Neutral Citation Number: [2013] EWHC 1579 (QB)

Case No: HQ09X03332

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 June 2013

Before:

MR JUSTICE IRWIN

- -

Between:

SALAHUDDIN AMIN	**Claimant**
- and -	
(1) THE DIRECTOR GENERAL OF THE SECURITY SERVICE [MI5]	
(2) THE CHIEF OF THE SECRET INTELLIGENCE SERVICE [MI6]	
(3) THE FOREIGN AND COMMONWEALTH OFFICE	
(4) THE HOME OFFICE	
(5) THE ATTORNEY GENERAL	**Defendants**

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Patrick O'Connor QC and Danny Friedman QC (instructed by **Bhatt Murphy**) for the **Claimant**
Rory Phillips QC and Jonathan Hall (instructed by the **Treasury Solicitor**) for the **Defendants**

Hearing dates: 12 and 13 December 2012

FURTHER SUBMISSIONS MADE IN WRITING: 21 December 2012 and 17 January 2013

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OPEN Judgment Approved by the court for handing down

Mr Justice Irwin:

Introduction

1. The Defendants seek to strike out the Particulars of Claim in this case as representing an abuse of process. The core point arising is whether the claim represents an unacceptable collateral attack on the rulings of Sir Michael Astill, sitting as a Deputy High Court Judge in the Claimant's criminal trial at the Central Criminal Court in 2006.

Factual Background

2. The Claimant is of dual UK and Pakistani nationality. He was born on 3rd March 1975. From November 2001 to April 2004 he was living in Pakistan. [**Redaction**]

3. On 3rd March 2004, following advice from his uncle, a retired Pakistani brigadier, the Claimant surrendered himself voluntarily to the Pakistani authorities. The relevant agency was the Inter Services Intelligence ["ISI"]. The Claimant's account subsequently was that, although his surrender was voluntary, he expected to be detained only for a day or two. [**Redaction**].

4. [**Redaction**]

5. [**Redaction]**

6. There has never been any claim on behalf of the Claimant that he was directly mistreated in any way by any British officer.

7. [**Redaction]**

8. [**Redaction]**

9. **[Redaction]**

10. **[Redaction]** In due course on 8th February 2005, the Claimant left Pakistan. On his arrival at Heathrow airport he was indeed arrested and was subsequently interviewed under caution. In the course of such interviews, later used as evidence in his trial, he made admissions of conspiracy with other defendants to use fertiliser-based explosives and a radio isotope bomb in the United Kingdom. **[Redaction]** As I have already indicated, he was subsequently charged, prosecuted and convicted of such a conspiracy.

The Claimant's Complaints

11. During the Claimant's interviews in the United Kingdom, he alleged to the interviewing officers that he had suffered ill treatment before arriving back in the UK. He claimed that he was bullied by the American agents and "even tortured once by Pakistan authorities". He claimed he had been threatened with being "skinned alive" and that that had brought him to make admissions. He claimed he had admitted things that he had not in fact done. He claimed that the interviewers in Pakistan were trying to involve him in matters of which he was not guilty. They had asserted to him that he was so involved and he felt that he had no choice but to agree, in order to get rid of them.

12. In the course of these interviews, the Claimant handed to the interviewing officers a handwritten note, in which he asserted a number of specific matters. He claimed that he was beaten, threatened and abused by ISI interrogators and made to hear the screams of other prisoners being interrogated. He had been subjected to mental torture by American agents with threats to send him to Cuba and threats to his family. He had been taken for questioning handcuffed, hooded and shackled. He was kept in terrible conditions. He claimed that before he flew to Heathrow he was told by Pakistan authorities that he had been originally arrested following orders from the United Kingdom, and that therefore he would arrive in the United Kingdom as a free man having "served his punishment" in Pakistan.

13. Unsurprisingly, given the background to this investigation, there was a prolonged and elaborate process of disclosure of information on the part of the Crown. Material was disclosed in tranches, with supplementary disclosure and, on occasion, corrections of earlier errors. Taken together, this body of material came to be known as the "MS" material. Much of it touched upon the Claimant's detention in Pakistan and the actions of the authorities in establishing knowledge about him and his activities.

14. In the course of the interlocutory criminal proceedings, bearing on disclosure and no doubt with an eye to forthcoming abuse of process applications, Counsel for the Claimant formulated a document entitled "Defence Summary of Treatment of Mr Amin in Pakistan Custody". This document encapsulated or crystallised the case intended to be advanced by the Claimant on that issue. It is not necessary to repeat the contents of the document because it is common ground that, for all practical purposes, the account of alleged mistreatment is the same as that incorporated into the Particulars of Claim in this case. It was on that basis that subsequently the applications to exclude interviews and to stay the criminal proceedings on the grounds of abuse of process were made.

Criminal Proceedings at the Old Bailey

15. By January 2006, interlocutory proceedings in the Crown Court were on foot. As I have already indicated, a good deal of the factual background was common ground, although it is of course important to stress that neither the Crown, nor any witness on

behalf of the Crown, conceded that the Claimant had been mistreated to the extent he claimed. Nor did they make any concession of "complicity" in such mistreatment as might be established.

16. Written admissions were made pursuant to s. 10 of the Criminal Justice Act 1967. It is not necessary to recapitulate those fully here. However, there were important points expressly agreed. **[Redaction]**

17. **[Redaction]**

18. **[Redaction]**

19. The Judge heard evidence in a *voir dire* between 31st January and 10th February 2006. The Claimant gave evidence, as did his uncle, the retired Pakistani brigadier. The Court also considered a statement from Syed Ali Hasan, "a principal researcher for Human Rights Watch in Pakistan". As the judge subsequently recorded, the statement of that witness:

> "details human rights abuses found in Pakistan in relation to the interrogation of persons in custody. It was accompanied by a large volume of documentation setting out details. The contents of both the statement and the accompanying literature had been read and considered."

20. **[Redaction]** There was also evidence from a British police officer concerning the Claimant's arrival in the United Kingdom, his processing through arrest, procedures before interview and interviews. **[Redaction]** Evidence was also given to the judge by a Detective Superintendent Brunty, who had a supervisory role of the arrest and investigation of the Claimant.

21. The Claimant was represented at the Central Criminal Court by Mr Patrick O'Connor QC, as he was before me. Mr O'Connor submitted to the judge that the material before him established an abuse of process that should lead to a stay of the criminal proceedings. He put the matter on two bases. Firstly, he said there could not be a fair trial. Secondly, he said that it would be unfair for the Claimant to be tried because it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. This was, Mr O'Connor submitted, abuse of process to the level and of the kind recognised in *R v Horseferry Road Magistrates' ex parte Bennett* [1994] 1 AC 42 and *R v Mullen* (1999) 2 Cr App R 143 ["*Bennett*/*Mullen* abuse"]. In allied submissions, Mr O'Connor also sought to persuade the judge, essentially on the basis of the same material, that the admissions made in interviews with British police officers after his arrival in the UK should be excluded from evidence pursuant to ss. 76 and/or 78 of the Police and Criminal Evidence Act 1984.

22. The judge rejected all of these submissions. He gave his decision on the abuse of process application on either 17th or 18th February 2006: both dates have been submitted to me. The ruling was followed by detailed written reasons which were handed down in May 2006. On 23rd February 2006, the judge gave a detailed oral ruling rejecting the application to exclude the admissions in interview. I will quote from the judge's key conclusions a little later in this judgment.

23. The criminal trial thus proceeded with the Claimant's admissions in evidence. The Claimant's complaints about his treatment were brought before the jury who subsequently convicted him, although Pakistan was referred to throughout as "Country A".

The Criminal Appeal

24. The Claimant appealed his conviction. The appeal was heard between 10th and 17th June 2008 by the Court of Appeal (Criminal Division). The judgment of the court was delivered by Sir Igor Judge PQBD (as he then was) on 23rd July: see [2008] EWCA Crim 1612.

25. The Court of Appeal set out a summary of the essential facts and noted that "the grounds of appeal which occupied the largest proportion of the hearing before us related to the circumstances of Amin's arrest and eventual production in the UK, complaints about the disclosure process, as it applied in this case, and an unsuccessful application to the trial judge to recuse himself." The Court went on to emphasise that at trial:

> "the Crown did not adduce … any evidence whatever produced during the course of Amin's interviews in Pakistan. **[Redaction]** The prosecution relied exclusively on virtually 600 pages of notes made in the course of Amin's interviews in this country, in the presence of his solicitor, when Amin himself accepted that he had been properly treated. Indeed his own evidence was that although he was tortured and ill treated, and accordingly made admissions, when he was in the exclusive custody of the authorities in Pakistan, when he was interviewed in that country by UK security officials no impropriety was alleged." - paragraph 11.

26. In paragraphs 63 to 82 of the judgment of the Court of Appeal, the Court addressed the case as to the admissibility of the admissions in interview in the United Kingdom, and on abuse of process. In the course of those paragraphs, the Court summarised the arguments advanced on behalf of this Claimant and the rulings of the trial judge. I adopt the summary set out in the judgment of the Court of Appeal and, for that reason, have not felt it necessary to set out a summary of my own, save for some key passages set out later in this judgment. The Court rejected any criticism of the approach by the judge to either of the issues in question, commending the judge's findings, his "close

examination of the evidence" and "careful analysis of the essential facts". They found his conclusions not to be open to criticism. The Court considered there was "no arguable basis for interfering with the judge's decision" and specifically found that "there is no shred of evidence that the UK authorities were complicit in any misconduct which may have attended the process which led to Amin's flight to this country". The Court of Appeal sustained the Claimant's conviction.

Subsequent Procedural History

27. This claim was issued on 22nd July 2009. Particulars of Claim were served and filed on 19th November 2009. There followed an extensive period in which both sides sought to grapple with the procedural problems associated with litigating this matter, given the need to address the material and evidence dealt with in private, and the un-redacted judgments of the trial judge and the Court of Appeal. This process culminated in the order of Lord Judge LCJ of 3rd July 2012. The annexes to that order set out the "handling conditions" affecting the conduct of the case. Annex C to the order of 3rd July is a draft order, the text of which was incorporated in a consent order made before Master Leslie dated 6th August 2012, completing the arrangements for trial of this application.

The claim

28. The case is framed against these Defendants principally in vicarious liability for the alleged torts of individual SS or SIS officers committed in the purported performance of their duties. It is said that there was false imprisonment, assault and battery, misfeasance in public office, negligence and liability under ss. 6 and 7 of the Human Rights Act 1998 for violation of the Claimant's rights under Articles 3 and 5 of the European Convention on Human Rights. It is further claimed that the liability of each Defendant arises "by way of complicity in the treatment of the Claimants by agents of the Pakistan Government while he was in their custody".

29. After a recital of the factual allegations, the claim addresses "complicity". Complicity is nowhere defined in the pleading. It is said that the SS and SIS officers were complicit in the initial detention of the Claimant by Pakistani agents and complicit in the interrogation process by the Pakistani agents. Details are given of the acts that constituted complicity. So far as the initial detention is concerned, it is alleged that the Defendants "procured and requested the Pakistani authorities" to detain the Claimant, provided information to enable them to locate him, provided information to identify him and stated to the Pakistani authorities that the Claimant was a dangerous active terrorist whose detention was of great importance. It is said that the Defendants' officers knew that the Claimant's detention would be unlawful under Pakistani law. It is said that the Defendants' officers failed to take steps to ensure the Claimant's release from detention. The claim is that they could and should have obtained his release by advising the Claimant or his family to demand his release and demand consular access and that the officers concerned "colluded with the Pakistan

authorities to ensure that the Claimant's family did not make approaches to the UK consul".

30. It is further said that the relevant officers were complicit in the interrogation process because they provided information and suggested questions to the Pakistani agents, participated in about 11 interviews of the Claimant while in Pakistani custody, did so in the presence of a Pakistani interrogator and whilst the Claimant's legs were shackled. Officers are said to have provided UK interview records subsequently to Pakistani agents, discussed the UK agent interviews with Pakistani agents after each session, shared a close relationship with the Pakistani agents in the presence of the Claimant, followed up questions and issues which had previously been pursued by Pakistani interrogators and used UK-controlled premises as the venue for the interviews. It is claimed officers maintained a deception as to the position of the Claimant's brother which had been initiated by Pakistani agents, provided detailed suggested questions to US agents for joint interrogation of the Claimant, conducted a joint interview with US agents in the presence of a Pakistani interrogator and co-operated with Pakistani agents to frustrate the release of the Claimant from their custody.

31. The Particulars of Claim also allege complicity on the part of the Defendants' officers in the Claimant's "unlawful expulsion from Pakistan". This part of the claim was abandoned by Mr O'Connor in the immediate period before the hearing in front of me.

32. Paragraph 39 of the Particulars of Claim emphasises the fundamental nature of the allegation of complicity to the case and alleges a motivation for the conduct claimed:

> "In relation to each and every act of complicity set out above, the said officers made a specific calculation that they were prepared to act without regard to legality, in order to gain benefit from the product thereof, by way of information or the presence of the claimant in the UK".

33. Originally breach of the European Convention on Human Rights was alleged against the relevant officers, but that claim was abandoned. However, the third and fourth Defendants, in addition to the allegation of vicarious liability, are alleged to be directly liable in negligence, misfeasance and under ss. 6 and 7 of the Human Rights Act 1998, for knowingly permitting the conduct of the officers, and failing to issue any or any sufficient and accurate guidance and/or instructions to officers bearing on the "legal limits of their dealings with foreign agencies such as those in Pakistan, who are likely to violate the human rights of detainees".

34. The third and fourth Defendants and senior officers within the two services concerned are said to be liable for not issuing or obtaining guidance for officers in the field and it is said are liable in withholding guidance or sanctioning the actions complained of, because those acts or omissions "were deliberate and calculated to facilitate dealing

with such [foreign] agencies and gaining the product of such abuses, whilst not in any way inhibiting the abuses. They were also cynically calculated to foster an impression that the UK government and its agencies does not 'condone or approve' of such abuses". Finally, direct liability, on the part of the third defendant only, is said to arise through a failure to obtain or try to obtain consular access to the Claimant during his detention. It is alleged that at all material times the British High Commission in Pakistan was aware of the Claimant's detention.

35. It will be seen that the claim is perfectly clearly stated. In the language used and in the logic which informs and structures the claim, as to the vicarious liability and the direct liability alleged, the claim hinges on the allegation of complicity between British officers and Pakistani officers. Without that complicity, the various torts or breaches of duty could not be established. Moreover, without such complicity, causation in respect of the direct liability alleged could not be established.

36. In both of his rulings, Sir Michael Astill reached conclusions which bear directly on the issue of "complicity". In the course of his oral ruling declining to exclude the UK interviews, the judge broadly rejected the account given by the Claimant of his treatment in Pakistan, although he accepted some of the factual allegations and accepted explicitly that "his treatment amounted to 'oppression' for the purposes of s. 76(2) (a) [of the Police and Criminal Evidence Act 1984]". As will already be evident, the judge rejected the suggestion that such oppression in Pakistan tainted the properly conducted interviews in England. In the written reasons for rejecting a stay on the basis of abuse of process, the judge was even more explicit. In paragraph 85 of his ruling, the judge stated:

[Redaction]

37. In further key passages, the judge went on to say the following:

[Redaction]

38. I have already recited the terms in which the Court of Appeal commended and sustained the trial judge's conclusions.

The Legal Arguments

39. Each side was content to treat the term 'complicity' as meaning "being a party to" the actions complained of. This matches the dictionary definition. The current edition of the Oxford Dictionary defines complicity as the state of "being an accomplice; partnership in an evil action". That meaning is consistent with the approach of the Court of Appeal in *R v Rangzieb Ahmed & Another* [2011] EWCA Crim 184, see paragraphs 41 to 48. For present purposes, the claim of complicity may better be phrased: were the officers of the defendants or the defendants themselves party to the actions of the Pakistani agents and authorities which are complained of? The judge's answer was an unequivocal no. Can that issue be re-litigated in these proceedings?

40. The Defendants seek to strike out the statement of case pursuant to CPR Part 3.4(2)(b) on the basis that the statement of case is an abuse of the Court's process. The central plank of the attack is that the claim represents a collateral attack on a final decision adverse to the Claimant, made by a court of competent jurisdiction, in breach of the principle enunciated by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police & Others* [1982] AC 529. The facts of *Hunter* are well known. The claimant was one of the Birmingham Six accused of bombing and was convicted principally on the basis of a confession. The trial judge (Bridge J) delivered a reasoned judgment following a *voir dire* extending over eight days of evidence. The judge rejected the claim of physical abuse against Hunter and his co-defendants. The judge found that the prosecution had established beyond reasonable doubt that there had been no physical violence or threats to Hunter which might be capable of impugning the confession.

41. The House of Lords concluded that the statement of claim in Hunter's civil action seeking damages for assault on the part of the police represented an abusive collateral attack upon the findings of the trial judge. The question sought to be raised was the identical question which had already been decided: see Lord Diplock at 542D. The proper approach was to seek a fresh appeal. There was a general rule of public policy that the use of civil actions to initiate a collateral attack on a final decision against the intending plaintiff by criminal courts of competent jurisdiction should be treated as an abuse of the process of the court see Lord Diplock at 545A-B. The policy might be departed from, but only where there was fresh evidence which "entirely changes the aspect of the case", following the test laid down by Earl Cairns LC in *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App.Cas. 801 at page 804.

42. The Defendants acknowledge that there exist factual differences between this case and the case in *Hunter*. However, Mr Phillips QC for the Defendants submits in effect that the differences bring no distinction. Disclosure was complete in the criminal proceedings. The burden of proof in the abuse of process hearing was on the Claimant, to the standard of probability. The ruling by the judge was final and it was not *obiter*, because a stay could only be justified if the misconduct outweighed the public interest in bringing the Claimant to justice.

43. Mr Phillips accepted that there was no direct or unambiguous evidence to show that the Claimant sought to bring this claim as a means of attack upon his criminal conviction. However, in *Smith v Linskills* [1996] 1 WLR 763, the Court of Appeal rejected the proposition that this kind of abuse was dependent upon demonstration of a collateral motive. Moreover, the Defendants submit that it is a clear inference from the approach taken by this Claimant that he does not accept his conviction and that these proceedings do represent a means of attacking or undermining it.

44. I turn to the key propositions advanced by the Claimant. Mr O'Connor begins by emphasising the general principle that at the stage of a strike out application, any reasonable doubt must be resolved in favour of the claimant: see *Johnson v Gore-Wood & Co* [2002] 2 AC 1, per Lord Bingham at 36E. I accept that general principle, as I also accept the importance of the question of treatment of detainees, as

emphasised by Lord Neuberger MR in *R (Mohamed) v Foreign Secretary (No. 2)* [2011] QB 218 at paragraph 184.

45. Mr O'Connor seeks to qualify the effect of the principle in *Hunter* and to suggest its application to the instant case will be inappropriate. He does so in a number of ways. First, he relies upon the remarks of Lord Hoffmann in *Hall v Simons* [2002] 1 AC 615 at page 702F to the effect that the power of strike out must be used only where "justice and public policy demand it". Mr O'Connor suggests that the implication of *Hall v Simons* is that the principle must not be applied inflexibly, a point which he says is consistent also with the approach of Lord Steyn in the same case, the relevant passages being found at page 679F-H. Mr O'Connor and his able junior, Mr Friedman, marshalled a good deal of authority, both in writing and orally, to the same effect. It is not necessary for me to refer directly to all of the authorities cited.

46. However, Mr O'Connor lays considerable emphasis on the decision of the Court of Appeal in *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1, [2003] EWCA Civ 321. In *Bairstow*'s case, the former managing director of a company brought wrongful dismissal proceedings against the company. In dismissing the claim, the judge found that the claimant director had been guilty of grave misconduct and neglect. The director's appeal was dismissed. Subsequently, the Secretary of State applied for a statutory disqualification order against the director, on the ground that he was unfit to be concerned in the management of a company. In the disqualification application, the Secretary of State wished to rely on the findings made in the wrongful dismissal proceedings. At a pre-trial review in the disqualification application, the judge held the parties were bound by the findings in the wrongful dismissal proceedings and no challenge to those findings could be mounted.

47. The director appealed successfully. The judgment of the court was given by Sir Andrew Morritt V-C. The court held that factual findings made in the wrongful dismissal claim were not admissible in the disqualification proceedings as evidence of the facts found. A collateral attack on an earlier decision of the court of competent jurisdiction might be, but was not necessarily, an abuse of process. An earlier decision of a civil court was binding on the parties to that civil action and to their privies in any later civil proceedings. However, if the parties to later civil proceedings had not been parties to the earlier action, it would only be an abuse of process to challenge the earlier decision if re-litigation of the same issues would be manifestly unfair or would bring the administration of justice into disrepute. In *Bairstow*'s case, of course, the Secretary of State had not been a party to the wrongful dismissal proceedings. On the facts of the instant case, it would not be unfair to either party to require the Secretary of State to prove his case by legally admissible evidence nor would it bring the administration of justice into disrepute.

48. The court in *Bairstow*'s case reviewed earlier authority, including the decision in *Walpole v Partridge & Wilson* [1994] QB 106. In that case, the plaintiff had been convicted by Justices of obstructing a veterinary officer in the course of his duty. The plaintiff instructed the defendants to advise him on the merits of appeal. They failed to advise him to lodge his notice of appeal in time. When he sued his solicitors for

negligence, they sought to strike out his claim as a collateral attack on the final decision of a court of competent jurisdiction, namely the Magistrates' Court. The attempt at strike out was unsuccessful, the court holding that the issues before the Justices and in the civil proceedings were different. In the Court of Appeal, Ralph Gibson LJ pointed out, at page 116, that the decision of the House of Lords in *Hunter*'s case was that initiation of proceedings as described by Lord Diplock may be an abuse of the process of the court, but not that it necessarily is so. Ralph Gibson LJ also observed that the decision of the two different courts in question in *Walpole v Partridge & Wilson* might well be different if reached on "markedly different evidence". Those qualifications to the principle in *Hunter*'s case were approved by the Court of Appeal in *Bairstow*'s case. The Court of Appeal emphasised the "importance of considering (1) the nature and effect of the earlier judgment; (2) the nature and basis of the claim made in the later proceedings; and (3) any grounds relied on to justify the collateral challenge": see paragraph 36. The conclusion of the Court of Appeal in *Bairstow*'s case are set out in paragraphs 39 to 44 of the report.

49. In my view, it is not unduly simplistic to say those conclusions contain the following key points. First, it was common ground that the factual findings and conclusions of the judge in the wrongful dismissal proceedings were not binding on the parties to the disqualification proceedings, as the Secretary of State had not been a party or privy of a party to the earlier case. The second question was "whether to re-litigate any of the issues before [the judge] would be manifestly unfair to either the Secretary of State or Mr Bairstow". The Court of Appeal concluded that it was not manifestly unfair to the Secretary of State that "he should be required to prove the serious allegations he makes with regard to the conduct of Mr Bairstow". It was obviously not "manifestly unfair to Mr Bairstow to require the Secretary of State to prove his case." The court next considered whether such "re-litigation" would "bring the administration of justice into disrepute". The court concluded it would not on the facts of *Bairstow*'s case.

50. In considering the effect of *Bairstow*'s case, it seems to me that two critical points must be borne in mind. Firstly, the court did not (and, of course, could not) seek to disapprove the principle laid down by the House of Lords in *Hunter*'s case: it was a question of application to the facts of the given case. Secondly, the point at issue on *Bairstow's* case was proof of the guilt of the director, not the truth or otherwise of allegations of mistreatment such as arise in the instant case and which were said to warrant a stay on the criminal prosecution. This distinction seems to me to be of importance and it is a distinction made by Mr O'Connor himself. The Claimant's written submissions include the following passage:

> "Hunter involved a direct challenge to the basis for his criminal conviction. This claim does not. [The Claimant's] guilt or innocence of the criminal charges is entirely distinct from how he was treated in Pakistan custody (sic) and whether UK agencies were implicated therein. There is no suggestion in these proceedings that the London confessions by [the Claimant] were an insufficient basis for his conviction or were inadmissible. We invite the court to approach him at all stages as being guilty of the offence of which he was convicted."

51. Mr O'Connor seeks to make a further distinction from the position in *Hunter*'s case. At the time of the trial of Hunter and his co-defendants, the law required the judge to be sure that the allegations of assault and other abuses were untrue. In the instant case, the judge rejected, to the criminal standard, only the evidence given by this Claimant as to the voluntariness of the confessions made in London. So far as the ruling in relation to abuse of process is concerned, the matter was decided by the judge on the standard of probability. It is accepted that there was a burden of proof upon this Claimant when raising such allegations in the criminal proceedings but, of course, where the standard is probability, the question of burden becomes almost entirely academic. Mr O'Connor goes on to point out that in *Hunter* the jury must be taken to have made findings to the criminal standard rejecting the allegations there advanced. In the instant case, the jury were concerned only with the reliability of the London confessions. For all these reasons, Mr O'Connor seeks to distinguish the instant case from falling within the *Hunter* principle at all.

52. The Claimant makes a number of connected points about the evidence in the case which it is suggested removes the case from the application of the *Hunter* principle. In logical sequence, it is firstly said that "no part of the claim necessarily involves establishing that the trial judge's rulings were wrong, on the material then available to the court." It is then said that the judge did not "make clear what precise allegations of mistreatment he is accepting, in particular what 'physical oppression' he accepted and what he rejected." In addition, Mr O'Connor submits **[Redaction]** I intend no disrespect to Mr O'Connor, but it seems to me unnecessary to repeat the detail with which those submissions were made, both in writing and orally. I reject them.

53. The allegations made by the Claimant in these proceedings are, for all purposes, identical to those advanced before the judge. That is to say, the Claimant alleges much more extensive and more serious mistreatment at the hands of Pakistani agents than was **[Redaction]** accepted by the judge. It seems to me quite unrealistic to suggest that the claim does not involve an attempt to displace that part of the judge's conclusions.

54. Moreover, the judge rejected entirely the claim of complicity in that mistreatment which, as I have already pointed out, lies at the heart of this claim. The concessions made by the prosecution in the criminal proceedings **[Redaction]** by no stretch of the imagination **[Redaction]** amount to an acceptance of complicity. **[Redaction]** The elegance of the distinctions sought to be made by Mr O'Connor does not in the end conceal their fragility. This Claimant's case depends squarely on the suggestion the judge was wrong even in relation to the evidence before him.

55. The Claimant submits that there is now available significant further evidence beyond that available to the judge in the criminal proceedings. He also argues that the judge's conclusions of fact have to be interpreted in a specific fashion as the consequence of the expert evidence which was before him.

56. As the Claimant's submissions confirm, the criminal court heard a considerable body of expert opinion as to the track record of Pakistani security agencies and their practices in relation to the detention and interrogation of suspects was before the judge. The expert relied on before the judge was Mr Ali Dayan Hasan, the "Senior South Asian Researcher for Human Rights Watch since May 2003". His report, with considerable supporting material, was before the judge in the *voir dire*, but he was unavailable to give live evidence. He did later give live evidence to much the same effect before the jury. It is said that this body of evidence did and does substantiate the allegation of complicity. Since that evidence was before the judge and was not contradicted by any expert evidence called by the Crown, Mr O'Connor submits that the judge's finding on complicity has to be glossed so as to mean:

> "There is no evidence of complicity such as could render the proposed trial an abuse of process and justify the grant of a stay".

57. The Claimant advances the further argument that there is fresh evidence supporting the case on complicity. This consists of a report dated 2009 from the organisation Human Rights Watch entitled "Cruel Britannia: British Complicity in the Torture and Ill-treatment of Terror Suspects in Pakistan". The Claimant's expert Syed Ali Hasan, whose written evidence was received in the criminal proceedings, is the author of the report.

58. Mr O'Connor emphasises the credibility of that witness, and is able to cite a decision of the Special Immigration Appeals Commission to that effect [*Nasser & Others v Secretary of State for the Home Department*: Appeal SC/77/80/81/82/83/09, 18 March 2010]. For present purposes, and without attempting to make any fresh assessment of the witness, I accept he should be treated as credible.

59. I reject the argument that the fact this evidence was before the judge, un-contradicted by an expert for the Crown, means that the judge must be taken to have reached conclusions only as glossed or amended by the Claimant. The judge expressed himself clearly on the issue of complicity, and in terms which it appears to me left no room for doubt.

60. I also question whether the evidence is fresh, or fresh to any significant extent. It is in substance the same account and the same assessment, in respect of this Claimant, of the same historical events as were before Sir Michael Astill. This is not a fresh case, or even a fresh angle on the case, but a reprise of the same evidence which was previously admitted, reformulated and published. Even if I am wrong on the point, the point remains that such fresh evidence can and should be deployed in a criminal appeal, rather than in civil proceedings.

The decision in *El-Masri v Macedonia*, App 396330/09

61. On the second day of argument before me, 13 December 2012, the Grand Chamber of the European Court of Human Rights gave judgment in the *El-Masri* case, which concerned the collaboration between Macedonia and the United States in Counter-Terrorist Operations. The parties were given leave to make submissions as to the effects of this decision, after the close of the hearing. Both parties did so.

62. It is accepted that the facts of *El-Masri* are different, but the Claimant relies on a number of points of principle to be derived from the decision. Shortly, they are the endorsement by the ECtHR of the negative inferences that can properly be drawn from the failure of States to provide an adequate response to accusations of wrong-doing in respect of citizens in custody; the emphasis on the importance of the investigatory obligations of States where there was arguably involvement in breaches of Article 3 of the Convention and the emphasis placed by the Court on the positive duty on the relevant Member State to obtain assurances and take other necessary steps to protect the individual, even where the Member State was not the detaining power, or primarily responsible for any ill-treatment.

63. The Defendants respond by emphasising that the Claimant was able to, and did in fact, raise his concerns and make his case on the relevant allegations, in the course of the criminal proceedings. The UK authorities were not silent in the face of the allegations, but met them in evidence. The Defendants note that no allegation is made that the UK failed in its obligations to investigate the Claimant's allegations: the Claimant does not say the Defendants turned a blind eye to what happened to him. The court could and did investigate the Claimant's allegations fully.

64. I accept that the decision in *El Masri* emphasises the obligations of Member States in circumstances broadly analogous to the current case. I accept the implication that in such circumstances the State must investigate, and ensure that proper legal process and remedy is available, where there is a potential breach of Article 3. However, it does not seem to me to arise from the decision that the obligation extends to a guarantee of a second attempt to establish such a case, where it has once been rejected by a court of competent jurisdiction, in the absence of significant fresh evidence, calling for a re-examination. For these reasons, it does not seem to me that the decision in *El-Masri* carries the matter any further.

The outcome if the Claimant were to succeed

65. In the course of these proceedings I asked both parties to consider a question which seems to me arises squarely here, and to bear directly on whether re-litigation here would bring the administration of justice into disrepute. The question was as follows:

> "If this claim were to proceed and succeed, what would prevent the Claimant from publicising the result, claiming in public that

> his conviction was tainted by mistreatment abroad, with which British agencies were complicit?"

66. The Defendants' answer is essentially "nothing".

67. The Claimant's answer is more extended. The result of a successful claim would be public, along with as much of the reasoning as can be made open, consistent with the public interest. There could be no limit as to the number of people who could comment on the outcome of litigation, and that includes the Claimant. The Claimant accepts that some of the comment would be accurate and responsible, and some not. Mr O'Connor submits that the court should be concerned with "objective disrepute" which he defines as whether the claim is properly to be regarded as inconsistent with the previous ruling and would, properly understood, bring the administration of justice into disrepute. In effect, Mr O'Connor submits the question in context becomes whether a successful outcome to the claim could reasonably serve to undermine and taint the Claimant's criminal conviction, in the minds of the reasonable and well-informed member of the public. Mr O'Connor says this could not arise.

68. The argument is, in part, based on the decision in *R v Rangzieb Ahmed & Another* [2011] EWCA Crim 184. Mr O'Connor says that decision means that, if his client were to establish in civil proceedings the complicity with abuse claimed, it would still not lead to a quashing of his conviction. The principle laid down in *Ahmed* is that there must be "a connection between any alleged wrong-doing in the trial" (paragraph 39) and that:

> "there must be a connection between the torture and the prosecution. The issue is the nature of connection. For the reasons given, we are satisfied that the necessary connection exists where torture has an impact on the trial, but not otherwise. Even if there had been torture whilst [RA] was in Pakistan, it had no bearing on the trial and there was no reason why the question of whether or not he was guilty of an antecedent crime in England should not be decided according to law." *Ahmed*, paragraph 40.

69. It seems to me that in his reliance on those *dicta* from *Ahmed*, Mr O'Connor's argument crumbles. The essence of the civil case which the Claimant seeks to bring is the very same complicity with mistreatment which he says should have led to the criminal trial being stopped. Mr O'Connor's argument is that, despite that fact, the connection with the criminal trial would not arise in the minds of the right-thinking member of the public. It seems to me that is unrealistic. Moreover, Mr O'Connor really has no answer to the question I asked. At best, I infer that he and those who instruct him would advise the Claimant against suggesting in public that his conviction was tainted by mistreatment abroad with which British agencies were complicit. That is really of little or no effect in preventing the system of criminal justice being brought into disrepute.

70. Although both forms of abuse of process were alleged in the criminal proceedings, the emphasis was always placed on the *Bennett/Mullen* abuse. Such a claim constitutes a most unusual defence to a criminal charge. If such a "defence" prevails, it does so despite, or at least irrespective of, the guilt of the defendant. The defence is there to protect the integrity of the courts and our system of criminal justice. In my judgment, it would be astonishing if, through the vehicle of a civil claim, an effective collateral challenge could be mounted to the reasoned rejection of this type of defence, particularly when that rejection has been confirmed in the Court of Appeal.

Conclusions

71. For those reasons, the Defendants succeed in their application.

72. I do not shy away from the effect of my ruling. It is that serious allegations of "complicity" by the agencies of the UK government in significant ill treatment, once fully addressed in criminal proceedings, can only properly be litigated in circumstances such as this, through renewed criminal appeal. Such an appeal will not always be achieved, since barriers may stand in the way of renewal. In the absence of a successful appeal, the Claimant will not be permitted to advance these allegations in the civil courts, with the opportunity to invoke the normal rules for disclosure in civil proceedings and the normal arrangements for trial. All this is significant, but it is a direct consequence of the fact that the Claimant raised these allegations in his criminal proceedings. He raised them as a matter of critical importance to those proceedings, as a matter which should preclude, and if successful would have been likely to preclude, his prosecution. He had his allegations firmly rejected. The consequence is that right-thinking people who were confronted with these allegations being advanced once more in a civil court would inevitably perceive them as being deployed to cast doubt on the Claimant's conviction even were the Claimant to disavow such an intention.

73. Accordingly, the Particulars of Claim in this case are struck out as an abuse of the process of the court.