

ON WEDNESDAY 12 DECEMBER 2007

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

**R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence
(Respondent)**

[2007] UKHL 58

LORD BINGHAM OF CORNHILL

My Lords,

1. Since October 2004 the appellant, who is a national of both this country and Iraq, has been held in custody by British troops at detention facilities in Iraq. He complains that his detention infringes his rights under article 5(1) of the European Convention on Human Rights, a Convention right protected by the Human Rights Act 1998, and also founds a good claim in this country under the English common law. These claims were rejected by the Queen's Bench Divisional Court (Moses and Richards JJ: [2005] EWHC 1809 (Admin), HRLR 1355) and also by the Court of Appeal (Brooke, May and Rix LJJ: [2006] EWCA Civ 327, [2007] QB 621). Both courts below delivered lengthy and careful judgments, commensurate with the importance and difficulty of the issues then raised, but a new issue has (by agreement) been raised and argued before the House, as explained below.

2. The appellant has not been charged with any offence, and no charge or trial is in prospect. He was arrested and has since been detained on the ground that his internment is necessary for imperative reasons of security in Iraq. He was suspected of being a member of a terrorist group involved in weapons smuggling and explosive attacks in Iraq. He was believed by the British authorities to have been personally responsible for recruiting terrorists outside Iraq with a view to the commission of atrocities there; for facilitating the travel into Iraq of an identified terrorist explosives expert; for conspiring with that explosives expert to conduct attacks with improvised explosive devices against coalition forces in the areas around Fallujah and Baghdad; and for conspiring with the explosives expert and members of an Islamist terrorist cell in the Gulf to smuggle high tech detonation equipment into Iraq for use in attacks against coalition forces. These allegations are roundly denied by the appellant, and they have not been tested in any proceedings. Nor is their correctness an issue in these proceedings. The House must therefore resolve the legal issues falling for decision on the assumption that the allegations are true, without forming any judgment whether they are or not.

3. In the courts below the appellant's Human Rights Act argument was directed to a single question, turning essentially on the relationship between article 5(1) of the European Convention on the one hand and the United Nations Charter, and certain resolutions of the UN Security

Council, on the other. More specifically, this question is agreed to be whether the provisions of article 5(1) of the Convention are qualified by the legal regime established pursuant to United Nations Security Council Resolution (“UNSCR”) 1546 (and subsequent resolutions) by reason of the operation of articles 25 and 103 of the UN Charter, such that the detention of the appellant has not been in violation of article 5(1). This is the issue which the courts below decided against the appellant, and it remains an issue dividing the parties. But it is now the second issue. For the Secretary of State, prompted (it seems) by the admissibility decision of the Grand Chamber of the European Court of Human Rights in *Behrami v France, Saramati v France, Germany and Norway* (Application Nos 71412/01 and 78166/01 (unreported), 2 May 2007) has raised an entirely new issue, not ventilated in the courts below, directed to the attributability in international law of the conduct of which the appellant complains. As agreed, the issue is “whether, by reason of the provisions of UNSCR 1511 (2003) and/or UNSCR 1546 (2004), and/or UNSCR 1637 (2005) and/or UNSCR 1723 (2006) and/or (so far as it may be relevant) UNSCR 1483 (2003), the detention of the appellant is attributable to the United Nations and thus outside the scope of the ECHR”. The Secretary of State, relying strongly on *Behrami and Saramati*, contends that the appellant’s detention is attributable to the UN, a contention which (if correct) defeats his claim under article 5. This has been treated as the first issue in this appeal.

4. What is now the third issue can be more simply expressed: whether English common law or Iraqi law applies to the appellant’s detention and, if the former, whether there is any legal basis for his detention. The appellant would wish to contend that he has a good claim even if Iraqi law is applicable, but this question was not litigated below, was not agreed as an issue, has not been the subject of expert evidence of Iraqi law and has not been considered by the House.

The first issue

5. It was common ground between the parties that the governing principle is that expressed by the International Law Commission in article 5 of its draft articles on the Responsibility of International Organizations (adopted in May 2004 and cited by the European Court in *Behrami and Saramati*, para 30):

“Conduct of organs or agents placed at the disposal of an international organization by a state or another international organization

The conduct of an organ of a state or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.”

The European Court also quoted (para 31) from paras 1 and 6-7 of the ILC’s authoritative commentary on this article (General Assembly Official Records 59th Session, Supp No 10 (A/59/10)):

“1. When an organ of a state is placed at the disposal of an international organization, the organ may be fully seconded to that organization. In this case the organ’s conduct would clearly be attributable only to the receiving

organization...Article 5 deals with the different situation in which the lent organ or agent still acts to a certain extent as organ of the lending state or as organ or agent of the lending organization. This occurs for instance in the case of military contingents that a state placed at the disposal of the [UN] for a peacekeeping operation, since the state retains disciplinary powers and criminal jurisdiction over the members of the national contingent. In this situation the problem arises whether a specific conduct of the lent organ or agent has to be attributed to the receiving organization or to the lending state or organization ...

6.Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing state retains over disciplinary matters and criminal affairs. This may have consequences with regard to attribution of conduct ...

Attribution of conduct to the contributing state is clearly linked with the retention of some powers by that state over its national contingent and thus on the control that the state possesses in the relevant respect.

7.As has been held by several scholars, when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question.”

...

7. It is necessary to identify the main events occurring between March 2003 and the present before considering the application of these principles to the present case.

[description of Security Council events dealing with Iraq war omitted]

...

22. Against the factual background described above a number of questions must be asked in the present case. Were UK forces placed at the disposal of the UN? Did the UN exercise effective control over the conduct of UK forces? Is the specific conduct of the UK forces in detaining the appellant to be attributed to the UN rather than the UK? Did the UN have effective command and control over the conduct of UK forces when they detained the appellant? Were the UK forces part of a UN peacekeeping force in Iraq? In my opinion the answer to all these questions is in the negative.

23. The UN did not dispatch the coalition forces to Iraq. The CPA was established by the coalition states, notably the US, not the UN. When the coalition states became occupying powers in Iraq they had no UN mandate. Thus when the case of Mr Mousa reached the House as one of those considered in *R(Al-Skeini and others) v Secretary of State for Defence* (*The Redress Trust intervening*) [2007] UKHL 26, [2007] 3 WLR 33 the Secretary of State accepted that the UK was liable under the European Convention for any ill-treatment Mr Mousa suffered, while

unsuccessfully denying liability under the Human Rights Act 1998. It has not, to my knowledge, been suggested that the treatment of detainees at Abu Ghraib was attributable to the UN rather than the US. Following UNSCR 1483 in May 2003 the role of the UN was a limited one focused on humanitarian relief and reconstruction, a role strengthened but not fundamentally altered by UNSCR 1511 in October 2003. By UNSCR 1511, and again by UNSCR 1546 in June 2004, the UN gave the multinational force express authority to take steps to promote security and stability in Iraq, but (adopting the distinction formulated by the European Court in para 43 of its judgment in *Behrami and Saramati*) the Security Council was not delegating its power by empowering the UK to exercise its function but was authorising the UK to carry out functions it could not perform itself. At no time did the US or the UK disclaim responsibility for the conduct of their forces or the UN accept it. It cannot realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant.

24. The analogy with the situation in Kosovo breaks down, in my opinion, at almost every point. The international security and civil presences in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK a subsidiary organ of the UN. The multinational force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq. It is quite true that duties to report were imposed in Iraq as in Kosovo. But the UN's proper concern for the protection of human rights and observance of humanitarian law called for no less, and it is one thing to receive reports, another to exercise effective command and control. It does not seem to me significant that in each case the UN reserved power to revoke its authority, since it could clearly do so whether or not it reserved power to do so.

25. I would resolve this first issue in favour of the appellant and against the Secretary of State.

The second issue

26. As already indicated, this issue turns on the relationship between article 5(1) of the European Convention and article 103 of the UN Charter. The central questions to be resolved are whether, on the facts of this case, the UK became subject to an obligation (within the meaning of article 103) to detain the appellant and, if so, whether and to what extent such obligation displaced or qualified the appellant's rights under article 5(1).

27. Article 5(1) protects one of the rights and freedoms which state parties to the European Convention have bound themselves to secure to everyone within their jurisdiction. It has been recognised as a right of paramount importance. It is one to which, by virtue of the Human Rights Act 1998, UK courts must give effect. Its terms are familiar: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:..." There follows a list of situations in which a person may, in accordance with a procedure prescribed by law, be deprived of his liberty. It is unnecessary to recite the details of these situations, since none of them is said to apply to the appellant. In the absence of some exonerating condition, the detention of the appellant would plainly infringe his right under article 5(1).

28. The Charter of the United Nations was signed in June 1945 as the Second World War, with its horrific consequences in many parts of the world, was drawing to a close. It is necessary to review its terms in a little detail. In the preamble the parties expressed their determination to save succeeding generations from the scourge of war and to reaffirm faith in fundamental human rights. Its objects, expressed in article 1, were (among others) to maintain international peace and security and, to that end, to take effective collective measures for the prevention and removal of threats to the peace; and to promote and encourage respect for human rights. Member states bound themselves (article 2) to fulfil in good faith the obligations assumed by them in accordance with the Charter, and to give the UN every assistance in any action it might take in accordance with the Charter. By article 24 the Security Council has primary responsibility for the maintenance of peace and security and acts on behalf of member states in discharging that responsibility. Member states agree (article 25) to accept and carry out the decisions of the Security Council in accordance with the Charter.

29. Chapter VII governs "Action with respect to threats to the peace, breaches of the peace, and acts of aggression". It opens (article 39) by providing that the Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and decide what measures should be taken in accordance with articles 41 and 42 to maintain or restore international peace and security. Article 41 is directed to measures not involving the use of armed force. More pertinently, article 42 empowers the Security Council, if it considers that article 41 powers were or would be inadequate, to take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. By article 43, member states undertake, in order to contribute to the maintenance of international peace and security, to make available to the Security Council on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities necessary for the purpose of maintaining international peace and security. Such agreements were to govern the number and types of forces, including their location, readiness and facilities and were to be negotiated as soon as possible on the initiative of the Security Council. No such agreements have, in practice, ever been made, and article 43 is a dead letter.

30. It remains to take note of article 103, a miscellaneous provision contained in Chapter XVI. It provides:

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

This provision lies at the heart of the controversy between the parties. For while the Secretary of State contends that the Charter, and UNSCRs 1511 (2003), 1546 (2004), 1637 (2005) and 1723 (2006), impose an obligation on the UK to detain the appellant which prevails over the appellant's conflicting right under article 5(1) of the European Convention, the appellant insists that the UNSCRs referred to, read in the light of the Charter, at most authorise the UK to take action to detain him but do not oblige it to do so, with the result that no conflict arises and article 103 is not engaged.

31. There is an obvious attraction in the appellant's argument since, as appears from the summaries of UNSCRs 1511 and 1546 given above in paras 12 and 15, the resolutions use the language of authorisation, not obligation, and the same usage is found in UNSCRs 1637 (2005) and 1723 (2006). In ordinary speech to authorise is to permit or allow or license, not to require or oblige. I am, however, persuaded that the appellant's argument is not sound, for three main reasons.

32. First, it appears to me that during the period when the UK was an occupying power (from the cessation of hostilities on 1 May 2003 to the transfer of power to the Iraqi Interim Government on 28 June 2004) it was obliged, in the area which it effectively occupied, to take necessary measures to protect the safety of the public and its own safety. Article 43 of the Hague Regulations 1907 provides, with reference to occupying powers:

"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country".

This provision is supplemented by certain provisions of the Fourth Geneva Convention. Articles 41, 42 and 78 of that convention, so far as material, provide

"41. Should the Power, in whose hands protected persons may be, consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of articles 42 and 43...

42. The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary...

78. If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment".

These three articles are designed to circumscribe the sanctions which may be applied to protected persons, and they have no direct application to the appellant, who is not a protected person. But they show plainly that there is a power to intern persons who are not protected persons, and it would seem to me that if the occupying power considers it necessary to detain a person who is judged to be a serious threat to the safety of the public or the occupying power there must be an obligation to detain such person: see the decision of the International Court of Justice in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 116, para 178. This is a matter of some importance, since although the appellant was not detained during the period of the occupation, both the evidence and the language of UNSCR 1546 (2004) and the later resolutions strongly suggest that the intention was to continue the pre-existing security regime and not to change it. There is not said to have been such an improvement in local security conditions as would have justified any relaxation.

33. There are, secondly, some situations in which the Security Council can adopt resolutions couched in mandatory terms. One example is UNSCR 820 (1993), considered by the European Court (with reference to an EC regulation giving effect to it) in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2005) 42 EHRR 1, which decided in paragraph 24 that “all states shall impound all vessels, freight vehicles, rolling stock and aircraft in their territories...”. Such provisions cause no difficulty in principle, since member states can comply with them within their own borders and are bound by article 25 of the UN Charter to comply. But language of this kind cannot be used in relation to military or security operations overseas, since the UN and the Security Council have no standing forces at their own disposal and have concluded no agreements under article 43 of the Charter which entitle them to call on member states to provide them. Thus in practice the Security Council can do little more than give its authorisation to member states which are willing to conduct such tasks, and this is what (as I understand) it has done for some years past. Even in UNSCR 1244 (1999) relating to Kosovo, when (as I have concluded) the operations were very clearly conducted under UN auspices, the language of authorisation was used. There is, however, a strong and to my mind persuasive body of academic opinion which would treat article 103 as applicable where conduct is authorised by the Security Council as where it is required: see, for example, Goodrich, Hambro and Simons (eds), *Charter of the United Nations: Commentary and Documents*, 3rd ed (1969), pp 615-616; *Yearbook of the International Law Commission* (1979), Vol II, Part One, para 14; Sarooshi, *The United Nations and the Development of Collective Security* (1999), pp 150-151. The most recent and perhaps clearest opinion on the subject is that of Frowein and Krisch in Simma (ed), *The Charter of the United Nations: A Commentary*, 2nd ed (2002), p 729:

“Such authorizations, however, create difficulties with respect to article 103. According to the latter provision, the Charter-and thus also SC resolutions-override existing international law only insofar as they create ‘obligations’ (cf. Bernhardt on article 103 MN 27 et seq.). One could conclude that in case a state is not obliged but merely authorized to take action, it remains bound by its conventional obligations. Such a result, however, would not seem to correspond with state practice at least as regards authorizations of military action. These authorizations have not been opposed on the ground of conflicting treaty obligations, and if they could be opposed on this basis, the very idea of authorizations as a necessary substitute for direct action by the SC would be compromised. Thus, the interpretation of article 103 should be reconciled with that of article 42, and the prevalence over treaty obligations should be recognized for the authorization of military action as well (see Frowein/Krisch on article 42 MN 28). The same conclusion seems warranted with respect to authorizations of economic measures under article 41. Otherwise, the Charter would not reach its goal of allowing the SC to take the action it deems most appropriate to deal with threats to the peace-it would force the SC to act either by way of binding measures or by way of recommendations, but would not permit intermediate forms of action. This would deprive the SC of much of the flexibility it is supposed to enjoy. It seems therefore preferable to apply the rule of article 103 to all action under articles 41 and 42 and not only to mandatory measures.”

This approach seems to me to give a purposive interpretation to article 103 of the Charter, in the context of its other provisions, and to reflect the practice of the UN and member states as it has developed over the past 60 years.

34. I am further of the opinion, thirdly, that in a situation such as the present “obligations” in article 103 should not in any event be given a narrow, contract-based, meaning. The importance of maintaining peace and security in the world can scarcely be exaggerated, and that (as evident from the articles of the Charter quoted above) is the mission of the UN. Its involvement in Iraq was directed to that end, following repeated determinations that the situation in Iraq continued to constitute a threat to international peace and security. As is well known, a large majority of states chose not to contribute to the multinational force, but those which did (including the UK) became bound by articles 2 and 25 to carry out the decisions of the Security Council in accordance with the Charter so as to achieve its lawful objectives. It is of course true that the UK did not become specifically bound to detain the appellant in particular. But it was, I think, bound to exercise its power of detention where this was necessary for imperative reasons of security. It could not be said to be giving effect to the decisions of the Security Council if, in such a situation, it neglected to take steps which were open to it.

35. Emphasis has often been laid on the special character of the European Convention as a human rights instrument. But the reference in article 103 to “any other international agreement” leaves no room for any excepted category, and such appears to be the consensus of learned opinion. The decisions of the International Court of Justice (*Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie* [1992] ICJ Rep 3, para 39; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [1993] ICJ Rep 325, per Judge ad hoc Lauterpacht, pp 439-440, paras 99-100) give no warrant for drawing any distinction save where an obligation is *jus cogens* and according to Judge Bernhardt it now seems to be generally recognised in practice that binding Security Council decisions taken under Chapter VII supersede all other treaty commitments (Simma (ed), *The Charter of the United Nations: A Commentary*, 2nd ed (2002), pp 1299-1300).

36. I do not think that the European Court, if the appellant’s article 5(1) claim were before it as an application, would ignore the significance of article 103 of the Charter in international law. The court has on repeated occasions taken account of provisions of international law, invoking the interpretative principle laid down in article 31(3)(c) of the Vienna Convention on the Law of Treaties, acknowledging that the Convention cannot be interpreted and applied in a vacuum and recognising that the responsibility of states must be determined in conformity and harmony with the governing principles of international law: see, for instance, *Loizidou v Turkey* (1996) 23 EHRR 513, paras 42-43, 52; *Bankovic v Belgium* (2001) 11 BHRC 435, para 57; *Fogarty v United Kingdom* (2001) 34 EHRR 302, para 34; *Al-Adsani v United Kingdom* (2001) 34 EHRR 273, paras 54-55; *Behrami and Saramati*, above, para 122. In the latter case, in para 149, the court made the strong statement quoted in para 21 above.

37. The appellant is, however, entitled to submit, as he does, that while maintenance of international peace and security is a fundamental purpose of the UN, so too is the promotion of respect for human rights. On repeated occasions in recent years the UN and other international bodies have stressed the need for effective action against the scourge of terrorism but have, in the same breath, stressed the imperative need for such action to be consistent with international human rights standards such as those which the Convention exists to protect. He submits that it would be anomalous and offensive to principle that the authority of the UN should itself serve as

a defence of human rights abuses. This line of thinking is reflected in the judgment of the European Court in *Waite and Kennedy v Germany* (1999) 30 EHRR 261, para 67, where the court said:

“67. The court is of the opinion that where states establish international organisations in order to pursue or strengthen their co-operation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the contracting states were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective ...”

The problem in a case such as the present is acute, since it is difficult to see how any exercise of the power to detain, however necessary for imperative reasons of security, and however strong the safeguards afforded to the detainee, could do otherwise than breach the detainee’s rights under article 5(1).

38. One solution, discussed in argument, is that a state member of the Council of Europe, facing this dilemma, should exercise its power of derogation under article 15 of the Convention, which permits derogation from article 5. However, such power may only be exercised in time of war or other public emergency threatening the life of the nation seeking to derogate, and only then to the extent strictly required by the exigencies of the situation and provided that the measures taken are not inconsistent with the state’s other obligations under international law. It is hard to think that these conditions could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw. The Secretary of State does not contend that the UK could exercise its power to derogate in Iraq (although he does not accept that it could not). It has not been the practice of states to derogate in such situations, and since subsequent practice in the application of a treaty may (under article 31(3)(b) of the Vienna Convention) be taken into account in interpreting the treaty it seems proper to regard article 15 as inapplicable.

39. Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee’s rights under article 5 are not infringed to any greater extent than is inherent in such detention. I would resolve the second issue in this sense.

...

44. For these reasons the appeal must be dismissed. The parties (other than the intervener) are invited to make submissions on costs within 14 days.

LORD RODGER OF EARLSFERRY

My Lords,

45. The appellant, Mr Al-Jedda, has been detained since October 2004 by British forces serving as part of the multinational force (“MNF”) in Iraq. The basis of his detention is that his internment is necessary for imperative reasons of security in Iraq. Although the appellant does not accept that his internment is actually necessary, it is common ground that, for the purposes of this appeal, the House should proceed on the assumption that his internment is indeed necessary for the reasons given by the Secretary of State.

46. Similarly, it is common ground that the present appeal concerns only the alleged violation of the appellant’s rights under article 5(1) of the European Convention on Human Rights and Fundamental Freedoms (“the Convention”). The House is not concerned with any issue relating to the provisions for the review of his continued detention - or indeed with any issue relating to article 5(4) of the Convention.

47. In short, the appellant complains that, since detention on the ground that it is necessary for imperative reasons of security is not permissible under article 5(1) of the Convention, his detention is unlawful under section 6(1) of the Human Rights Act 1998 (“HRA”). He seeks, *inter alia*, a declaration to that effect and a mandatory order that the Secretary of State should release him.

48. The fact that the appellant is detained in Iraq is not in itself a bar to such proceedings under the HRA. Although, for the most part, the Act applies only to acts of public authorities within the United Kingdom, it will also usually apply to acts of United Kingdom public authorities outside the United Kingdom where the victim is within the jurisdiction of the United Kingdom for purposes of article 1 of the Convention: *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] 3 WLR 33. In the present case, counsel for the Secretary of State argued, however, that there are two distinct reasons why the appellant cannot rely on his article 5(1) Convention rights in these proceedings.

49. First, and more fundamentally, counsel submitted that the acts of the British forces in detaining the appellant were to be attributed to the United Nations in international law. The European Court of Human Rights would accordingly be incompetent *ratione personae* to consider any application by him in respect of those acts. The point was not, and could not have been, argued in the courts below since it is based on the subsequent decision of the Grand Chamber of the European Court of Human Rights in *Behrami v France, Saramati v France, Germany and Norway* (Application Nos 71412/10 and 78166/01) (unreported), 2 May 2007.

50. Secondly, counsel submitted that, in any event, by virtue of Security Council Resolution 1546, and articles 25 and 103 of the United Nations Charter (“the Charter”), the British forces were under an obligation to intern the appellant which superseded any obligation of the United Kingdom under article 5(1) of the Convention.

51. It is now well established, of course, that the Convention rights in Schedule 1 to the HRA are distinct obligations in the domestic legal systems of the United Kingdom. The Act does not incorporate into our domestic law the international law obligations under the Convention as such. See, for instance, *In re McKerr* [2004] 1 WLR 807. In the courts below, the appellant ran an argument based on that line of authority, to the effect that, even if the international law obligations of the United Kingdom under article 5(1) had been superseded by the terms of Resolution 1546, that made no difference to the Secretary of State's domestic law obligation not to act incompatibly with the appellant's article 5 Convention rights as set out in Schedule 1 to the HRA. By virtue of section 1(2) of the HRA, that position could be changed only by the United Kingdom derogating from article 5(1).

52. In section 21(1) of the HRA the term "Convention" in the Act is defined, however, as meaning the European Convention "as it has effect for the time being in relation to the United Kingdom". On that basis, in the courts below the Secretary of State argued that, to the extent that article 5(1) was trumped by the terms of Resolution 1546 and articles 25 and 103 of the Charter, it did not have "effect...in relation to the United Kingdom" for purposes of the HRA.

53. At para 74 of its judgment, the Divisional Court accepted the Secretary of State's submission to that effect. Under reference to *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, the Court of Appeal did so also: [2007] QB 621, 652-654, paras 88-99, per Brooke LJ. The appellant did not challenge the decision of the Court of Appeal on that point before the House.

54. While the effect of *Quark Fishing* was not explored by counsel in relation to the Secretary of State's (new) first argument, the position must be the same as with his other argument. If the European Court would hold, as it held in relation to the defendant states in *Behrami*, that the action of the British forces in detaining Mr Al-Jedda was attributable to the United Nations, then it would also declare his complaint to be incompatible *ratione personae* with the provisions of the Convention: *Behrami*, para 153. In other words, the Convention would not have "effect...in relation to the United Kingdom" in respect of Mr Al-Jedda's detention. So, in accordance with the decision of the Court of Appeal, he could not bring proceedings in the English courts under the HRA alleging that his detention was unlawful because it was incompatible with his article 5(1) Convention rights.

55. I emphasise the point since it explains why the House, a domestic court, finds itself deep inside the realm of international law - indeed inside the very chamber of the United Nations Security Council itself. The House is confronted by these issues precisely because it is called upon to assess how a claim by the appellant, that his international law rights under article 5(1) of the Convention had been violated by the United Kingdom, would fare before the European Court in Strasbourg. How would that court resolve the two issues of international law? Would the European Court hold that the appellant's complaint was incompatible *ratione personae* with the provisions of the Convention? If not, would it hold that, by reason of articles 25 and 103 of the Charter, in so far as there was a conflict, the obligations of the British forces under Security Council Resolution 1546 prevailed over the United Kingdom's obligations under article 5(1) of the European Convention? In answering these questions, the House must, of course, have regard to the way that the European Court has approached similar questions in the past. The

interpretation and application of the decision of the European Court in *Behrami* are accordingly central to any consideration of the first question.

...

59. There is an obvious difference between the factual position in Kosovo that lay behind the *Behrami* case and the factual position in Iraq that lies behind the present case. The forces making up KFOR went into Kosovo, for the first time, as members of KFOR and in terms of Security Council Resolution 1244. By contrast, the Coalition forces were in Iraq and, indeed, in occupation of Iraq, for about six months before the Security Council adopted Resolution 1511, authorising the creation of the MNF, on 16 October 2003.

60. While Resolution 1511 provided the authority for establishing the MNF, the legal position of the British forces in Iraq changed significantly at the end of June 2004. From May 2003 until the end of June 2004, the British forces had been the forces of a power which was in occupation of the relevant area of Iraq. But on 28 June the occupation ended. The interim constitution of Iraq, the Transitional Administrative Law, came into effect and sovereignty was transferred to the Iraqi Interim Government. Since the United States and the United Kingdom were no longer occupying powers, a new legal basis for their actions had to be established. This is to be found in Resolution 1546 which was co-sponsored by the United States and the United Kingdom and which the Security Council adopted on 8 June 2004. That Resolution regulated the position of the MNF when Mr Al-Jedda was detained in October 2004. By virtue of later resolutions, which do not need to be examined in detail, the core provisions of that Resolution have continued to regulate the position throughout the period of his detention.

...

64. Another point requires to be cleared out of the way. As already mentioned, in *R (Al-Skeini) v Secretary of State for Defence* [2007] 3 WLR 33 the House held that proceedings could be brought under the HRA in United Kingdom courts in respect of violations of Convention rights by a United Kingdom public authority acting within the jurisdiction of the United Kingdom in terms of article 1 of the Convention. For purposes of the first issue in this appeal, however, the House is not concerned with whether or not Mr Al-Jedda, while detained by British forces, has been within the jurisdiction of the United Kingdom in terms of article 1. The decision of the European Court in *Behrami* makes that quite clear. At para 71, the court said:

“The court therefore considers that the question raised by the present cases is, less whether the respondent states exercised extra-territorial jurisdiction in Kosovo but far more centrally [‘fondamentalement’], whether this court is competent to examine under the Convention those states’ contribution to the civil and security presences [‘le rôle joué par ces Etats au sein des présences civile et de sécurité’] which did exercise the relevant control of Kosovo.”

Having concluded that it was not competent, *ratione personae*, for the court to scrutinise the role played by the states in the civil and security presences in Kosovo, the court found it unnecessary to consider whether the court would have been competent *ratione loci* to examine complaints against the respondent states about extraterritorial acts or omissions: para 153. Equally, for

purposes of the first issue in this appeal, the crucial point is whether the European Court would be competent, *ratione personae*, to scrutinise the role played by the British members of the MNF in detaining the appellant. If the court would not be competent for that reason, then the issue of whether it would be competent, *ratione loci*, does not arise.

65. My Lords, it may seem tempting to begin and end any discussion of the position by focusing on the appellant's detention and by asking - using the language in article 5 of the International Law Commission's draft articles on the Responsibility of International Organisations (2004) - whether the United Nations organisation was in "effective control" of the British forces as they were detaining him. Obviously, the answer is that what the British forces did by way of detaining the appellant, they did as members of the MNF under unified command. No one would suggest that the Security Council either was, or could have been, involved in the particular decision to detain the appellant or in the practical steps taken to carry out that decision. But that was equally obviously the case with the detention of Mr Saramati in the *Behrami* case. The Grand Chamber held, at para 140, that the Security Council "retained ultimate authority and control and that *effective command of the relevant operational matters was retained by NATO*" (emphasis added). On this basis - and despite the fact that the "effective command" of the relevant operational matters was retained by NATO - the Grand Chamber held that the detention of Mr Saramati was attributable to the United Nations.

...

104. ... Having concluded that this was indeed the position, it followed that, when the French troops detained Mr Saramati, they were exercising the powers which the Security Council had delegated to them. Since that delegation had not, unlawfully, deprived the Council of its responsibility for the exercise of those powers, the action of the French troops in detaining Mr Saramati was in principle attributable to the United Nations in terms of article 3 of the draft articles on the Responsibility of International Organisations.

105. My Lords, if that was the conclusion reached by the Grand Chamber in the case of the detention of Mr Saramati, I am bound to conclude that the court would reach the same conclusion in the case of Mr Al-Jedda. Just as the members of KFOR were exercising powers of the Security Council lawfully delegated to them by the Council, so also the members of the MNF were exercising powers of the Security Council lawfully delegated to them by the Council under Resolution 1546. That being so, the court would hold, first, that the Council retained ultimate authority and control and so remained responsible in law for the exercise of those powers and, secondly, that the action of the British troops, as members of the MNF, in detaining Mr Al-Jedda was in principle attributable to the United Nations in terms of article 3 of the draft articles on the Responsibility of International Organisations.

106. In *Behrami*, at para 144, the Grand Chamber proceeded to consider the effect of its conclusion that the detention of Mr Saramati was in principle attributable to the United Nations. It noted that the United Nations is an organisation having a legal personality separate from that of its member states and that it is not a Contracting Party to the Convention. In particular, at para 146, the court began to consider whether it was competent *ratione personae* to review the acts of the respondent states carried out on behalf of the United Nations. It also went on to consider,

more generally, the relationship between the Convention and the United Nations acting ["les actes de l'ONU"] under Chapter VII of the Charter.

107. I need not examine the Grand Chamber's reasoning in detail since the court would plainly adopt the same approach in any case where it had concluded that the actions of the respondent state in question had been carried out on behalf of the United Nations. I note, however, that, in reaching its conclusion, the court had regard, at para 147, to articles 25 and 103 of the Charter, as interpreted by the International Court of Justice. In para 148, the court attached "even greater significance" to the imperative nature of the principal aim of the United Nations and of the Security Council's powers under Chapter VII. While ensuring respect for human rights represents an important contribution to achieving international peace:

"the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force...."

108. This leads to the court's conclusion, at para 149, that:

"the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the court. To do so would be to interfere with the fulfilment of the UN's key mission in this field, including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself."

109. Finally, in para 151, the Grand Chamber rejected an argument based on its decision in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2005) 42 EHRR 1 where the competence of the court had been upheld. The court noted that, in that case, the impugned act had been carried out by the respondent state authorities on its territory and following a decision by one of its Ministers. By contrast, the impugned acts of KFOR could not be attributed to the respondent states and, moreover, did not take place on the territory of those states or by virtue of a decision of their authorities. The same reasoning would apply to the action of the British forces, as members of the MNF, in detaining the appellant in Iraq, without there being any decision of the United Kingdom government ordering his detention.

110. The court finished up, at para 151, by repeating that:

"UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective."

111. I am accordingly satisfied that, since the detention of the appellant by British forces taking part in the MNF was an action which was covered by Security Council Resolution 1546

and occurred in the course of the mission of the MNF, the European Court would hold that the Convention could not be interpreted in a manner that would subject that action to its scrutiny. A complaint by Mr Al-Jedda, based on the same allegations of a violation of article 5(1) as in the present case, would accordingly be held to be incompatible *ratione personae* with the provisions of the Convention. In consequence, the court would hold an application based on that complaint to be inadmissible.

112. Since article 5(1) of the Convention would therefore not have “effect...in relation to the United Kingdom” in respect of Mr Al-Jedda’s detention in international law before the European Court in Strasbourg, in accordance with the decision of the Court of Appeal, which he does not challenge, I conclude that Mr Al-Jedda cannot bring proceedings in the English courts under the HRA, alleging that his detention was unlawful because it was incompatible with his article 5(1) Convention right.

113. In my view, the result is accordingly that, like Mr Saramati, following the decision of the Grand Chamber in *Behrami*, Mr Al-Jedda must find his protection from arbitrary detention in the commitment, given by Mr Powell to the Security Council, that members of the MNF would at all times act consistently with their obligations under the law of armed conflict, including the Geneva Conventions. It is for the Security Council, exerting its ultimate authority and exercising its ultimate right of control, to ensure that this commitment is fulfilled.

114. That being my conclusion on the first issue, the second issue does not arise for determination. On that matter I am, however, in substantial agreement with what my noble and learned friend, Lord Bingham, has said. I add only these short observations.

...

120. For these reasons I would dismiss the appeal.

BARONESS HALE OF RICHMOND

My Lords,

121. On 28 September 2004, more than three years ago now, a British citizen who is resident in this country arrived in Baghdad (where he has relatives) with his children. On 10 October he was arrested (by whom is disputed) and flown from Baghdad to a British detention facility in Basra. He has remained in the custody of British forces in Basra ever since. He has not been charged with, still less tried for, any criminal offence. Instead, his detention has been periodically reviewed and authorised by senior officers in the British army. He began these proceedings in June 2005, seeking a declaration that his detention is and has always been unlawful and a mandatory order either for his release or for his transfer to the United Kingdom if he is to be further detained. He has also begun separate proceedings to challenge the factual basis of his detention but these have not yet been heard.

122. If he were to be returned to this country, he might face detention for up to 28 days under the Terrorism Act 2000 or be made subject to a control order under the Prevention of

Terrorism Act 2005. Otherwise he could only be detained if charged with a criminal offence. There is no doubt that prolonged detention in the hands of the military is not permitted by the laws of the United Kingdom. Nor could it be permitted without derogation from our obligations under the European Convention on Human Rights. Article 5(1) of the Convention provides that deprivation of liberty is only lawful in defined circumstances which do not include these. The drafters of the Convention had a choice between a general prohibition of “arbitrary” detention, as provided in article 9 of the Universal Declaration of Human Rights, and a list of permitted grounds for detention. They deliberately chose the latter. They were well aware of Churchill’s view that the internment even of enemy aliens in war time was “in the highest degree odious”. They would not have contemplated the indefinite detention without trial of British citizens in peace time. I do not accept that this is less of a problem if people are suspected of very grave crimes. The graver the crime of which a person is suspected, the more difficult it will be for him to secure his release on the grounds that he is not a risk. The longer therefore he is likely to be incarcerated and the less substantial the evidence which will be relied upon to prove suspicion. These are the people most in need of the protection of the rule of law, rather than the small fry in whom the authorities will soon lose interest.

123. Furthermore, this House has held that our obligations under the Convention are owed to people detained by the United Kingdom military in Iraq: see *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26, [2007] 3 WLR 33. Why should this case be different from that? The difference is that no-one suggests that it is lawful for British soldiers so to maltreat a person in their custody, even in Iraq, that he dies of his injuries. But it is suggested that it is lawful to intern a person in Iraq. The source of that authority is said to be the United Nations Security Council resolutions dealing with the activities of US, UK and other forces making up the multi-national force (“MNF”) after the transfer of power to the Iraqi Interim Government on 28 June 2004. It is said that either (i) those resolutions make the acts of the MNF attributable to the United Nations in international law, thus relieving the UK of responsibility for them; or (ii) those resolutions qualify or displace the obligations in the ECHR so that internment may in certain circumstances be lawful.

124. I would reject the first argument, for the reasons given by my noble and learned friend, Lord Bingham of Cornhill. I agree with him that the analogy with the situation in Kosovo breaks down at almost every point. The United Nations made submissions to the European Court of Human Rights in *Behrami v France, Saramati v France, Germany and Norway* (Application Nos 71412/01 and 78166/01) (unreported, 2 May 2007), concerning the respective roles of UNMIK and KFOR in clearing mines, which was the subject of the *Behrami* case. It did not deny that these were UN operations for which the UN might be responsible. It seems to me unlikely in the extreme that the United Nations would accept that the acts of the MNF were in any way attributable to the UN. My noble and learned friend, Lord Brown of Eaton-under-Heywood, has put his finger on the essential distinction. The UN’s own role in Iraq was completely different from its role in Kosovo. Its concern in Iraq was for the protection of human rights and the observance of humanitarian law as well to protect its own humanitarian operations there. It looked to others to restore the peace and security which had broken down in the aftermath of events for which those others were responsible.

125. I also have difficulty with the second argument. It would be so much simpler if the European Convention on Human Rights had contained a general provision to the effect that the rights guaranteed are qualified to the extent required or authorised by United Nations resolutions. This may not be surprising: by then the European nations who had vowed “never again” would they tolerate the abuses they had suffered before and during the Second World War had become disillusioned with the United Nations as a reliable source of human rights protection. As Brian Simpson has put it, “Europe must go it alone” (*The European Convention on Human Rights: The First Half Century*, University of Chicago Law School). But now that the United Nations has to some extent emerged from its cold war paralysis, some way has to be found of reconciling our competing commitments under the United Nations Charter and the European Convention. I agree with Lord Bingham, for the reasons he gives, that the only way is by adopting such a qualification of the Convention rights.

126. That is, however, as far as I would go. The right is qualified but not displaced. This is an important distinction, insufficiently explored in the all or nothing arguments with which we were presented. We can go no further than the UN has implicitly required us to go in restoring peace and security to a troubled land. The right is qualified only to the extent required or authorised by the resolution. What remains of it thereafter must be observed. This may have both substantive and procedural consequences.

127. It is not clear to me how far UNSC resolution 1546 went when it authorised the MNF to “take all necessary measures to contribute to the maintenance of security and stability in Iraq, in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks” (para 10). The “broad range of tasks” were listed by Secretary of State Powell as including “combat operations against members of these groups [seeking to influence Iraq’s political future through violence], internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq’s security”. At the same time, the Secretary of State made clear the commitment of the forces which made up the MNF to “act consistently with their obligations under the law of armed conflict, including the Geneva Conventions”.

128. On what basis is it said that the detention of this particular appellant is consistent with our obligations under the law of armed conflict? He is not a “protected person” under the fourth Geneva Convention because he is one of our own citizens. Nor is the UK any longer in belligerent occupation of any part of Iraq. So resort must be had to some sort of post conflict, post occupation, analogous power to intern anyone where this is thought “necessary for imperative reasons of security”. Even if the UNSC resolution can be read in this way, it is not immediately obvious why the prolonged detention of this person in Iraq is necessary, given that any problem he presents in Iraq could be solved by repatriating him to this country and dealing with him here. If we stand back a little from the particular circumstances of this case, this is the response which is so often urged when British people are in trouble with the law in foreign countries, and in this case it is within the power of the British authorities to achieve it.

129. But that is not the way in which the argument has been conducted before us. Why else could Lord Bingham and Lord Brown speak of “displacing or qualifying” in one breath when clearly they mean very different things? We have been concerned at a more abstract level with

attribution to or authorisation by the United Nations. We have devoted little attention to the precise scope of the authorisation. There must still be room for argument about what precisely is covered by the resolution and whether it applies on the facts of this case. Quite how that is to be done remains for decision in the other proceedings. With that caveat, therefore, but otherwise in agreement with Lord Bingham, Lord Carswell and Lord Brown, I would dismiss this appeal.

LORD CARSWELL

[opinion omitted]

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

...

Issue One – Attributability

...

144. I turn, therefore, to “the key question” and in particular to the five factors which led the court in *Behrami* (para134) to conclude that the UN in Kosovo had retained ultimate authority and control. The first, that Chapter VII of the Charter allows the UNSC to delegate to member states, applies equally here. So too the second, the power to provide for security being a legally delegable power. The third I shall leave over for the moment. It is difficult to find any relevant distinction with regard to the fourth: UNSCR 1511 (which authorised the formation of the MNF) fixed its mandate no less precisely than UNSCR 1244 defined KFOR’s mandate. Indeed, so far as the power of internment was concerned, resolution 1546 was altogether more specific (see paras 14 and 15 of Lord Bingham’s opinion), resolution 1244 having entrusted KFOR merely with such general responsibilities as “ensuring public safety and order”. Nor could the fifth factor, the reporting requirements, reasonably lead to a different conclusion about ultimate authority and control here. True, this case lacks the additional safeguard noted in *Behrami* that KFOR’s report had to be presented by the UN Secretary General, but that surely is counterbalanced by the fact that the MNF’s mandate ceases unless renewed by the SC whereas KFOR’s mandate was to continue until the SC decided otherwise (a decision which, at least theoretically, a permanent member could have vetoed).

145. To my mind it follows that any material distinction between the two cases must be found in the third factor, or rather in the very circumstances in which the MNF came to be authorised and mandated in the first place. The delegation to KFOR of the UN’s function of maintaining security was, the court observed, “neither presumed nor implicit but rather prior and explicit in the resolution itself”. Resolution 1244 decided (para 5) “on the deployment in Kosovo, under United Nations auspices, of international civil and security presences” - the civil presence being UNMIK, recognised by the court in *Behrami* (para 142) as “a subsidiary organ of the UN”; the security presence being KFOR. KFOR was, therefore, expressly formed under UN auspices. Para 7 of the resolution “[a]uthorise[d] member states and relevant international

organisations to establish the international security presence in Kosovo as set out in point 4 of Annex 2...". Point 4 of Annex 2 stated: "The international security presence with substantial NATO participation must be deployed under unified command and control and authorised to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees."

146. Resolution 1511, by contrast, was adopted on 16 October 2003 during the USA's and UK's post-combat occupation of Iraq and in effect gave recognition to those occupying forces as an existing security presence. Para 13 of the resolution is instructive:

"Determines that the provision of security and stability is essential to the successful completion of the political process as outlined in paragraph 7 above and to the ability of the United Nations to contribute effectively to that process and the implementation of resolution 1483 (2003), and *authorises* a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq ["UNAMI"], the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure."

147. By resolution 1483, adopted on 22 May 2003, the SC had "[r]esolved that the United Nations should play a vital role in humanitarian relief, for reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance" and, pursuant to it, the Secretary General[C T1] had established UNAMI, an essentially humanitarian and civil aid mission. As para 13 of resolution 1511 indicated, it was that mission which was the UN's contribution to the situation in Iraq. The MNF under unified command which para13 was authorising was to contribute to the security of, amongst others, UNAMI. Unlike KFOR, however, it was not itself being deployed "under UN auspices". UNAMI alone represented the UN's presence in Iraq.

148. Nor did the position change when resolution 1546 was adopted on 8 June 2004, three weeks before the end of the occupation and the transfer of authority from the CPA to the interim government of Iraq on 28 June 2004. UNAMI was to continue with its work (para 7). So too was the MNF, both of them acting at the request of the incoming interim government of Iraq. Resolution 1546 accordingly reaffirmed the authorisation of the MNF under unified command (this time "in accordance with the letters annexed", described by Lord Bingham at para14). And, as para10 noted, consistently with the previous position, the MNF's tasks, including the prevention and deterrence of terrorism, were imposed so that, amongst other things, "the United Nations can fulfil its role in assisting the Iraqi people as outlined in para 7 above" - namely UNAMI's humanitarian and civil aid work. Nothing either in the resolution itself or in the letters annexed suggested for a moment that the MNF had been under or was now being transferred to United Nations authority and control. True, the SC was acting throughout under Chapter VII of the Charter. But it does not follow that the UN is therefore to be regarded as having assumed ultimate authority or control over the force. The precise meaning of the term "ultimate authority and control" I have found somewhat elusive. But it cannot automatically vest or remain in the

UN every time there is an authorisation of UN powers under Chapter VII, else much of the analysis in *Behrami* would be mere surplusage.

149. It is essentially upon this basis, therefore, that I regard the present case as materially different from *Behrami* and am led to conclude that the appellant's internment is to be attributed, not to the UN acting through the MNF, but rather directly to the UK forces.

...

155. It follows from all this that, despite the appellant's success on the first issue, his appeal nevertheless fails and must be dismissed.

Post Script

Since writing this judgment I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Rodger of Earlsferry. I confess to having found it sufficiently persuasive to cause me to doubt the correctness of my own conclusion on the difficult issue of attribution. Given, however, that a majority of your Lordships are for the appellant on this issue and that in any event, having regard to the unanimity of view on issue two, it cannot decide the outcome of this appeal, I prefer to leave over for another day my final conclusion on the point. I just wish to indicate that I may change my mind.