with action when there is a risk of torture or CIDT occurring at the hands of third parties. “*The Annex*” describes the issues which should be taken into account when considering whether standards of detention and treatment are acceptable but officers should consult senior personnel and/or legal advisers if they are in doubt. Paragraph 11 provides that officers should use the table when considering whether to proceed when there is a risk of torture or CIDT occurring at the hands of a third party.
16. The table referred to in paragraphs 10 and 11 thus applies, as those paragraphs state, to the involvement of UK personnel with detainees overseas in the custody of a liaison service where it is perceived that there is a risk of torture or CIDT. The table has two columns and three sections. The first column describes the situation to be considered. The second column states what action the officers should take.
17. The first section of the table is straightforward. It applies “If you know or believe torture will take place”. The required action is:
 - “1. You must not proceed and Ministers will need to be informed.
 2. You should raise concerns with liaison or detaining authority to try and prevent torture occurring unless in doing so you might make the situation worse.”

The second section is “[in] circumstances where you judge there is a lower than serious risk of CIDT taking place and standards of arrest and detention are lawful.” In these circumstances, the officer may proceed keeping the situation under review. Both the first and second sections also apply if the serious risk of the detainee being subjected to unacceptable standards applies to past treatment – see paragraphs 17 and 20 of the Guidance.

18. The third section of the table is “In all other circumstances” and covers all intermediate situations for both torture and CIDT between the situation where the officer knows or believes that torture will take place (section 1), and where the officer judges that there is a lower than serious risk of CIDT (section 2). For section 3:

“1. You must consult senior personnel. You must not proceed unless either:

(a) senior personnel and legal advisers conclude that there is no serious risk of torture or CIDT, or;

(b) you are able to effectively mitigate the risk of mistreatment to below the threshold of a serious risk through reliable caveats or assurances.

2. If neither of the two preceding approaches apply, Ministers must be consulted.”

19. It is not necessary for present purposes to consider what Ministers might do, because the Guidance is guidance to officers of the Agencies and, where it applies, to members of the UK Armed Forces. The latter part of section 3, however, does say that consulting Ministers does not imply that action will be authorised, but it enables Ministers to look at the full complexities of the case and its legality. The substance of this is repeated in paragraph 14 of the Guidance. It is to be presumed that Ministers will act lawfully.
20. The crux of the Commission’s remaining case is that the expression “serious risk”, as it applies in the Guidance to both torture and CIDT, misstates the legal position, and in particular misstates the potential criminal liability of UK officers as secondary parties to torture or CIDT inflicted by foreign liaison services. The proposition is that the threshold test should be “real risk” not “serious risk” and that there is a difference. If torture or CIDT is inflicted by foreign liaison services and a UK officer sufficiently participates in relevant related action judging that there was no real risk of torture or CIDT, the officer would not commit an offence as a secondary party. But, if the officer judged that there was no *serious* risk, when the risk was, not serious, but nevertheless *real*, he would, other things being equal, commit an offence as a secondary party. At one level, this is lawyer’s dialectic, but Mr Emmerson maintains that there is a difference in law, and that the Guidance, which claims to state the law so that officers would not risk personal liability, should get it right.
21. To withdraw for a moment from the dialectic into the world of practical possibility, we understand that potentially acute problems of this kind may arise, for example, if a UK intelligence officer has the opportunity to question a person detained by a liaison service of a foreign state. That state’s record relating to torture or CIDT may be suspect, and the UK officer has to judge whether there is a relevant risk that the person may be, or may have been, subjected to torture or CIDT. Another possibility would be if a UK officer requests the detention by a foreign liaison service with such a record of a person for questioning by the UK officer. What in law is the degree of foresight of the risk of torture or CIDT which could render the officer criminally liable as a secondary party, if there is torture or CIDT? If the level of risk is misstated, not only may the officer be criminally liable but the United Kingdom could be in breach of international law.
22. The main circumstance in which the Commission’s case could be relevant is that referred to in the second section of the table, where the officer judges that there is a lower than serious risk of CIDT. That is the only part of the table where the officer

can proceed without consulting senior personnel. The “serious risk” test is also to be applied by senior personnel and legal advisers in the third section, but the table is not in the first instance addressed to them – see the use of the word “you” in the first column for two of the sections and in the second column of section 3. It will, however, be seen that “serious risk” reappears with more general reference to “unacceptable standards” in later paragraphs of the Guidance.

23. To return to the Guidance, paragraph 12 is not directly relevant to our considerations. It concerns circumstances where UK Armed Forces personnel have to consider tactical questioning of detainees held by other nations with no opportunity to refer to senior personnel or Ministers.
24. Paragraphs 13-15 are headed “Roles and Responsibilities”. Paragraph 13 refers to training and appropriate Departmental and Armed Forces legal advice. It states importantly that Crown Servants should be aware that they are subject to English criminal law in respect of their actions in the course of their duties overseas.
25. There follow in paragraphs 16 to 30 guidance relating to five circumstances with which the Agencies or the UK Armed Forces might be concerned. The five circumstances are:
 - i) procedures for interviewing detainees overseas in the custody of a liaison service (paragraphs 16 to 22);
 - ii) seeking intelligence from a detainee in the custody of a foreign liaison service (paragraphs 23 to 24). This concerns feeding questions to a foreign service;
 - iii) soliciting detention by a foreign liaison service (paragraphs 25 to 26).
 - iv) receiving unsolicited information obtained from a detainee in the custody of a foreign liaison service (paragraphs 26 to 28). Here the source of the information will usually not be disclosed, but if unsolicited information is received which is known or believed to be from a detainee believed to have been subjected to unacceptable standards, senior personnel must be informed, who must notify Ministers if the senior personnel believe the concerns to be valid. Action may be required to avoid the liaison service believing that continued receipt of information is an encouragement of the methods used to achieve it (paragraph 28);
 - v) procedures for interviewing detainees held in UK custody.

Points of relevance in these paragraphs include that the expression “serious risk” is repeatedly used (e.g. paragraphs 17, 20, 21, 24, 26); there is reference to attaching conditions or obtaining assurances as to treatment, so that, if the assurances are believed to be reliable, the proposed interview may take place (paragraphs 16, 17, 21, 23, 25); and that personnel must withdraw if they become aware of a serious risk of unacceptable standards or if the detainee makes specific complaints considered to be credible (paragraph 20).

26. Paragraph 29 of the Guidance provides:

“Individuals may be detained and questioned by UK forces overseas in accordance with the rules of engagement for the specific operation. Interviewing of detainees for intelligence purposes may only be undertaken by authorised personnel. All detainees held by UK Armed Forces must be treated humanely at all times, in accordance with international law and any UK law that may be applicable. Guidance on the handling of detainees is published by MOD in Joint Doctrine Publication 1-10. All UK facilities for the holding of detainees are subject to inspection by Provost Marshal Army, and by the International Committee of the Red Cross.”

Since detainees held overseas in UK custody cannot be detained by the Agencies, this paragraph applies in the first instance to the UK Armed Forces, so that reference to the Joint Doctrine Publication is understandable. We say in parenthesis that, contrary to Mr Singh’s submission on behalf of Mr Al Bazzouni, we do not read this paragraph as directing Armed Forces personnel to the Annex – see below.

27. The Annex, to which the reader is directed in paragraph 10, states that torture is an offence under UK law and is defined as a public official intentionally inflicting severe mental or physical pain or suffering in the performance or purported performance of his duties. This is a close précis of part of Article 1 of the *United Nations Convention against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment* (1984) (“UNCAT”) and replicates section 134(1) of the Criminal Justice Act 1988. Article 2 of UNCAT requires each State Party to take effective measures to prevent acts of torture in any territory under its jurisdiction. An order from a superior officer may not be invoked as justification for the torture. By Article 4, each State Party shall ensure that all acts of torture are offences under its criminal law. The same applies to an act by a person which constitutes complicity or participation in torture.

28. The Annex to the Guidance then refers to CIDT as follows:

“Cruel, Inhuman or Degrading Treatment or Punishment (CIDT) is a term which is used in some international treaties but is not defined in UK law. In the context of this guidance, the UK Government considers that the following practices, *which is not an exhaustive list*, could constitute cruel, inhuman or degrading treatment or punishment:

- (i) use of stress positions;
- (ii) sleep deprivation;
- (iii) methods of obscuring vision or hooding (except where these do not pose a risk to the detainee’s physical or mental health and is necessary for security reasons during arrest or transit);
- (iv) physical abuse or punishment of any sort;
- (v) withdrawal of food, water or medical help;

- (vi) degrading treatment (sexual embarrassment, religious taunting etc); and
- (vii) deliberate use of ‘white’ or other noise.”

Mr Al Bazzouni’s case is that the exception (in brackets) in (iii) is unlawful in so far as it embraces hooding. In short, his case is that hooding should without exception be forbidden.

29. The Note of Additional Information from the Secretaries of State is consistent with the Guidance, and does not add to the issues which require decision in this case. We quote two paragraphs of the Note to illustrate the acute difficulties which officers (and indeed Ministers) may have to face. The two paragraphs are:

“The decision can be more complicated in relation to other forms of mistreatment. The reality is that the term cruel, inhuman or degrading treatment or punishment covers a spectrum of conduct. At the lower end some have argued that this can include certain conditions of detention that are commonplace in many of the countries with which we must work if we are to effectively protect British lives. While the UK is at the forefront of efforts to try to tackle unacceptable treatment of detainees we recognise, for example, that it is unrealistic to expect that prisons in these countries will be built to the standards we expect in this country.”

“We will consider a number of factors, including but not limited to: the credible and mitigating steps that can be taken, if necessary through our personal involvement, to reduce the risk of mistreatment; the range of UK action proposed and whether it would increase or decrease the likelihood of mistreatment taking place; whether there is an overwhelming imperative for the UK to take action of some sort, e.g. to save life; and, above all, whether there is a legal basis for taking action. These are extremely difficult decisions and it is right that Ministers ought to bear responsibility for them.”

The Joint Doctrine Publication

30. The Joint Doctrine Publication, which is referred to in paragraph 29 of the Guidance and whose website text is there referred to in a footnote, applies to all persons being held by UK Armed Forces. It provides in paragraph 201 of chapter 2 that basic principles of humanity must be applied when dealing with all captured or detained persons. Paragraphs 206 and 207 of the May 2006 version contain prohibitions of universal application. Prohibited acts include torture and “outrages upon personal dignity, in particular humiliating and degrading treatment ...”. A footnote to this states in terms that “[t]he practice of hooding any captured or detained person is prohibited.”
31. The April 2008 version of the Publication is in stronger terms. Paragraph 209 refers to techniques which are proscribed and which “MUST NEVER” be used as an aid to

tactical questions or interrogation. There is a footnote referring to a statement in Parliament on 2nd March 1972 by the Prime Minister, Edward Heath MP, following allegations of inhumane treatment made by individuals detained in Northern Ireland in the early 1970s. “5 Techniques” were proscribed, the second of which was “**Hooding**. Putting a bag over a captured or detained person’s head and keeping it there, whether as part of the [tactical questioning and interrogation] process or not.”

32. Paragraph 210 of the April 2008 version of the Publication refers to activities which are permitted subject to safeguards and qualifications. These include:

“**Restriction of Vision.** In order to maintain operational security, it might in some cases be necessary to obscure the vision of captured or detained persons (e.g. when transiting through or past militarily sensitive sites or activity). Ordinarily, this can be easily achieved by travelling in enclosed vehicles, or vehicles with opaque glass. Where this is not practicable, a captured or detained person may be required to wear blacked out goggles specifically issued for that purpose, but only for the time and extent necessary to preserve operational security. The practice of hooding any captured or detained person is prohibited.”

The Commission’s case

33. There were originally four grounds of challenge to the Guidance. The Commission did not proceed with ground 2 (which concerned aiding and assisting), nor ground 4 (which concerned assurances). Ground 1, which was scarcely pursued at the hearing, although it was advanced at length in writing, was that the Guidance did not prohibit an Intelligence Officer from taking steps to secure a person’s detention by a state known to practice torture, even though there was reason to believe that there was a “real risk” or “serious risk” that the individual would be tortured. As we have shown, subject to the “real risk/serious risk” point, the Guidance does not permit officers to proceed if they believe that there is such a risk without reference to senior personnel or Ministers, and it is now accepted that the Guidance does not purport to be guidance as to what Ministers might do. The “real risk/serious risk” point is covered by ground 3 and ground 1 raises no viable additional argument. Ground 3 contends that the Guidance is unlawful because it only prohibits or restricts officers from proceeding if there is a “serious risk” which is the wrong standard in law and fails to reflect the UK’s international legal obligations or the domestic criminal law.
34. Mr Emmerson helpfully and for the sake of economy invited us to focus on the circumstances envisaged in paragraphs 25 and 26 of the Guidance, where a UK intelligence officer solicits the detention of a person by a foreign liaison service, for example, so that the UK officer may question the detained person. The UK officer has engendered the detention and is complicit in it. If the UK officer knows or believes that there is a real risk of torture by foreign state agents and the person is tortured, there will be a breach by the United Kingdom of international law and the individual officer commits a breach as a secondary party of section 134 of the Criminal Justice Act 1988. Mr Emmerson says that either of these will do for the purposes of the Commission’s claim.

35. Section 134 of the 1988 Act was enacted to comply with the requirements of Articles 1 to 4 in particular of UNCAT. Section 134(1) provides:

“A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.”

This in the context under discussion would be the offence of the principal, that is a person acting in an official capacity in a liaison state. Subsection (2) refers to third party actors and is not directly relevant. Subsection (4) provides that it is a defence to prove that there was lawful authority, justification or excuse, whose meaning includes in relation to pain and suffering inflicted outside the United Kingdom, lawful authority, justification or excuse under the law of the place where it was inflicted, not being the law of the United Kingdom. Although this might raise the theoretical possibility of an individual officer defending a personal criminal charge of torture as a secondary party by seeking to establish that the principal’s torture was lawful under the law of the place where it was committed – we express no view as to the academic viability of such a defence – it could scarcely alone support a general instruction to individual UK officers which was otherwise wrong in law.

36. The Commission’s case, expounded in writing at great length and with extensive learning, is that torture as it is defined in Article 1 of UNCAT is forbidden by customary international law and therefore by the English Common Law. Article 1 prohibits torture which is inflicted “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”. This, it is submitted, embraces circumstances where a UK intelligence officer solicits the detention of a person for questioning knowing or believing that there is a real risk that he will be tortured. The officer has, it is said, “consented” to or “acquiesced” in the torture if it occurs. It is submitted that “acquiescence” means “tacit assent” or “agreement or consent by silence”. This is a principal’s breach of Article 1 of UNCAT, not aiding or assisting.
37. As to domestic law, section 134 of the 1988 Act constitutes the UK’s compliance with Article 4 of UNCAT. Section 134 does not make acquiescence a criminal offence. This is a matter of secondary liability under domestic law by section 8 of the Accessories and Abettors Act 1861. This provides that whoever aids, abets, counsels or procures the commission of an indictable offence shall be criminally liable as a principal offender. The secondary party has to encourage or assist the principal offender, and has at least to foresee that the commission of the crime by the principal was a real or substantial risk. It is not necessary for the secondary party to know, believe or intend that the principal will commit the indictable offence.
38. The Commission’s simple case is that the relevant legal test for secondary liability is foresight that there is a *real* risk that the principal will commit the indictable offence, not a *serious* risk. Mr Emmerson says that this is the effect of the decision of the Court of Appeal Criminal Division in *R v Bryce* [2004] 2 Cr App R 35 which is binding on this court. He says that a “real risk” is a risk which is not a fanciful possibility. He refers in this respect to *Archbold* (2011) paragraph 17-67 where the

expression is used as equivalent to realising that something may happen, and where *Bryce* is not cited in the paragraph in which this expression appears.

39. In *Bryce*, the appellant was charged under the 1861 Act as a secondary party to a murder. He was alleged to have transported the killer and the gun which he used to commit the murder to a caravan near the victim's home so that the killer could wait for an opportunity to carry out the killing. The appellant's case was that he knew nothing of the gun or the plan to murder the victim. He had simply given the eventual killer a lift. He did not give evidence. At the time of the assistance, the killer, on his own evidence, had had reservations about carrying out the killing, although he had not expressed these reservations to anyone. His resolve to do so was strengthened by a subsequent visit from the person who instigated the crime. The trial judge directed the jury that the appellant would be guilty as an accessory if he deliberately assisted the killer by taking him to the caravan with the gun, knowing that this was in order to assist the killer to kill or cause really serious injury to the victim, or realising that there was a real possibility that he might do so. The fact that the killer had not reached a final decision, in his own mind, whether to go through with the murder was no defence. It was submitted on appeal against conviction that the case should have been withdrawn from the jury in the absence of evidence that, at the time of the assistance, the principal offender had formed the intent to commit the offence. The headnote records that this submission was rejected by the court, holding that all that was necessary in the secondary party was foresight of the real possibility that an offence would be committed by the principal. Thus expressed, the finding uses the expression "real possibility", but the issue under consideration was, not the formulation of the degree of foresight, but whether at the time of the assistance the principal had formed the necessary intent.
40. It was further submitted that the summing up was defective because it left to the jury the impression that any assistance, however remote or slight, was sufficient to establish the offence, and had failed to direct the jury that an intention on the part of the appellant to assist the principal offender to kill or cause really serious injury was required. The court held that the prosecution had to prove intentional assistance. They must prove that an act done by the appellant in fact assisted the later commission of the offence, an act which the appellant did deliberately, realising that it was capable of assisting the offence; and that at the time of doing the act, the appellant contemplated the commission of the offence, that is he foresaw it as a "real or substantial" risk or "real possibility". In this formulation "real" is equated with "substantial".
41. Potter LJ gave the judgment of the court which included Hooper and Astill JJ. Upon a submission of no case, it had been submitted on behalf of the appellant that the case was not to be equated with a joint enterprise, because the appellant's assistance was complete before the principal had formed the necessary intent. The judge had rejected that submission in reliance on *R v Rook* (1993) 97 Cr App R 327, [1993] 1 WLR 1005 to the effect that, as with joint enterprise, it was sufficient for the secondary party to foresee that the event was a "real or substantial risk" and nonetheless lent his assistance.
42. Paragraph 48 of the judgment addresses the question whether the secondary party has actually to know that the crime will be committed, or is something less sufficient? Paragraph 49 suggests that, where an accessory has rendered assistance before the

perpetrator commits the crime, “the circumstances in respect of which knowledge is sufficient for liability may go wider than that of the specific crime actually committed.” The accused cannot be sure in advance of the precise intentions of the eventual perpetrator. It is sufficient if he has knowledge of the type of crime in contemplation. A person who supplies equipment to be used in the course of committing an offence of a particular type is guilty as a secondary party provided he knows the purpose to which the equipment is to be put or realises that there is a “real possibility” that it will be used for that purpose and the equipment is actually used for that purpose. The phrase “real possibility” is used, but the issue under discussion concerned knowledge of the type of crime in contemplation, not the degree of possibility that it would be committed.

43. The court then proceeded to consider the judgment of Lloyd LJ in *R v Rook* at length, concluding in paragraph 58:

“*Rook* is, in our view, authority for the proposition that it is not necessary to show that the secondary party intended the commission of the principal offence and that it is sufficient if the secondary party at the time of his actions relied on as lending assistance or encouragement contemplates the commission of the offence, that is knows that it will be committed or realises that it is a *real possibility* that it will be committed.” (emphasis added)

44. The appellant in *Rook* had been convicted as a secondary party to a contract killing. He was one of three men who met and agreed the details of the plan to kill the wife of a fourth man on the following day. He did not turn up on the following day and the killing was done by his two fellows. His defence was that he never intended the victim to be killed and believed that, if he absented himself, the others would not go through with the plan. The trial judge had directed the jury that they would be entitled to convict if he did what he had done on the day before the murder intending to assist the other two to commit a murder which he knew would probably be committed. This was said on appeal to be a misdirection, because it was necessary that the appellant should have intended the victim to be killed. The appeal failed. Lloyd LJ said that there was no misdirection, except that the reference to the appellant knowing that a murder would *probably* be committed was too favourable to the accused.

45. In reaching this conclusion, Lloyd LJ cited a passage from *R v Powell and English* [1999] AC 1 to the effect that it is enough that the secondary party should have foreseen the event as a *real or substantial risk*; and he referred to *Maxwell v Director of Public Prosecutions for Northern Ireland* [1978] 1 WLR 1350 and *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653 to conclude that it followed that it is no defence to a secondary party to say that he did not intend the victim to be killed or to suffer harm, if he contemplated or foresaw the event as a “*real or serious*” risk.

46. The court’s relevant conclusion in *Bryce* was as follows (paragraph 71):

“We are of the view that, outside the *Powell and English* situation (violence beyond the level anticipated in the course of

a joint criminal enterprise), where a defendant, D, is charged as the secondary party to an offence committed by P in reliance on acts which have assisted steps taken by P in the preliminary stages of a crime later committed by P in the absence of D, it is necessary for the Crown to prove intentional assistance by D in the sense of an intention to assist (and not to hinder or obstruct) P in acts which D knows are steps taken by P towards the commission of the offence. Without such intention the *mens rea* will be absent ... sufficient for D to be liable on the basis of 'common purpose' or 'joint enterprise'. Thus, the prosecution must prove:

- (a) an act done by D which in fact assisted the later commission of the offence,
- (b) that D did the act deliberately realising that it was capable of assisting the offence,
- (c) that D at the time of doing the act contemplated the commission of the offence by A, i.e. he foresaw it as a 'real or substantial risk' or 'real possibility' and,
- (d) that D when doing the act intended to assist A in what he was doing."

47. In reaching this conclusion, the court had referred to House of Lords authority (*Maxwell* cited by Lloyd LJ in *Rook*) where the contemplation or foresight is expressed as "real or serious". So "real possibility", "real or substantial risk" and "real or serious risk" are all to be found in *Bryce*, which is not a persuasive starting point for the submission that "serious risk" in the Guidance is wrong in law when it should be "real risk". It is not surprising, perhaps, that the degree of foresight in *Bryce* is expressed in various ways because the degree of foresight was not in issue. The relevant issue was the secondary party's intention. We do not regard *Bryce* as binding authority for the proposition relied on by Mr Emmerson.
48. The Commission refer to a number of Strasbourg cases, deportation cases under UNCAT and cases decided by the United Nations Committee against Torture to show that these use the expressions "real risk", "risk" or "real and immediate risk" in various contexts, but not "serious risk". The cases referred to are *Soering v United Kingdom* (1989) 11 EHRR 439 at paragraph 91; *Karoui v Sweden* (CAT 185/2001); *Tala v Sweden* (CAT 43/1996); *Osman v United Kingdom* (1998) 29 EHRR 245; *Z v United Kingdom* (2001) 34 EHRR 97; and *Hajrizi Dzemailj v Yugoslavia* (CAT/C/29/D/161/2000). Mr Emmerson referred us to *A v Secretary of State for Home Department (No. 2)* [2006] 2 AC 221 on the different issue whether evidence is admissible in SIAC proceedings if there is a real risk that it has been obtained by torture. The Commission also provided us with a random selection of domestic cases on a variety of unrelated topics in which, in the main, "real" is contrasted with "fanciful" or "theoretical". That, depending on the context, is not controversial.
49. It is submitted that a "serious risk" and a "real risk" are different as a matter of ordinary language. A "real risk" is one that exists and is identifiable, in contrast with

a risk that is fanciful or so improbable as not to be a risk at all. A “serious risk”, by contrast, refers to some (undefined) level of probability. One of the difficulties, it is said, of requiring intelligence officers to consider whether there is a “serious risk” as opposed to a “real risk” is that it is not clear what officers are being asked to determine or what level of risk meets the subjective and unidentified standard of “serious”. As will appear, we find this attempt to define a difference elusive. In the end, the officers have to make a judgment, and, although there could be a difference – but see below – a judgment of whether a risk is “serious” is no more subjective than a judgment of whether the risk is “real”.

The Government’s case

50. Mr Eadie QC, on behalf of the Government, says that the Guidance is not, and is not intended to be, a treatise or statement on international law. That would be impracticable. It is practical guidance to officers on the ground, and the core aim of the Guidance is procedural. Its aim is to see that those on the ground consider whether the treatment contemplated is acceptable. If there is doubt about this, individual officers are required to refer to more senior personnel or to Ministers, who may be able to take action such as obtaining reliable assurances.
51. The original grounds of claim comprised a number of instances where there was an abstract challenge to a part of the text of the Guidance without reference to the facts of particular cases. The Commission have to show that the Guidance is unlawful on its face. This problem has reduced, because the Commission’s case has substantially narrowed, but Mr Eadie submits that the court should be slow to give guidance of this kind, especially in circumstances that are important to national security and at times highly controversial. He submits that the position in international law is less than clear and there are doubts as to the extent to which the court can properly opine about international law. As to domestic criminal law, criminal cases should normally be decided by criminal courts in real cases where there are real facts, and where, if there is an important point of criminal law, the Attorney General can intervene. We agree that the Administrative Court, called upon to determine in the abstract the legality of a public document, should be slow to adopt the mantle of the Court of Appeal Criminal Division, who would only determine such points if it was necessary to do so in a criminal appeal concerning real facts. Mr Eadie accepts that there have been cases in which the court has decided public law points of criminal law. Examples are *Royal College of Nursing v Department of Health and Social Security* [1981] AC 800 and *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112, but these involved narrow issues on agreed facts. In the present case, it is now accepted that most of the original grounds raised questions which could not properly be determined without a particular factual context. The claim had essentially reduced to consideration of the circumstances in paragraphs 25 and 26 of the Guidance – soliciting detention by a foreign liaison service.
52. It now being accepted that there is little difference between ground 3 of the grounds of claim and ground 1, Mr Eadie submits that there is no material difference in the context between a “real risk” and a “serious risk”. [If that is so, says Mr Emmerson, what is all the fuss about? Indeed.] Mr Eadie submits that “real” is not very low and “serious” is not very high. Certainly in *Soering* the expression used is “real risk”, but with the significant addition that there must be “substantial grounds for believing” that there is a real risk (paragraph 91). We also note that, in paragraph 121 of

Soering, the court records without apparent disapproval a submission by the UK Government to the effect that in judicial review proceedings the court would have power to quash a challenged deportation decision to a country where it was established that there was a “serious risk” of inhuman or degrading treatment.

53. Mr Eadie refers to a number of cases for the proposition that courts tend to use the expressions “substantial grounds for believing”, “real risk” and “serious risk” interchangeably. The cases he referred to were *Mamatkulov v Turkey* (GC) [2005] ECHR 64 at paragraph 68 “substantial grounds for believing”; *Saadi v Italy* [2009] 49 EHRR 30 “serious reasons to believe” paragraph 132, “substantial risk” paragraph 139; *Ismoilov v Russia* [2008] ECHR 348 “real risk” paragraph 125, “serious risk” paragraph 128; *Isakov v Russia* [2010] ECHR 1070 “serious risk” paragraph 112; *Iskandarov v Russia* [2010] ECHR 1336 “serious risk” paragraph 131; *Kolesnik v Russia* [2010] ECHR 942 “serious risk” paragraph 72. These cases in the main concern the risk upon a person’s return of treatment contrary to Article 3 of the European Convention, and are therefore of general relevance.
54. In *In re Officer L* [2007] 1 WLR 2135, the House of Lords held that the positive obligation under Article 2 of the European Convention to take steps towards the prevention of loss of life at the hands of others arose only when the risk was “real and immediate”. Lord Carswell said at paragraph 20:

“Two matters have become clear in the subsequent development of the case law. First, this positive obligation arises only when the risk is “real and immediate”. The wording of this test has been the subject of some critical discussion, but its meaning has been aptly summarised in Northern Ireland by Weatherup J in *In re W’s Application* [2004] NIQB 67, at [17], where he said that “a real risk is one that is objectively verified and an immediate risk is one that is present and continuing”. It is in my opinion clear that the criterion is and should be one that is not readily satisfied: in other words, the threshold is high.”

In *Van Colle v Chief Constable of Hertfordshire Police* [2009] 1 AC 225, where the issue was whether there had been a violation of Article 2 by reason of an alleged police failure of protection, Lord Bingham (paragraph 30) and Lord Hope (paragraph 66) in effect said that *Officer L* had not qualified or glossed the real and immediate test in *Osman v UK* (1998) 29 EHRR 245.

55. *R v Benjafield* [2003] 1 AC 1099 concerned confiscation proceedings, where the Criminal Justice Act 1988 and the Drug Trafficking Act 1994 used the expression “serious risk of injustice”. Paragraph 41(4) of the judgment of the court in the Court of Appeal said, of the weight to be given to the word “serious”, that “any real as opposed to fanciful risk of injustice can be appropriately described as serious”. In paragraph 15 of Lord Steyn’s opinion in the House of Lords, he said that the court’s role is to decide whether there is or might be “a risk of serious or real injustice”.
56. Mr Eadie submits that the court should not lose touch with reality and should appreciate that officers on the ground will not engage in dialectic. The Government made a judgment that the expression “serious risk” is to be preferred to “substantial

grounds for believing that there is a real risk”. In any event, the Guidance does not need to track the *Soering* wording because of the different context. What matters is to get across the essential message.

57. Mr Perry QC, in submissions on behalf of the Government specifically relating to the criminal law, refers us to the Law Commission Report *Participating in Crime* (Law Comm. No. 305) May 2007 and an article by Professor Simester, “*The Mental Element in Complicity* (2006) 122 LQR 578, for the proposition that the Commission is asking the Divisional Court for an opinion on what scholars reckon is the most difficult area of criminal law. He says, for instance, that it is unresolved whether joint enterprise liability is or is not an extension of secondary party participation.
58. The Law Commission Report has 221 pages and we can only skate its surface, when Mr Perry submits that we should not in any event decide the specifically criminal law point and that it is unnecessary to do so. Paragraphs B.67ff of the Report address “The Fault Element of Secondary Liability”. In paragraph B.76, it is said that the case law is confusing on the question whether a secondary party defendant must at least believe that his or her conduct is capable of assisting or encouraging the principal or whether the defendant must also believe that the conduct will assist or encourage the principal. The Law Commission took *Johnson v Youden* [1950] 1 KB 544 as a starting point and explained that, although this authority had apparently been approved at least twice in the House of Lords, subsequent cases appeared to dilute the requirement of knowledge. One such case was *Bryce* of which the Law Commission said at B.114:

“In *Bryce* the Court of Appeal said that it suffices if D “contemplates” the commission of the principal offence in the sense of realising that “it is a real possibility that it will be committed”. This was stated as a general proposition applying to both non-joint criminal ventures and joint criminal ventures. However, the Court of Appeal relied on *Rook* which was a case of joint criminal venture. Further, the judgment of the Court wrongly cites *Bainbridge* as authority for the proposition that D aids P to commit an offence if D provides P with assistance realising that “there is a real possibility” that it will be used to commit an offence of a particular type.”

59. Professor Simester’s conclusion begins:

“Complicity liability is notoriously difficult, both doctrinally and conceptually, in part because its underlying principles are themselves in tension.”

60. Mr Emmerson says that we should not concern ourselves with academic debate about what the law might be, but concentrate on what it is, that is, as he submits, as given in *Bryce* which he says is binding. Mr Perry says that we should not plunge into legal debate more than is absolutely necessary and that it is not necessary to take *Bryce* apart (which we have to an extent done earlier in this judgment) because of the simple fact that there is in the context no material difference between “real risk” and “serious risk”.

Discussion

61. In our judgment, Mr Eadie and Mr Perry are correct that, in the context of the Guidance and taking it for what it is, there is no material difference between a “real risk” and a “serious risk” of torture or CIDT taking place. We reach this conclusion for a number of reasons. First, this is our own understanding of the import of the two phrases in the context in which they are used. The context is that the document is intended to give practical guidance to intelligence officers on the ground. It is not a treatise on English criminal law. What matters is how the document would be read and applied by individual intelligence officers, not how it would fare at the Law Commission or in a University Graduate Law School. The document makes clear that, in all relevant instances other than where there is no serious risk of CIDT (section 2 of the table), the officer must not proceed at all (section 1) or the matter must be referred to senior personnel or Ministers.
62. Second, in the context of torture or CIDT, a real risk must be a risk that is serious, because torture and CIDT are by universal consent serious. We understand Mr Emmerson’s logical distinction between the likelihood that a risk may eventuate and the quality of the consequences if it does, but that is a lawyer’s or schoolman’s point, not one which would carry through into the sense of this document on the ground.
63. Third, for the reasons we have given, *Bryce* is not binding authority for the proposition which Mr Emmerson claims for it. Fourth, we accept the submission on behalf of the Government that numerous cases of general relevance use the two phrases and other possibilities interchangeably. Few, if any, of these cases concern the degree of foresight necessary for secondary liability in criminal law, because that was not in issue – as it was not in *Bryce*, where there is also an interchange of phrases. The cases do, however, support our own view that there is no normally perceived difference in meaning and import which this context requires.
64. Fifth, paragraph 1 of the Guidance does not *promise* that officers whose actions are consistent with the Guidance will be immune from personal liability. It says that they have good reason to be confident. And, although the Guidance claims to set out principles which are consistent with UK domestic law, it is not a legal treatise nor a judgment of the Court of Appeal Criminal Division on particular facts. It is entitled to convey the sense of the relevant principles (which it does) in language suitable to its purpose. For this reason, our decision in these judicial review proceedings, which in effect invite us to require the Government to rewrite the document, concerns the meaning of this document as it would be understood in its context. It is not a decision which is capable of carrying authority in a criminal prosecution. That said, we are confident that no individual officer would be successfully prosecuted, in this jurisdiction at least, because he judged that a risk of torture or CIDT was not serious, but when he would have judged that the same risk was real.

International Law

65. The Guidance also says that it is consistent with international law, and we have had the benefit of much learning and paper from both parties on this topic.

66. The Commission's essential case turns on the meaning and application of "acquiescence" in Article 1 of UNCAT, where acquiescence is a species of complicity. Article 1 of UNCAT provides:

"For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

67. The submission in outline is that the underlying obligation prohibiting torture is *ius cogens* and of universal application. There is no need for UNCAT to prohibit torture. It cannot seriously be contested that *ius cogens* is part of the common law, from which the State cannot derogate. Mr Emmerson refers here to *R v Bow Street Magistrates ex parte Pinochet (No. 3)* [2000] 1 AC 147; *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221; and *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270. Article 1 of UNCAT, he says, properly reflects the international definition of torture which is part of customary international law which as such has become part of the law of England and Wales. "Acquiescence" in Article 1 of UNCAT is coextensive with the law of secondary participation in English law. It means "tacit consent" or "agreement or consent by silence", which is to be equated with turning a blind eye to a real risk of torture. Therefore, the argument is, the Guidance is not, as it claims to be, consistent with international law. We note that logically the submission has the principle as part of English law deriving from international law, not international law itself.
68. The Government's submission in outline is that large parts of the Commission's longer argument are hugely contentious and not accepted to be correct. In particular, although the universal prohibition on torture itself is unproblematic, finer points of the potential liability of secondary parties are controversial and not to be imported into English law as customary international law, which they are not and which does not in any event automatically become part of domestic law. It is necessary to be very clear what principle is said to constitute customary international law, and it is not possible to jump from the broad assertion that torture is forbidden to the incorporation of a thoroughly contentious meaning of "acquiescence" in Article 1 of UNCAT. Even if the principle is sufficiently clear and established by a sufficient international consensus, it does not follow that the principle will be admitted into English law as customary international law. There has to be no constitutional objection, as if the court was admitting a principle on a subject which democratic accountability should leave to Parliament. Mr Eadie submits that it would in this instance be thoroughly objectionable for the court to step in, even if the antecedent requirements were established, which they are not. He says that there is no basis as a matter of customary international law principles that "acquiescence" in torture in Article 1 of

UNCAT equates with knowledge of a real risk, as distinct from a serious risk – there is no treaty, no state practice and no compelling authority having that effect.

69. We record these outline submissions to indicate the nature of the debate, not as a prelude to discussing or deciding a disproportionately large academic debate which we consider, in agreement with Mr Eadie, that it is not necessary or appropriate to resolve in this case for the following reasons.
70. It would be very odd, to say the least, if, on a matter where the United Kingdom Parliament had specifically legislated, imported international law gave a different answer to the point in issue from English law without the import. By section 134 of the 1988 Act, the United Kingdom complied with its obligations under Article 4 of UNCAT and enacted the substance of the prohibition of torture as defined in Article 1 of UNCAT. Parliament did not expressly import that part of Article 1 comprising the words “at the instigation of or with the consent or acquiescence of” because that existed in the common law principles of secondary liability contained in section 8 of the 1861 Act as interpreted in subsequent case law. Importing the “acquiescence” part of Article 1 into English law, when Parliament had obviously decided for good reason not to import it in the statute, would be very odd and probably illegitimate. We do not have to decide that, because it is the Commission’s express case, in paragraph 50 of their skeleton argument, that “the UK has correctly transposed UNCAT Art 4 into domestic law through CJA s.134 read in conjunction with the ordinary rules on secondary liability. The UK criminal law on secondary liability (properly interpreted) ensures that those who “acquiesce” in acts of torture, within the meaning of UNCAT Art 1 will commit a criminal offence and will be punished.” Article 4 of UNCAT requires states to ensure that all acts of torture are offences under its criminal law. The same is to apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. It is the Commission’s case that for relevant purposes complicity embraces acquiescence and that each is encompassed by the ordinary English rules of secondary liability. It is not, therefore, the Commission’s case that there is a gap in the domestic rules of secondary liability which Article 1 of UNCAT or customary international law need to fill.
71. The international law debate is also arid and does not need to be decided in the light of our decision that, for the purposes of the Guidance, “real risk” and “serious risk” are interchangeable. Attempting to import “real risk” by means of “acquiescence” does not help the case that “serious risk” is wrong.
72. We refrain therefore from entering into the international law debate. In doing so, we note that the French text of Article 1 of UNCAT does not use a word which would naturally translate into English as “acquiescence”. The relevant part of the French text is “... [when such pain or suffering is inflicted] par un agent de la fonction publique ou toute autre personne agissant à titre officiel ou à son instigation ou avec son consentement exprès ou tacite.” “Consent or acquiescence” is from the French “express or tacit consent”. We have noted the submission that tacit consent embraces turning a blind eye. But we doubt if an intelligence officer who judged that there was no serious risk of torture could properly be said to consent, even tacitly, to torture or to turn a blind eye to it, if torture were subsequently to happen or if, unknown to the officer, it had happened in the past.

Decision

73. In the result, we give the Commission permission to bring these judicial review proceedings on Ground 3 only, but that claim fails and is dismissed for the reasons we have given.

Mr Al Bazzouni's case

74. Hooding is placing a bag, often a sandbag, over the head of a detained person by compulsion.

75. As we have seen, the Annex to the Guidance is referred to in paragraph 10 as describing the issues which should be taken into account when considering whether standards of treatment and detention are acceptable. The Annex itself describes what might be unacceptable. The part of it relating to CIDT records that the UK Government considers that the listed practices “could” constitute CIDT. These include methods of obscuring vision or hooding, with the exception which is objected to:

“... (except where these do not pose a risk to the detainee’s physical or mental health and is necessary for security reasons during arrest or transit)”

76. Paragraph 29 of the Guidance concerns interviewing detainees held overseas in UK custody and it refers to the Ministry of Defence Joint Doctrine Publication, which forbids hooding without qualification. It is, in our view, evident that the Annex, in this respect at least, is only intended to apply to officers who may be concerned with persons held in detention by foreign liaison services. This is because intelligence officers have no powers of detention. UK Armed Forces may have such powers, but they are forbidden from using hooding. So the only circumstance in which the d(iii) exception is capable of applying is for those detained by foreign liaison services.
77. The claimant’s case is that the offending exception has the effect of condoning hooding by foreign liaison services where it is regarded as necessary for security reasons during arrest or transit. He says that hooding is to be regarded without exception as CIDT, which will always by its nature pose a risk to the detainee’s physical or mental health. He has convincing uncontradicted evidence to this latter effect.
78. The Government argues that the Annex only applies in this respect to detainees held by foreign liaison services. We agree with this, but think that consideration might be given to making this clearer. We also note that there is evidence, for instance, of people detained by foreign liaison services being transported by British forces in a British helicopter or vehicle who are expansively regarded as not being detained by British Forces so long as a foreign official is present. It is then contended by the Government that there is no internationally recognised definition of CIDT and that it is no part of the United Kingdom’s Government’s function to seek to impose its views on liaison services of other states. This is a difficult argument in the light of the internal inference from paragraph 29 that hooding, which the Joint Doctrine Publication forbids, is inhumane, and from other evidence relied on by the claimant.

79. The narrower and better focused argument is that in practice on the ground there may be occasions when acceptable methods of obscuring vision are not available; when it is imperative for security reasons to prevent a detained person from seeing where he was going, what he is passing or people he is with; and where perhaps the detained person himself does not object to this method of obscuring his sight or his identity.
80. We are satisfied that there is convincing evidence that the United Kingdom's Government's consistent policy has been that hooding is neither to be used nor condoned by UK personnel in any circumstance, including during transit or for security reasons. This is clear from the Joint Doctrine Publication to which we have referred. On 2nd March 1972, the Prime Minister, Edward Heath MP, stated without qualification to Parliament that five techniques formerly used for interrogation purposes in Northern Ireland were to be banned. These included hooding.
81. The claimant contends that putting a hood over a person's head by compulsion is both an assault and a battery at common law, and thus both a tort and a crime. It is also an outrage upon personal dignity and a crime under the International Criminal Court Act 2001, if done by UK service personnel anywhere in the world. The Government says that, since the exception in the Annex is only available when the hooding does not pose a risk to the detainee's physical or mental health, it could not involve any harmful force and would not therefore be an assault. The claimant says that this would be no defence to battery, which does not require harmful force or any impairment of physical health. There will always at least be a risk to the detainee's physical or mental health.
82. The Government says that there can be circumstances in which touching without consent or lawful excuse might not amount to battery and that hooding might not be battery. The claimant says that hooding is far removed from the types of accidental social contact cited by the Government. Forcibly putting a sandbag over someone's head is quite different from taking hold of his arm. Hooding will always be a battery unless the detained person consents, which is unlikely.
83. The Government argues that a soldier or intelligence or security officer might have a defence to proceedings for battery (a) under section 3 of the Criminal Law Act 1967 – using reasonable force to effect or assist in effecting lawful arrest – or (b) according to the law of armed conflict. The first of these could scarcely come within paragraph d(iii) of the Annex, since hooding during forcible arrest is likely to pose a risk to the detainee's physical or mental health by reason of the force, and forcibly maintaining the hooding after arrest would not be covered. As to (b), the claimant says that the law of armed conflict cannot oust the criminal law.
84. The claimant submits that hooding, other than in exceptional circumstances where there is consent, would infringe rights under Article 3 of the European Convention on Human Rights. The Guidance as to hooding would thus be unlawful if the detention is by UK Armed Forces, and there is also an obligation to secure Convention rights and freedoms within a territory over which UK Armed Forces have effective lawful control – *Al Saadoon v United Kingdom* (2009) 49 EHRR SE11 at paragraph 85.
85. The Government submits that the European Court of Human Rights has never suggested that hooding detainees necessarily breaches Article 3. On the occasions when the Strasbourg Court has considered hooding, they have seen no reason to

question its lawfulness in principle. We do not read *Ireland v United Kingdom* (1978) 2 EHRR 2 as supporting this proposition. The court there considered the five techniques as used in Northern Ireland before March 1972 (paragraphs 96, 165) which included hooding. The court's conclusion in paragraph 168 was that recourse to the five techniques amounted to a practice of inhuman and degrading treatment in breach of Article 3. We read this as a finding that the practice was in breach of Article 3 when the five techniques were used in combination (paragraph 167). But we have not had drawn to our attention any passage which says that hooding alone might not be unlawful. A possible inference is that it depends on the facts.

86. *Hurtado v Switzerland* (App No. 17549/90, 8th July 1994) was in effect a majority decision of the Commission that the circumstances in which a subsequently convicted drug offender had been arrested was not a violation of Article 3. Six officers had arrested him by throwing a stun grenade before entering his flat, forcing him to the ground, handcuffing and hooding him, and then beating him until he lost consciousness. The Commission's decision records that the arrested person was connected with an international drug cartel and that the police could not disregard the possibility that persons in the flat were armed. The hooding was designed to prevent the identification of the police, who were part of a special task force, when they themselves were not wearing masks. The applicant wore the hood for 15 minutes at the most. It was not established that the force used was in the context excessive or disproportionate.
87. In *Ocalan v Turkey* (2005) 41 EHRR 985, the applicant was taken on board a Turkish aircraft at Nairobi airport, where he was arrested and flown to Turkey. On arrival he was taken to Imrali Prison where he was held in custody and questioned by security forces. The State Security Court found him guilty of separatist offences, including forming and leading an armed gang, and he was originally sentenced to death. After Turkish legislation abolishing the death penalty in peace time, the court changed his death sentence to life imprisonment. He made numerous complaints of serious breaches of various Articles of the Convention, some of which were upheld. Complaints of violation of Article 3 relating to the conditions in which he was transferred from Kenya to Turkey and of his detention on the island of Imrali were not upheld. One complaint was that on the journey from the airport in Turkey to Imrali prison he wore a hood. He had appeared in photographs on the island without a hood or blindfold. The hooding was one fact of many. The judgment was a generalised one that it had not been sufficiently established that his arrest and the conditions in which he was transferred from Kenya to Turkey exceeded the usual degree of humiliation that is inherent in any arrest and detention, or attained the minimum level of severity required for Article 3 of the Convention to apply.
88. The essence of the claimant's case is that, by reason of the exception in paragraph d(iii) of the Annex, the Guidance fails to prohibit and, taken as a whole, impliedly authorises UK personnel to use hooding, and to condone the use by liaison services of hooding where it is "necessary for security reasons during arrest or transit". This would not only be unlawful, but contrary to the Government's explicit policy since 1972. We do not consider that the Guidance authorises hooding by UK officers or forces in any circumstance. It plainly does contemplate the possibility that some limited hooding by foreign liaison services during arrest or transit may be regarded as necessary for security reasons and that it may not constitute CIDT. We see the force

of the claimant's submission that, as expressed, the exception is likely to be read by officers on the ground as permitting hooding in circumstances of this kind. The circumstances in which it might be regarded as acceptable for intelligence officers to go along with hooding are at best ill-defined. The qualification that the hooding does not pose a risk to the detainee's physical or mental health is also ill-defined and, on the ground, inherently unpredictable.

89. We have been referred to some selected evidence which we are told has been given to the *Baha Mousa* public inquiry conducted under the chairmanship of the Rt. Hon. Sir William Gage to the effect that hooding may have been used by UK Forces in Iraq; that hooding can very often restrict breathing and have other serious physiological and psychological consequences; and that this was recognised quite clearly in some quarters in the Ministry of Defence in 2003. We do not propose to address or evaluate this evidence for a number of reasons. First, it is necessarily incomplete and has been fully considered in the *Baha Mousa* inquiry. Second, the Prime Minister's March 1972 statement to Parliament and the unqualified prohibition of hooding in the Joint Doctrine Publication are quite sufficient for our purposes. We are unimpressed by the Government's attempt in these proceedings to read qualifications into the 1972 statement, but in any event the Joint Doctrine Publication is quite clear. Third, the exception in d(iii) of the Annex, if it is sustainable at all, has (or should have) a very limited application – see below – which needs to be seen in the context that hooding by UK Armed Forces is prohibited without qualification.

Discussion

90. In our judgment, many of the submissions on both sides bypass the main point, which is that the exception in d(iii) of the Annex could only apply, if it is ever legitimate, to very narrow circumstances. The Government's policy has forbidden hooding and hooding is expressly forbidden for the UK Armed Forces. Intelligence and security officers do not have powers of detention. Although paragraph d of the Annex is expressed as a general non-definition of CIDT, d(iii) at least (but probably all of it) can only apply to intelligence officers having dealings with those detained by foreign liaison services, where it is the foreign liaison service that may be doing the hooding. Further, it seems that the exception should be further limited to instances where the foreign liaison service does not have available methods of obscuring vision which are not unacceptable – see paragraph 210 of the Joint Doctrine Publication quoted in paragraph 32 above.
91. The extended debate about whether hooding would be an assault, battery, infringement of Article 3 of the Convention or other illegality is largely beside the point. It may possibly be that, in certain factual circumstances, hooding might conceivably be none of these, although the nature of hooding and its prohibition must mean that it very often would be. We note the Government's submission that the Annex does not purport to define CIDT exhaustively, but that is beside the point also. This court cannot usefully debate or decide such matters in these proceedings in the absence of particular facts. The Annex is only, however, concerned with limited circumstances which do not extend beyond hooding during transit or arrest which does not pose a risk to the detainee's physical or mental health.
92. There are then two possibilities. First, the officer may be considering interviewing or soliciting the detention of a person, whom the foreign liaison service may subject to

hooding. If the officer judges that there is a serious risk of this, he will have to assume that the hooding will constitute CIDT, because it is Government policy to forbid it and the officer will be quite unable to judge in advance that it would not pose a risk to the detainee's physical or mental health and would not otherwise be unlawful, when all but consensual hooding very probably will pose such a risk. In these circumstances, the officer has to act in accordance with section 3 of the table by consulting senior personnel and cannot proceed other than in accordance with section 3.

93. Second, the officer may be concerned with a person in the officer's presence who is detained by a foreign liaison service who are going to subject the detainee to hooding. It may perhaps be that the officer can properly judge whether obscuring the detainee's vision is necessary for security reasons during arrest or transit. But we are not persuaded that the officer is properly able to judge whether hooding by members of the foreign liaison service will not pose a risk to his physical or mental health, unless the hooding is consensual. In short, the limited exception in the Annex is unworkable and, in our view, officers on the ground should not be encouraged or required to make any judgment which might possibly enable them to go along with it.
94. On a more general level, in our judgment, the series of difficult and confusing judgments which the exception in d(iii) of the Annex requires for its conceivably lawful operation is too great to expect officers on the ground to give effect to it without risking personal liability. The Government's policy is, for good reason, to prohibit hooding. d(iii) of the Annex should be changed to omit hooding from the ambit of the exception.
95. We give Mr Al Bazzouni permission to bring his claim and it succeeds to the extent that we have indicated. We are not presently inclined to make a declaration or grant other substantive relief. We trust that this judgment sufficiently indicates what, in our judgment, needs to be done.