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THE LAW GOVERNING UNITED KINGDOM GOVERNMENT TORT LIABILITY IN THE 'WAR ON TERROR'

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Abstract This article discusses the United Kingdom Supreme Court judgment in *Zubaydah v Foreign, Commonwealth and Development Office*, which addressed the law governing the tort liability of the United Kingdom Government for its alleged complicity in the claimant's arbitrary detention and torture overseas by the Central Intelligence Agency. In holding that English law applied, the Court departed from previous case law by giving decisive weight to public law factors in its choice-of-law reasoning. This decision arguably heralds a greater role for English law in relation to tort claims brought by overseas victims of allegedly wrongful exercises of British executive authority as a mechanism for achieving executive accountability, controlling abuse of power, ensuring the rule of law and providing victims access to remedy.

Keywords: private international law, conflict of laws, choice of law, tort, central government, the Crown, liability, complicity, war on terror, *Zubaydah v Foreign, Commonwealth and Development Office*.

I. INTRODUCTION

The United Kingdom (UK) is a close ally of the United States (US). It is, therefore, unsurprising that the UK armed forces and security services cooperate closely with their American counterparts. It is also well known that some of the practices adopted by the US armed forces and security services are questionable from human rights and international humanitarian law perspectives. Particularly notorious are the detentions of terror suspects by the Central Intelligence Agency (CIA) at clandestine 'black sites', effectively operating outside the laws and legal systems of the US and host States, and the interrogation practices that the CIA euphemistically calls 'enhanced interrogation techniques'.[1] The United Nations (UN) Human Rights Council regards these acts respectively as arbitrary detention, and torture and cruel, inhuman or degrading treatment.[2]

[1] US Senate Select Committee on Intelligence, 'Report of the Study of the Central Intelligence Agency's Detention and Interrogation Program' (9 December 2014) <https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf>. 'Black site' is a colloquial term for the locations where the CIA kept detainees in the war on terror around the world.

[2] Human Rights Council Working Group on Arbitrary Detention, 'Opinions Adopted by the Working Group at its Ninety-Fifth Session, 14–18 November 2022: Opinion No 66/2022 Concerning Zayn al-Abidin Muhammad Husayn (Abu Zubaydah)' (6 April 2023) UN Doc A/HRC/WGAD/2022/66, paras 104, 118.

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Military and intelligence cooperation with the US sometimes intersects with allegations of human rights and international humanitarian law violations by the US. In these situations, a victim pursuing a remedy may choose to commence proceedings not against the US, but against another State allegedly complicit in these violations. The main reason for this lies in often-insurmountable legal obstacles facing the victim in US courts[3] and the fact that the US enjoys immunity in foreign courts. In such cases, the victim's best chance of accessing a remedy may be to pursue 'substitute justice'[4] in the courts of allegedly complicit States.

This sets the stage for the case of *Zubaydah v Foreign, Commonwealth and Development Office* that was decided by the UK Supreme Court,[5] in which Abu Zubaydah, a detainee in Guantánamo Bay, sued the UK Government for its alleged complicity in the CIA's wrongful conduct. The case stands out for at least two reasons. First, the UK Government was not sued, as one might expect, under the Human Rights Act 1998 (HRA),[6] which implements the European Convention on Human Rights (ECHR) into UK law, but in tort. The case thus highlights the strategic use of tort law to bring claims which are essentially about human rights. Second, the claimant's reliance on tort causes of action, coupled with his detention and injuries overseas, gave rise to the issue of applicable law. The claimant pursued a remedy under English tort law, while the defendants argued that he should plead his claim under the tort laws of the foreign countries where he was allegedly detained and injured. The parties agreed that the issue of applicable law should be determined as a preliminary issue.

The Supreme Court judgment is important due to the insights it provides into the operation of choice-of-law rules for torts in the unusual context of intelligence cooperation, central government tort liability in English law and access to remedy for overseas victims of allegedly wrongful exercises of British executive authority. In holding that English law applied, the Supreme Court departed from previous case law by giving decisive weight to public law factors in its choice-of-law reasoning, thus arguably heralding a greater role for English law as a mechanism for achieving executive accountability, controlling abuse of power, ensuring the rule of law and providing victims access to remedy.

II. THE ASSUMED FACTS AND ISSUES ARISING

The parties agreed that the preliminary issue of applicable law should be decided by reference to assumed facts as pleaded by the claimant, which the defendants neither confirmed nor denied for national security reasons. The following reflects these assumed facts.

The CIA captured Zubaydah, a suspected Al-Qaeda member of Palestinian nationality, in Pakistan in March 2002. He was then rendered between black sites in Afghanistan, Guantánamo, Lithuania, Morocco, Poland and Thailand (which the Court referred to as the 'Six Countries'), finally being returned to Guantánamo in September 2006 where he has been held since. He was the first detainee at a black site and the first subject of 'enhanced interrogation techniques'. He remains in Guantánamo as a 'forever prisoner',[7] despite never standing trial for any crime.

[3] JE Pfander, *Constitutional Torts and the War on Terror* (OUP 2017) xv.

[4] K Roach, 'Substitute Justice? Challenges to American Counter Terrorism Activities in Non-American Courts' (2013) 82(5) MissLJ 907.

[5] *Zubaydah v Foreign, Commonwealth and Development Office* [2023] UKSC 50; [2024] 1 WLR 290.

[6] Human Rights Act 1998 c 42.

[7] E Pilkington, '"The Forever Prisoner": Abu Zubaydah's Drawings Expose the US's Depraved Torture Policy' *The Guardian* (London, 11 May 2023).

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Unable to pursue a remedy against the US,[8] Zubaydah commenced proceedings against three allegedly complicit States. After successfully suing Lithuania and Poland before the European Court of Human Rights,[9] he commenced proceedings against the UK Government in England. The case fell outside the ECHR's territorial scope because there was no allegation that the UK hosted a black site and it was not contended that he otherwise fell within the jurisdiction of the UK for human rights purposes. Zubaydah, therefore, sued the UK Government for damages in tort. The essence of the claim was that Security Service (MI5) and Secret Intelligence Service (MI6) officials knew or ought to have known that Zubaydah was rendered to, arbitrarily detained in and subjected to extreme mistreatment and torture at black sites. Nevertheless, their London offices sent the CIA numerous questions, with a view to the information being elicited from Zubaydah, expecting and intending (or at least indifferent to the fact) that he would be, and in fact was, subjected to extreme maltreatment and torture. Zubaydah sued the UK Government for its vicarious liability for the torts allegedly committed by MI5 and MI6 officials. The torts alleged against the defendants under English law were misfeasance in public office,[10] conspiracy to injure,[11] trespass to the person, false imprisonment[12] and negligence.[13]

[8] Zubaydah has unsuccessfully filed a number of motions in US courts: a habeas corpus motion in 2008, a motion for discovery in 2009, a notice to alert the Court that all pending motions were fully briefed and awaited action by the Court in 2018, a petition for a writ of mandamus in the Court of Appeals for the District of Columbia Circuit seeking an order to attend to the case and a collective habeas corpus petition in 2018: Human Rights Council Working Group on Arbitrary Detention (n 2) paras 39–40, 42. Zubaydah also pursued a 28 USC §1782 motion in the Federal District Court seeking to subpoena two former CIA contractors with the aim of obtaining information for use in Polish proceedings concerning his treatment in 2002 and 2003 at a CIA detention site located in Poland. The US Supreme Court instructed the Court of Appeals for the Ninth Circuit to dismiss the application for discovery based on the State secrets privilege, which allows the Government to bar the disclosure of information that, were it revealed, would harm national security. *United States v Husayn, aka Zubaydah* 595 US (2022).

[9] *Husayn (Zubaydah) v Poland* App No 7511/13 (ECtHR, 24 July 2014); *Zubaydah v Lithuania* App No 46454/11 (ECtHR, 31 May 2018).

[10] Misfeasance in public office involves two different forms of liability. According to Lord Steyn in *Three Rivers DC v Bank of England* [2003] 2 AC 1, 191, 'First there is the case of targeted malice by a public officer, ie conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.' There was no allegation that MI5 and MI6 officials acted with malice.

[11] Conspiracy to injure refers to conspiracy to use unlawful means. 'This form of the tort is committed where two or more persons combine and take action which is unlawful in itself with the intention of causing damage to a claimant who does incur the intended damage.' A Tettenborn and M Jones, *Clerk & Lindsell on Torts* (24th edn, Sweet & Maxwell 2023) para 23-108.

[12] Trespass to the person constitutes 'interference, however slight, with a person's elementary civil right to security of the person, and self-determination in relation to his own body … Trespass to the person may take three forms, assault, battery and false imprisonment: "An assault is an act which causes another person to apprehend the infliction of immediate, unlawful, force on his person; a battery is the actual infliction of unlawful force on another person", and false imprisonment is "the unlawful imposition of constraint on another's freedom of movement from a particular place".' ibid, para 14-01, referring to *Collins v Wilcock* [1984] 1 WLR 1172, Goff LJ, 1178.

[13] A successful claim for negligence has five elements: actionable harm suffered by the claimant; a duty of care of the defendant; a breach of duty by the defendant; a causal connection between the

Zubaydah's detention and injuries occurred overseas. The question arose whether the issues of existence and extent of tort liability of the UK Government were governed by English law or the laws of the Six Countries. The Rome II Regulation, which sets out the choice-of-law rules for determining the applicable law for the vast majority of non-contractual obligations in English private international law, did not apply because it covers only 'non-contractual obligations in civil and commercial matters' and expressly excludes claims for 'the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)'[14] and because the claims would also have fallen outside the temporal scope of the Regulation, at least in certain respects.[15] The choice-of-law rules for torts of Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (1995 Act)[16] applied instead.

Section 11(1) of the 1995 Act lays down the general rule that the applicable law is the law of the country in which the events constituting the tort in question occur. Some torts are transnational in the sense that elements of those events occur in more than one country. Section 11(2) specifies the applicable law in such cases. For example, for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the applicable law is the law of the country where the individual was when he sustained the injury.[17]

Section 12 lays down an 'escape clause'. Section 12(1) provides that if it appears, in all the circumstances, from a comparison of the significance of the factors connecting a tort with the country whose law would be the applicable law under the general rule and the significance of any factors connecting the tort with another country that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law is the law of that other country. Section 12(2) contains a non-exhaustive list of factors that may be considered as connecting a tort with a country. Section 15(1) provides that these choice-of-law rules also apply in relation to claims by or against the Crown.

Pursuant to the general rule, prima facie the laws of the countries where Zubaydah was when he was detained and injured—ie the laws of the Six Countries—applied. However, the case was closely connected with the UK because the defendants were UK public authorities exercising sovereign authority in the UK for the benefit of the UK. Therefore, the question arose whether the Section 12 escape clause should be applied and the general rule displaced in favour of English law. The claimant sought to plead

defendant's conduct; and 'the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote'. Tettenborn and Jones (n 11) para 7-04.

[14] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40, art 1(1). Recital 9 clarifies that claims arising out of *acta iure imperii* 'include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders'. The exclusion applies even where a claim alleges gross violations of human rights and international humanitarian law: C-292/05 *Lechouritou v Germany* ECLI:EU:C:2007:102. Rome II is assimilated EU law within the meaning of the UK Retained EU Law (Revocation and Reform) Act 2023 c 28, sec 5: Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/83).

[15] Rome II ibid, art 32.

[16] Private International Law (Miscellaneous Provisions) Act 1995 (1995 Act) c 42.

[17] ibid, sec 11(2)(a).

his claim under English law. The defendants argued that the laws of the Six Countries applied.

III. LOWER COURT JUDGMENTS

Lane J[18] adopted a broad view of the concept of 'tort' for the purposes of Section 12 of the 1995 Act, which covered the wrongful conduct of not only MI5 and MI6 officials but also of the primary tortfeasor, ie the CIA. On this view, the British officials' wrongful conduct 'was a component in the overall exercise undertaken by the CIA'[19] and 'only an element of the overall treatment of the claimant by the CIA in the Six Countries'.[20] This view of the concept of 'tort' amplified the connections with the Six Countries, as these were the locations where the claimant was injured and also where the CIA agents causing the injuries were physically present with the claimant at all relevant times.[21] The claimant argued that the connections with the Six Countries were reduced because the Six Countries hosted de facto legal 'black holes' between which the claimant was rendered, the CIA operated under US law, the claimant's presence in the Six Countries was involuntary and the defendants were indifferent to the countries in which the claimant was detained. In Lane J's view, the black sites were not legal black holes because host States' laws never ceased to apply there and the rendering of the claimant to the Six Countries was deliberate as far as the CIA was concerned.[22] Lane J further considered that the factors connecting the torts with England, ie submitting questions in England for the perceived benefit of the UK by emanations of the UK State, were not sufficiently strong.[23] He also adopted a high threshold for applying the escape clause.[24] It is on this basis that he held that the laws of the Six Countries applied.[25]

The Court of Appeal unanimously allowed the appeal.[26] Males LJ, with whom Thirlwall LJ and Sharp LJ agreed, adopted a narrow view of the concept of 'tort' for the purposes of Section 12 of the 1995 Act. He criticised Lane J for focusing on the wrongful conduct of the CIA instead of that of MI5 and MI6 officials.[27] Consequently, the only factor connecting the torts with the Six Countries was that this was where the claimant was injured. The fact that this was where the CIA agents causing the injuries were physically present with the claimant at all relevant times 'was in reality the inevitable corollary of' the first factor.[28] Males LJ reached the opposite conclusion to Lane J on the significance of the factors connecting the torts with the Six Countries and England.[29] Furthermore, Males LJ adopted a broader interpretation of the escape clause.

[18] *Husayn v Foreign and Commonwealth Office* [2021] EWHC 331 (QB); [2021] 4 WLR 39.
[19] ibid, Lane J, para 62. [20] ibid, para 69. [21] ibid, paras 49–60.
[22] ibid. For the sake of clarity, it should be mentioned that 'black sites' are where the CIA kept detainees in the war on terror. 'Legal black hole' is another colloquial term for a location where no law applies. Both terms were used by the UK Supreme Court and the lower courts. According to Lane J the 'black sites' where Zubaydah was kept were not 'legal black holes' because host States had their own laws which never ceased to apply there. [23] ibid, paras 61–70.
[24] ibid, paras 16, 18, 20, 64.
[25] Lane J also held, at ibid, paras 71–88, that the claimant could not rely on the public policy exception in sec 14(3)(a)(i) 1995 Act to achieve the application of English law. This point was not discussed before the Supreme Court.
[26] *Husayn (Zubaydah) v Foreign and Commonwealth Office* [2022] EWCA Civ 334; [2022] 4 WLR 40. [27] ibid, Males LJ, paras 21, 25, 37, 42. [28] ibid, para 26.
[29] ibid, paras 38–42.

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He referred to *Entick v Carrington*[30] to emphasise the public law function of tort law of holding the executive to account, controlling abuse of power and ensuring the rule of law,[31] which pointed strongly to the application of English law.[32]

IV. UK SUPREME COURT JUDGMENT

On 20 December 2023, the Supreme Court dismissed the appeal in a four-to-one decision (Lord Lloyd-Jones and Lord Stephens, with whom Lord Kitchin and Lord Burrows agreed; Lord Sales dissenting).

The first issue was the test to be applied before an appellate court can interfere with a lower court's evaluative judgment under Sections 11 and 12 of the 1995 Act. The majority held that '[a]n appellate court should not interfere with a judge's evaluation under Sections 11 and 12 unless there is shown to be a clear error of law, or the judge has reached a conclusion not reasonably open to them'.[33]

The second issue was whether the lower courts' evaluative judgment under Sections 11 and 12 was in fact open to review applying the test adopted under the first issue. Interestingly, the majority held that both Lane J and the Court of Appeal had erred in law. The majority agreed with the Court of Appeal that Lane J had failed to focus, under Section 12, on the wrongful conduct of MI5 and MI6 officials, wrongly increased the significance of the factors connecting the torts with the Six Countries and wrongly reduced the significance of the factors connecting the torts with England.[34] The Court of Appeal had erred by focusing on the defendants' wrongful conduct and neglecting that of the CIA.[35]

The majority then applied Sections 11 and 12 afresh. They found the connections between the torts and the Six Countries to be weak. First, Zubaydah was involuntarily present in the Six Countries, unaware of his specific location at any given time. Consequently, he lacked a reasonable expectation that the local laws would apply to his situation.[36] Second, the defendants were unaware of and indifferent to Zubaydah's location, and thus did not expect or intend the local laws to govern their conduct.[37] Third, Zubaydah was rendered to and detained in black sites in six different countries, which diluted the strength of the connections with these countries.[38] Fourth, his captors and torturers were agents of a third country, the US, and the black sites operated as 'de facto exclaves'.[39]

The majority thought that the connections between the torts and England were strong and emphasised 'public law factors' in their reasoning. First, the claimant sued the UK Government for its vicarious liability for the torts of its officers.[40] Second, the relevant events occurred partly in England and for the perceived benefit of the UK.[41] Third, UK executive agencies acted 'in their official capacity in the purported exercise of powers conferred under the law of England and Wales … The defendants are all emanations

[30] *Entick v Carrington* (1765) 2 Wils KB 275; 95 ER 807.
[31] *Husayn (Zubaydah)* (n 26) Males LJ, paras 40–41.
[32] Males LJ also held, at ibid, paras 51–59, that the public policy point did not have to be decided because English law applied and it would in any event be premature to decide this point before the content of foreign law had been established. This point was not discussed before the Supreme Court.
[33] *Zubaydah* (n 5) Lord Lloyd-Jones and Lord Stephens, para 57.
[34] ibid, paras 65, 72–79. [35] ibid, paras 80–82. [36] ibid, paras 75, 93.
[37] ibid, paras 76, 94. [38] ibid, paras 77, 95–97. [39] ibid, para 97. [40] ibid, para 99.
[41] ibid, paras 78, 100.

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of the UK Government and were at all material times subject to the criminal and public law of England and Wales.'[42] The majority also approved the Court of Appeal's reference to *Entick v Carrington*,[43] supporting the proposition that 'the fact that executive bodies are subject to English tort law has for centuries been a recognised means of holding the executive to account, controlling abuse of power and ensuring the rule of law'.[44]

Moreover, the majority stated obiter that:

> there is scope for suggesting, for example, that on the presumed facts of this case, it is a constitutional imperative that the applicable law in relation to the tort of misfeasance in public office in relation to the acts and omissions of the UK Services should be the law of England.[45]

Since the parties agreed, and the Court accepted, that the claimant's claim as a whole was governed either by English law or the laws of the Six Countries,[46] this point is likely to have operated almost as a trump card in the back of the majority's minds.

Lord Sales dissented. According to him, the test to be applied before an appellate court can interfere with a lower court's evaluative judgment under Sections 11 and 12 of the 1995 Act is whether the judge 'reached a conclusion which could be said to be irrational or outside the range of conclusions which were legitimately open to him'.[47] Since he thought that Lane J had not committed any error of law,[48] Lord Sales found that the Court of Appeal had erred by wrongly interfering with the judge's evaluative judgment.[49] Finally, Lord Sales also reached a different conclusion from the majority on a fresh application of Sections 11 and 12 by finding that the laws of the Six Countries applied.[50]

V. IMPLICATIONS OF THE UK SUPREME COURT JUDGMENT

The Supreme Court judgment is important due to the insights it provides into the operation of the choice-of-law rules for torts of the 1995 Act in the unusual context of intelligence cooperation; central government tort liability in English law; and access to remedy for overseas victims of allegedly wrongful exercises of British executive authority.

A. Operation of the Choice-of-Law Rules for Torts of the 1995 Act

The Supreme Court judgment sheds light on the concept of 'tort' for the purposes of Section 12 of the 1995 Act in a case where the defendant is allegedly complicit in a third party's wrongful conduct. Neither the editors of *Dicey, Morris and Collins* [51] nor the case law had addressed the meaning of the concept of 'tort' in this context.

Lane J adopted a broad view, holding that the concept covered the wrongful conduct of not only MI5 and MI6 officials but also of the primary tortfeasor, ie the CIA.[52] In

[42] ibid, para 101; similarly, para 78.
[43] *Entick v Carrington* (n 30).
[44] *Zubaydah* (n 5) Lord Lloyd-Jones and Lord Stephens, para 78(c).
[45] ibid, para 62.
[46] ibid, para 6.
[47] ibid, Lord Sales, para 118.
[48] ibid, paras 117, 118, 120, 121.
[49] ibid, paras 117–122.
[50] ibid, paras 123–153.
[51] L Collins and J Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws* (16th edn, Sweet & Maxwell 2022) para 35-150.
[52] See text accompanying nn 18–21 above.

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contrast, the Court of Appeal adopted a narrow view, holding that the concept covered only the wrongful conduct of MI5 and MI6 officials.[53] The different views of the concept of 'tort' partly explain the different conclusions reached by Lane J and the Court of Appeal on the issue of applicable law. The Supreme Court upheld Lane J's view on this point, which reflects the fact that the existence of a third party's wrongful conduct and the defendants' complicity in it were key elements of all the causes of action advanced against the defendants.[54] However, the Supreme Court also criticised Lane J for focusing on the CIA's wrongful conduct and not sufficiently considering that of MI5 and MI6 officials.[55]

The Supreme Court judgment also elucidates which factors may be taken into account as connecting a tort with a country for the purposes of Section 12. Section 12(2) states that these factors include those relating to the parties, any of the events which constitute the tort in question or any of the circumstances or consequences of those events. The editors of *Dicey, Morris and Collins* note that 'the relevant connection may be to the territory of a particular country, or to its legal system, with the consequence that the court may take into account a choice of law provision in a contract between the parties'.[56] Lane J and the Court of Appeal disagreed on whether 'public law factors' might be taken into account where the defendant was the executive and the claim arose out of its exercise of sovereign authority and, if so, what weight should be given to those factors. Lane J gave decisive weight to the conventional factors of the places of injury and acting.[57] In contrast, the Court of Appeal gave significant weight to the fact that the defendants, as emanations of the UK Government subject to English public law, acted in their official capacity in England for the perceived benefit of the UK, and to the public law function of tort law of holding the executive to account, controlling abuse of power and ensuring the rule of law.[58] The Supreme Court sided with the Court of Appeal, while adding obiter that there was scope for suggesting that it was a constitutional imperative for the tort of misfeasance in public office to be governed by English law.[59] Consequently, 'public law factors' should be taken into account and given significant, if not decisive, weight where the defendant is an English public authority or official acting in an official capacity.

Finally, the Supreme Court judgment clarifies the test to be applied before an appellate court can interfere with a lower court's evaluative judgment on the issue of applicable law. The editors of *Dicey, Morris and Collins* write that the application of the choice-of-law rules for torts of the 1995 Act involves a 'value judgment',[60] 'carried out in the light of the facts of a particular case',[61] which 'should not lightly be interfered with on appeal'.[62] This echoes the Supreme Court's statement in the *VTB* case, that:

> it is 'quintessentially' for the judge to make an assessment … and that the Court of Appeal would not interfere with that assessment unless it was satisfied that the judge made such an error in his assessment as to require the Court of Appeal to make its own assessment.[63]

[53] See text accompanying nn 27–28 above.
[54] See text accompanying n 35 above.
[55] See text accompanying n 34 above.
[56] Collins and Harris (n 51) para 35-151.
[57] See text accompanying nn 21–23 above.
[58] See text accompanying nn 29–31 above.
[59] See text accompanying nn 40–46 above.
[60] Collins and Harris (n 51) para 35-147.
[61] ibid, para 35-148.
[62] ibid, para 35-150.
[63] *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5; [2013] 2 AC 337, Lord Clarke, para 199.

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However, these statements are somewhat circular. That a lower court's decision 'should not lightly be interfered with on appeal' unless the court made 'such an error' that justifies interference does not tell us when an appellate court can interfere. In his dissent, Lord Sales adopted a strict test of 'irrationality'.[64] The majority of the Supreme Court did not go as far and adopted the test of whether there was 'a clear error of law, or the judge has reached a conclusion not reasonably open to them'.[65]

B. Central Government Tort Liability

The Supreme Court rightly observed that 'the fact that executive bodies are subject to English tort law has for centuries been a recognised means of holding the executive to account, controlling abuse of power and ensuring the rule of law'.[66] However, neither this quote nor the judgment mentions the features of central government tort liability in English law that explain why the choice-of-law issue arose in *Zubaydah* in the first place. An interesting aspect of the judgment is that the Supreme Court's emphasis on 'public law factors' in its choice-of-law reasoning is not entirely consistent with some important features of central government tort liability. If Cane's view that central government tort liability laws fall somewhere on the 'private/public law model' spectrum is accepted,[67] the importance of the Supreme Court judgment lies in the fact that it can be seen as moving the English model away from the private and closer to the public end of the spectrum.

Section 15(1) of the 1995 Act clearly provides that the Act's choice-of-law rules for torts also apply to claims by or against the Crown. However, to find a substantive explanation for why tort claims brought by overseas victims of allegedly wrongful exercises of British executive authority are subject to the choice-of-law process, a unique position in comparative law,[68] the enquiry must turn to the English law conception of central government tort liability.

Despite the Supreme Court's reference in the quote above to the tort liability of 'executive bodies', central government tort liability in English law was only introduced in 1947 with the adoption of the Crown Proceedings Act (1947 Act).[69] Before that, the UK Government enjoyed immunity from tort liability—it was a fundamental principle of the common law that the King could do no wrong. The Crown, ie the central government, could not commit a tort, authorise the commission of a tort or be vicariously liable for a tort.[70] Section 2 ('Liability of the Crown in tort') of the 1947 Act heralded a profound change, allowing the UK Government to be held liable in tort both directly and vicariously. The Act recognises only three narrow bases of direct tort liability of the UK Government, namely breach of employers' duties, duties

[64] *Zubaydah* (n 5) Lord Sales, para 118. In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, HL, a leading authority on judicial review, Lord Diplock controversially preferred to use the term 'irrational' rather than 'unreasonable', which he famously said 'applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it' 410.

[65] *Zubaydah* (n 5) Lord Lloyd-Jones and Lord Stephens, para 57.

[66] ibid, para 78(c).

[67] P Cane, *Controlling Administrative Power* (OUP 2016) Ch 10.

[68] For Australia, for example, see *Habib v Commonwealth of Australia* [2010] FCAFC 12.

[69] Crown Proceedings Act 1947 (1947 Act) c 44.

[70] *Viscount Canterbury v A-G* (1843) 1 Ph 306; 41 ER 648; *Tobin v R* (1864) 16 CBNS 310; 143 ER 1148; *Feather v R* (1865) 6 B&S 257; 122 ER 1191, QB.

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attaching to property and statutory duties that are also imposed on private persons.[71] Vicarious liability applies in respect of torts committed by the Government's servants or agents.[72] Section 17(3) provides that civil proceedings against the UK Government can only be instituted against an authorised department or the Attorney General, hence Zubaydah suing the Foreign, Commonwealth and Development Office, the Home Office and the Attorney General for their vicarious liability. There were no allegations of direct tort liability.

The UK Government still cannot be liable in tort if the Crown act of State defence applies. As Lady Hale explained in *Rahmatullah (No 2) v Ministry of Defence*, there can be no tort liability for:

> sovereign acts—the sorts of thing that governments properly do; committed abroad; in the conduct of the foreign policy of the State; so closely connected to that policy to be necessary in pursuing it; and at least extending to the conduct of military operations which are themselves lawful in international law.[73]

This is because the law regards acts of UK Government officials done in the lawful exercise of the UK Government foreign relations prerogative as sovereign acts of the whole State that cannot be unlawful under domestic tort law. This principle stretches all the way back to the Glorious Revolution establishing a constitutional monarchy in England. John Locke's writings, which influenced the ideological foundation of the Revolution, argued that acts by the executive in the lawful exercise of its foreign relations powers should be regarded as sovereign acts of the whole State and not as the acts of individuals in fact exercising them.[74] Locke's argument was later adopted by Blackstone[75] and not contradicted by Dicey.[76] The issue of the law applicable to the existence and extent of tort liability of the UK Government arose in *Zubaydah* only because the Crown act of State defence did not apply. The defendants did not raise this defence because aiding, abetting, counselling, procuring or encouraging torture and cruel, inhuman and degrading treatment can never be a lawful exercise of the foreign relations prerogative.[77]

Another important feature of central government tort liability in English law is the role of Dicey's principles of equality before the law and personal responsibility of wrongdoers.[78] In a legal system where the central government could not be held liable in tort, such principles were necessary for executive accountability, controlling abuse of power and ensuring the rule of law. This means that wrongful acts of UK Government officials purporting to exercise UK Government powers are regarded by tort law as private, personal acts of citizens who happen to wear a uniform, thus giving rise to

[71] 1947 Act (n 69) section 2(1)(b), 2(1)(c), 2(2). [72] ibid, section 2(1)(a).

[73] *Rahmatullah (No 2) v Ministry of Defence* [2017] UKSC 1; [2017] AC 649, Lady Hale, para 37. The 1947 Act preserved the application of the Crown act of State defence in section 40(2)(b): ibid, paras 38–41.

[74] J Locke, *Two Treatises of Government: Second Treatise* (1689, P Laslett ed, student edn, CUP 1988) paras 96, 145.

[75] W Blackstone, *Commentaries on the Laws of England: Book I of the Rights of Persons* (1765, W Prest gen ed, D Lemmings ed, OUP 2016) 163.

[76] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan and Co 1915) 419-23.

[77] See, eg, *Belhaj v Straw* [2017] UKSC 3; [2017] AC 964, Lord Mance, paras 8, 10.

[78] Dicey (n 76) Ch XII.

private, personal tort liability. Again, this principle stems from the Glorious Revolution, as can be seen in Locke's statement that '[t]he *Commission*, or *Command of any Magistrate, where he has no Authority*' is 'as *void* and *insignificant*, as that of any private Man'.[79] Thus in *Zubaydah*, the basis of liability could only be the private, personal tort liability of UK Government officials purporting to exercise the UK Government's powers, for which the defendants could only be vicariously liable.

Taken together, these important features of central government tort liability in English law explain why the choice-of-law issue arose in *Zubaydah*. When the Crown act of State defence does not apply, tort law regards the wrongful acts of UK Government officials purporting to exercise UK Government powers as private, personal acts. When such acts are done overseas or cause harm overseas, they trigger the application of choice-of-law rules like other private, personal acts done in the transnational realm. Section 15 of the 1995 Act reflects this.

The facts of *Zubaydah* illustrate the sometimes absurd nature of the fiction of private, personal liability that lies at the heart of central government tort liability in English law. MI5 and MI6 officials share intelligence with foreign States in their official capacity, but if such acts are wrongful, they will be deemed to be private, personal acts. Yet if they actually shared intelligence with a foreign State in their private, personal capacity as it would normally be understood, they would be in breach of the Official Secrets Act 1989.

It is important to note that the Supreme Court judgment is not entirely consistent with this fiction. The Court gave significant weight to the fact that the relevant acts of MI5 and MI6 officials were done for the perceived benefit of the UK and the defendants and their officials were at all material times subject to English public law. But if under the English law of central government tort liability the relevant acts of MI5 and MI6 officials were regarded as private, personal acts, why did it matter that they were done for the perceived benefit of the UK and that the defendants and their officials were subject to English public law? Furthermore, the Court stated that the defendants themselves (ie the UK executive agencies, as opposed to their officials) acted 'in their official capacity in the purported exercise of powers conferred under the law of England and Wales'.[80] But if the basis of the defendants' liability was that they were, like any other employer, vicariously liable in respect of torts committed by their servants or agents, why did it matter what the defendants did or did not do, in what capacity and pursuant to what powers? The only thing that ought to have mattered was whether an individual committed a tort in the course of employment and whether that individual was a servant or agent of one of the defendants.

The Supreme Court judgment is even more remarkable in this respect when compared with the previous judgments that dealt with the issue of applicable law to tort claims brought by overseas victims of allegedly wrongful exercises of British executive authority. With one exception that was overturned on appeal,[81] the courts did not take into account or give weight to public law factors in their choice-of-law reasoning in

[79] Locke (n 74) para 206 (original emphasis). Similarly, Blackstone (n 75) 162–4.

[80] *Zubaydah* (n 5) Lord Lloyd-Jones and Lord Stephens, para 101.

[81] *Sophocleous v SoS for the Foreign and Commonwealth Office* [2018] EWHC 19 (QB), appeal allowed in [2018] EWCA Civ 2167; [2019] QB 949. The High Court judgment in *Sophocleous* is noted in U Grušić, 'Acts of Torture as an Instrument of Government Policy in the Colony of Cyprus in the 1950s and Choice of Law' (2018) 67(4) ICLQ 1005.

any previous judgments.[82] In holding that the laws of the places of the torts applied, the courts relied on the principle of territoriality, the weight of the general rule in Section 11 and the high threshold for applying the escape clause from Section 12 of the 1995 Act. The cases in which these factors were emphasised involved traffic accidents, industrial accidents and economic torts, and were relied on as precedents.[83] Lord Sales' dissenting judgment, suggesting there was nothing exceptional about *Zubaydah*,[84] is an attempt to hold on to this case law. In contrast, the majority's judgment is a decisive step towards the adoption of a public law-oriented reasoning in choice of law in relation to tort claims brought by overseas victims of allegedly wrongful exercises of British executive authority that accords a much greater role to English law.

This conclusion is also supported by the fact that the majority stated *obiter* that there was scope for suggesting that it was a constitutional imperative for the tort of misfeasance in public office to be governed by English law in a case where it had been agreed by the parties and accepted by the Court that the claim as a whole, including misfeasance and four other causes of action, must be governed either by English law or by foreign law. This assertion too supports a conclusion that the majority judgment in *Zubaydah* pushes the English model of central government tort liability towards the public end of Cane's spectrum.[85]

C. Relationship with Previous Case Law

The Supreme Court's emphasis on 'public law factors' in its choice-of-law reasoning in *Zubaydah* and the absence of such reasoning in the previous judgments dealing with the same issue brings into question the relationship between these strands of case law. Before *Zubaydah*, choice of law in tort under the 1995 Act was a live issue in three cases involving allegedly wrongful exercises of British executive authority: *Al-Jedda*; *Belhaj*; and *Rahmatullah (No 2)*.[86] In these cases, the courts held that foreign law governed the claims. However, the Supreme Court judgment in *Zubaydah* brings into question the precedential value of the previous case law.

In *Zubaydah*, the Supreme Court and the Court of Appeal declined to give weight to the judgment in *Rahmatullah (No 2)* because the 'judge … simply concluded … that, having given careful consideration to all the factors relied on by the claimants, it

[82] In addition to the judgments in *Zubaydah* (n 5) and *Sophocleous* ibid, the other judgments are *R (Al-Jedda) v SoS for Defence (Al-Jedda (No 1))* [2006] EWCA Civ 327; [2007] QB 621; [2007] UKHL 58; [2008] 1 AC 332; *Al-Jedda v SoS for Defence (Al-Jedda (No 2))* [2009] EWHC 397 (QB); [2010] EWCA Civ 758; [2011] QB 773; *Belhaj v Straw* [2013] EWHC 4111 (QB); [2014] EWCA Civ 1394; [2017] AC 964; *Rahmatullah v MoD (Rahmatullah (No 2))* [2019] EWHC 3172 (QB). For an extensive analysis of this case law, see U Grušić, *Torts in UK Foreign Relations* (OUP 2023) especially pt III.

[83] See *Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21; [2002] 1 WLR 2304, Waller LJ, para 12(v) and *Harding v Wealands* [2004] EWCA Civ 1735; [2005] 1 WLR 1539, Waller LJ, para 20, which were relied on in the Court of Appeal judgment in *Al-Jedda (No 1)* ibid, Brooke LJ, para 106, the High Court judgment in *Belhaj* ibid, Simon J, para 128 and the Court of Appeal in *Belhaj* ibid, Dyson LJ, para 146.

[84] *Zubaydah* (n 5) Lord Sales, para 149, referring to *Zubaydah* as falling 'in the general run of cases'.

[85] Cane (n 67).

[86] See n 82. Choice of law in tort was also a live issue in *Sophocleous* (n 81), but the applicable law in this case was determined by the common law double actionability rule, largely abolished by the 1995 Act.

would be disproportionate to list them all in full and it was sufficient to state that he was satisfied that taken together they did not displace the general rule'.[87]

The contrast between the outcomes in *Zubaydah* and *Belhaj* is stark because the two cases involved similar (assumed) facts. In *Belhaj*, the claimants sued the UK government for its complicity in their abduction, rendition, arbitrary detention and torture in China, Libya, Malaysia, Thailand and on board a US-registered aircraft by foreign State agents. The laws of China, Libya, Malaysia, Thailand and the US were held to be applicable.

The facts of *Zubaydah* and *Belhaj* are similar in the following important respects. The claimants were involuntarily present in foreign States in locations under the control of foreign State agents, to which they were rendered and where they were detained and injured by foreign State agents. All the places where Zubaydah was detained and one of the places where the claimants in *Belhaj* were detained (Bangkok black site) were 'de facto exclaves'. The defendants in the two cases and the bases of liability invoked against them, which included misfeasance in public office, were virtually the same. The UK Government's alleged complicity in the wrongful conduct of foreign States arose out of the sharing of intelligence, done by UK officials from their London offices for the perceived benefit of the UK. The UK Government requested information elicited from the claimants by foreign State agents. The UK Government did not expect or intend the local laws at the claimants' locations to govern their conduct.

However, there are also important differences between the two cases. Unlike in *Zubaydah*, in *Belhaj* the UK Government and the claimants were aware of their location (with the possible exception of a black site in Bangkok and a US-registered aircraft). While in *Belhaj* the chain of events was started by the UK Government by informing the CIA of the claimant's location, in *Zubaydah* the UK Government took advantage of a chain of events started by the CIA.

The question arises whether these differences are sufficient to justify the different outcomes in the two cases? The first important difference, namely what the claimants and the UK Government were or were not aware of, does not justify the different outcomes. In *Belhaj*, there was no indication that the UK Government was aware of the claimants being located at a black site in Bangkok or on board a US-registered aircraft, yet Thai and US laws were held to be applicable. The second important difference, namely that in *Belhaj* the chain of events was started by the UK Government, also does not justify the different outcomes. In fact, it can even be regarded as a factor that connected the torts with England, making the decision to apply foreign law in *Belhaj* all the more surprising. As Lord Sales explained in his dissent in *Zubaydah*:

> it would have made a significant difference if the CIA had not chosen to seize, imprison and torture the claimant on their own initiative, but instead only did so at the instigation of the UK Services. If the UK Services had been the prime movers in such a scheme, that might have been a powerful factor pointing in favour of connecting the torts with England.[88]

The starkest contrast between the two cases is not one of differing facts, but rather lies in the judicial reasoning. The Supreme Court in *Zubaydah* gave significant, if not decisive, weight to 'public law factors' in its choice-of-law reasoning, whereas in *Belhaj* the courts (ie the High Court and the Court of Appeal) did not take into account those factors or give

[87] The Supreme Court judgment in *Zubaydah* (n 5) Lord Lloyd-Jones and Lord Stephens, para 89; similarly, the Court of Appeal judgment in *Husayn* (*Zubaydah)* (n 26) Males LJ, paras 47, 49.
[88] *Zubaydah* (n 5) Lord Sales, para 137.

much weight to them. They can hardly be criticised for this ten years before the Supreme Court issued its judgment in *Zubaydah*. Nevertheless, it is clear, with the benefit of hindsight, that the courts in *Belhaj* failed to take into account material factors, which undermined the cogency of their conclusion. If the case had gone to the Supreme Court on the issue of applicable law, and the Supreme Court had emphasised 'public law factors' in its choice-of-law reasoning as it did in *Zubaydah*, it is possible that it would have held that the lower courts had erred in law.

Admittedly, the Supreme Court in *Zubaydah* attempted to distinguish *Belhaj* on the basis that Belhaj:

> had connections with Libya where he was a prominent political and public figure … Furthermore, in *Belhaj* it was conceded that certain elements of the claim would be governed by foreign law. The claim for false imprisonment in China and Malaysia related to detention under Chinese and Malaysian immigration laws. Similarly, it is said that a later period of detention in Libya was under purported colour of Libyan national security law.[89]

These arguments are, however, not entirely persuasive. The claimants' connections with Libya and the claimants' concession do not justify the application of the laws of Thailand and the US.

There is a way to reconcile *Zubaydah* and *Belhaj*. If, as the Supreme Court did in *Zubaydah*, the courts should take into account and give significant, if not decisive weight, to 'public law factors' in their choice-of-law reasoning where the defendant is an English public authority or official acting in an official capacity, they are likely to apply English law to the existence and extent of the defendant's tort liability. However, this does not imply that foreign law should have no role. The choice does not have to be between exclusively applying English law and exclusively applying foreign law to all issues. Even if English law governs the existence and extent of tort liability, the law of the place of the tort can still play a role, eg by supplying the applicable standard of conduct (eg of the primary tortfeasor, as in *Belhaj*) or justifications for prima facie tortious conduct. This approach is supported by the possibility of applying the escape clause from Section 12 of the 1995 Act to determine the applicable law to 'the issues, or any of the issues' arising in a case.

Ultimately, the application of foreign law to tort claims brought by overseas victims of allegedly wrongful exercises of British executive authority originates from the Court of Appeal and House of Lords judgments in *Al-Jedda (No 1)*, which held that Iraqi law governed a claim for false imprisonment brought by a terror suspect with dual British and Iraqi nationality whom the UK armed forces arrested and detained in Iraq.[90] The Supreme Court judgment in *Zubaydah* brings into question the precedential value of the judgments in *Al-Jedda (No 1)* because the courts did not take into account or give much weight to 'public law factors' in their choice-of-law reasoning. But the outcome in *Al-Jedda (No 1)* fits well into the approach proposed above. The only choice-of-law issue in this case was whether the claimant's imprisonment in Iraq was justified 'in circumstances where the local law had been amended to give the multi-national force operating there the necessary powers to intern suspects in accordance with UN Security Council resolutions'.[91] The applicable law did not have to be determined for other issues.

[89] ibid, Lord Lloyd-Jones and Lord Stephens, para 88.

[90] *Al-Jedda (No 1)* (n 82).

[91] *Zubaydah* (n 5) Lord Lloyd-Jones and Lord Stephens, para 84. Similarly, *Mohammed v MoD* [2014] EWHC 1369 (QB), where the parties accepted the application of Afghan law.

D. Access to Remedy

Choice of law has been an issue in many cases involving allegedly wrongful exercises of British executive authority, possibly for tactical reasons. The defendants in *Zubaydah* did not argue that the laws of the Six Countries applied because the MI5 and MI6 officials who sent questions to their CIA counterparts had these laws in mind as governing their actions or from a desire to clarify that MI5 and MI6 officials should follow foreign law in similar cases in the future. The explanation for the defendants' pleading of foreign law lies elsewhere, arguably in the fact that applying the laws of the Six Countries would have made the claimant's claim more uncertain and resource intensive.[92]

However, the main reason for the application of English law in these cases lies not in the practical advantage it offers to claimants or because English law offers greater protection than foreign law.[93] It lies in the fact that, in English law, executive accountability, controlling abuse of power and ensuring the rule of law are assured through criminal law, the law of judicial review, the HRA, the law of *habeas corpus* and tort law. In this context, foreign tort law does not offer a good substitute for English tort law. This is implicit in the part of the Supreme Court judgment in *Zubaydah* where the court stated that an important factor was that the defendants were 'at all material times subject to the criminal and public law of England'.[94]

For example, in some countries, tort law does not apply to claims arising out of the exercise of sovereign authority. In other countries, rules on public authority tort liability are limited to those countries' public authorities and officials. If English choice-of-law rules point to the application of the law of such country, the application of the tort law of that country to tort claims brought by overseas victims of allegedly wrongful exercises of British executive authority would distort the applicable law in the sense of applying it in circumstances in which it is not meant to operate. Furthermore, if foreign law applies, a claim for misfeasance in public office can never be brought because a country's law of misfeasance limits its personal scope of application to that country's public authorities and officials. This is why the Supreme Court stated *obiter* that there was scope for suggesting that it was a constitutional imperative for the tort of misfeasance in public office to be governed by English law.

Finally, foreign laws are sometimes eminently inappropriate for the task of holding the UK Government to account, controlling abuse of power and ensuring the rule of law. Afghan law, which the parties agreed would apply in a previous case, 'was almost entirely destroyed when Afghanistan was ruled by the Taliban'.[95] Iraqi law, which the courts held to apply in *Al-Jedda*, came with 'a fair amount of confusion in the Iraqi legal system, and it may also be among legislators, about the changes of the last few years'.[96] Also, in *Zubaydah*, it was unclear whether the law in force in Guantánamo was Cuban law, US law or international law. On the other hand, English tort law is calibrated to

[92] Some support for this statement can be found in Lord Sales's dissent in *Zubaydah* (n 5), para 127.

[93] An argument that Lord Sales advanced against the application of English law is that the choice-of-law process should be neutral and that the claimant's reliance on English law as being more favourable to his interests should not be given any weight. ibid, paras 124–126, 129, 130.

[94] ibid, Lord Lloyd-Jones and Lord Stephens, para 101; similarly, para 78.

[95] *Mohammed* (n 91) Leggatt J, para 64.

[96] *Al-Jedda v SoS for Defence (Al-Jedda (No 2))* [2009] EWHC 397 (QB) Underhill J, para 46.

perform its public law function and the complex relationship between English tort law and public law has been fine-tuned over time.

VI. CONCLUSION

The turn of the millennium was a busy time for UK foreign policy. The UK's participation in the wars in Kosovo, Afghanistan and Iraq, as well as the 'war on terror', resulted in multiple tort claims in English courts which gave rise to choice-of-law issues. The Supreme Court judgment in *Zubaydah* is the final decision on these issues in this case. It held that English law applied, thus paving the way for the trial of the merits. It is a welcome judgment that provides important insights into the operation of choice-of-law rules for torts in the unusual context of intelligence cooperation, central government tort liability in English law and access to remedy for overseas victims of allegedly wrongful exercises of British executive authority. It underscores the importance of English law in terms of its ability to govern public power, thus heralding a greater role for English law as a mechanism for achieving executive accountability, controlling abuse of power, ensuring the rule of law and providing victims access to remedy. Nevertheless, it leaves some issues unresolved, such as the precedential value of previous case law, and therefore it has not definitively outlined the precise relationship between English law and foreign law in relation to central government tort liability.

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