Press Summary

20 December 2023

Zubaydah (Respondent) v Foreign, Commonwealth and Development Office and others (Appellants)

[2023] UKSC 50

On appeal from [2022] EWCA Civ 334

Justices: Lord Lloyd-Jones, Lord Kitchin, Lord Sales, Lord Burrows, Lord Stephens

Background to the Appeal

This appeal is concerned with the law applicable to torts (civil wrongs) alleged to have been committed by the UK Security Service and the UK Secret Intelligence Service ("**the UK Services**"). This is a preliminary issue and has been decided on the basis of the allegations made by the claimant, Mr Zubaydah. No findings of fact have been made.

The claimant is a Palestinian national who has been detained without trial by the United States' authorities since 2002 and is currently held in Guantánamo Bay. The claimant alleges that from at least May 2002 to at least 2006, whilst he was being rendered to, detained in and subjected to extreme mistreatment and torture at secret 'black sites' by the United States Central Intelligence Agency (**"the CIA"**), the UK Services sent numerous questions to the CIA for the purpose of eliciting information from the claimant.

The claimant seeks compensation for personal injuries which he says were sustained in pursuit of the information sought by the UK services in CIA black site facilities in Thailand, Poland, Morocco, Lithuania, Afghanistan and Guantánamo Bay ("**the Six Countries**"). He brought a claim naming the Foreign, Commonwealth and Development Office (**"the FCDO"**), the Home Office and the Attorney General as defendants, on the basis that they are vicariously liable for the acts of the UK Services. The torts alleged against them under the law of England and Wales are misfeasance in public office, conspiracy to injure, trespass to the person, false imprisonment, and negligence.

The High Court ordered that as a preliminary issue the law governing the torts should be identified. The claimant's primary case is that the law of England and Wales applies whereas the defendants argue that the laws of each of the Six Countries apply. The High Court agreed with the defendants, but the Court of Appeal overturned that decision.

The FCDO and others now appeal to the Supreme Court.

Judgment

The Supreme Court dismisses the appeal by a majority. The applicable law is the law of England and Wales, not the law of the Six Countries. Lord Lloyd-Jones and Lord Stephens give the leading judgment, with which Lord Burrows and Lord Kitchin agree. Lord Sales gives a dissenting judgment.

Reasons for the Judgment

The question of applicable law in this context is governed by sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995 ("**PILA**") **[50]**. Section 11 establishes a general rule that the law applicable to a tort claim is the law of the country in which the events constituting the tort in question occurred. Where the elements of those events occurred in different countries, the applicable law in respect of personal injury is the law of the country in which the injury was sustained **[51]**. Section 12 states that the general rule can be displaced if, following a comparison of the significance of the factors connecting the tort with the country of the applicable law under the general rule and the significance of the factors connecting that tort to a different country, it is substantially more appropriate for the law of the other country to apply **[53]**.

While an appeal court should be slow to interfere with the evaluation carried out by the trial judge under sections 11 and 12 of the PILA **[57]**, the Court of Appeal was right in this case to identify errors in the High Court's approach which were sufficiently significant to justify the Court of Appeal intervening and performing the evaluation for itself **[79]**.

However, the Court of Appeal took an unduly narrow approach by focussing on the conduct of the UK Services rather than the specific torts which are alleged to have occurred and which on the facts of this case involved actions by both the UK Services and the CIA **[80]-[81]**. As a result of this error, it was necessary for the Supreme Court to conduct the evaluation required by sections 11 and 12 of the PILA for itself.

The significance of the connection between the torts and the Six Countries is massively reduced by a number of factors. It is important to note that the Court's judgment is based on the facts as alleged by the Claimant: it must always be borne in mind that the issue appealed is a preliminary issue and there have been no factual findings in the proceedings yet **[13]**.

On the assumed facts, first the claimant was involuntarily present in the Six Countries because he had been unlawfully rendered there against his will in succession and could have had no reasonable expectation that the law of whichever location he was in (and which location was not known to him at the time) should apply to him **[93]**. Second, there is no suggestion that the UK Services were aware or ever took steps to find out where the claimant was being held **[94]**. Third, the rendition took place without reference to the laws of the Six Countries. Indeed, on the assumed facts an appropriate inference is that the locations were selected precisely to deny any access to local law or recourse to local courts **[95]**. Fourth, the fact that the claimant was held in six secret detention facilities in six different countries diminishes the significance of the law of any one of them **[96]**. Fifth, the claimant's captors and interrogators were not agents of the Six Countries but of a third party, the United States **[97]**.

There are also substantial factors which, on the assumed facts, connect the torts to the United Kingdom. First, the claim relates to torts allegedly committed by the UK Services **[99]**. Second, the events which constitute those alleged torts took place in part in England and in part by the CIA in the Six Countries **[100]**. Third, those alleged actions were taken by United Kingdom executive agencies acting in their official capacity in the purported exercise of the powers conferred to them under the law of England and Wales **[101]**. The majority concludes

that it would be substantially more appropriate for the law of England and Wales to apply to this claim than the law of the Six Countries **[102]-[103]**.

Lord Sales dissents and would allow the appeal. He does not consider that the High Court made any error of law in assessing whether the general rule should be displaced in this case **[117]-[118]**. Lord Sales agrees with the majority of the Supreme Court that the Court of Appeal was wrong to focus on the conduct of the UK Services rather than on the elements of the tort **[122]**. However, he concludes that it is not substantially more appropriate to apply the law of England and Wales to the claim and the laws of the Six Countries should apply **[130]–[154]**. He considers that it is highly significant that: (i) the claimant sustained his personal injuries and was imprisoned in the Six Countries **[132]**; and (ii) the CIA agents, who are the primary alleged wrongdoers, were present in the Six Countries and therefore subject to and answerable for their actions according to the laws of those countries **[134]-[136]**. Lord Sales considers that the fact that the UK Services were not the prime movers in the alleged scheme to seize, imprison and torture the claimant greatly diminishes the force of the connecting factor to England and Wales **[137]**.

References in square brackets are to paragraphs in the judgment.