



**Easter Term  
[2016] UKSC 25**

*On appeal from: [2015] EWCA Civ 1241*

## **JUDGMENT**

### **Ministry of Defence (Respondent) v Iraqi Civilians (Appellant)**

**before**

**Lord Neuberger, President  
Lady Hale, Deputy President  
Lord Mance  
Lord Sumption  
Lord Reed**

**JUDGMENT GIVEN ON**

**12 May 2016**

**Heard on 25 April 2016**

*Appellant*

Richard Hermer QC  
Marie Louise Kinsler  
Alison Pickup  
Andrew Scott  
(Instructed by Leigh Day)

*Respondent*

Derek Sweeting QC  
James Purnell

(Instructed by The  
Government Legal  
Department)

**LORD SUMPTION: (with whom Lord Neuberger, Lady Hale, Lord Mance and Lord Reed agree)**

1. English private international law distinguishes between matters of substance which are governed by the proper law of the relevant issue (*lex causae*), and matters of procedure which are for the law of the forum. The distinction was preserved when the English principles relating to the choice of law were amended and partly codified by the Private International Law (Miscellaneous Provisions) Act 1995: see section 14(3)(b). Limitation, which deprives the litigant of a forensic remedy but does not extinguish his right, is for that reason classified by the English courts as procedural. The result was that until the position was altered by statute in 1984, the English courts disregarded foreign limitation law and applied the English statutes of limitation irrespective of the *lex causae*. This was widely regarded as unsatisfactory, mainly because of the rather technical character of the distinction on which it was based between barring the remedy and extinguishing the right.

2. The Foreign Limitation Periods Act 1984 provided for the English courts, with limited exceptions, to apply the limitation rules of the *lex causae*. Section 1 provides:

“1. Application of foreign limitation law

(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter -

(a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; ... and

(b) ... the law of England and Wales relating to limitation shall not so apply.

...

(4) A court in England and Wales, in exercising in pursuance of subsection (1)(a) above any discretion conferred by the law of any other country, shall so far as practicable exercise that discretion in the manner in which it is exercised in comparable cases by the courts of that other country.”

3. The law of a country relating to limitation is defined by section 4. It means

“so much of the relevant law of that country as (in any manner) makes provision with respect to a limitation period applicable to the bringing of proceedings in respect of that matter in the courts of that country and shall include ... references to so much of that law as relates to, and to the effect of, the application, extension, reduction or interruption of that period.”

4. For this purpose, the “relevant law” means

“the procedural and substantive law applicable, apart from any rules of private international law, by the courts of that country.”

5. The question which arises on this appeal is how the Act is to be applied in a case where the foreign limitation law depends for its operation on facts which are not germane to litigation in England.

6. The claimants are 14 “lead claimants”, representative of more than 600 clients of solicitors Leigh Day. They claim to have suffered unlawful detention and/or physical maltreatment at the hands of British armed forces in Iraq between 2003 and 2009, for which the Ministry of Defence is liable in tort. It is agreed between the parties that any liability of the Ministry in tort is governed by Iraqi law. Under article 232 of the Civil Code of Iraq, the standard limitation period applicable to claims of this kind in Iraqi law is three years from the day on which the claimant became aware of the injury and of the person who caused it. This action was begun more than three years after most of the claimants must have been aware of these matters.

7. As far as those claimants are concerned, the fate of their claims may depend on the operation of article 435 of the Civil Code, which is one of a number of provisions suspending the running of time in particular cases. It provides:

“Article 435 - (1) The time limit barring the hearing of the case is suspended by a lawful excuse such as where the plaintiff is a minor or interdicted and has no guardian or is absent in a remote foreign country, or where the case is between spouses or ascendants and descendants, or if there is another impediment rendering it impossible for the plaintiff to claim his right.

(2) The period which lapses while the excuse still exists (lasts) shall not be taken into account (for the running of the time limitation).”

8. The circumstance on which the claimants rely as engaging this provision is that Coalition Provisional Authority Order 17, which had and still has the force of law in Iraq, made it impossible for them to sue the British government in Iraq. Section 2(1) of the Order provides that coalition forces in Iraq (including British forces) are “immune from Iraqi legal process.” Section 2(3) provides that coalition personnel are to be “subject to the exclusive jurisdiction of their parent states”, and “immune from local criminal, civil and administrative jurisdiction” other than by persons acting on behalf of their parent states. Section 2(5) provides that parent states may waive the immunity in respect of criminal liability at the request of the Coalition Provisional Authority if there are no relevant criminal sanctions in the parent state. It is agreed between the parties that CPA Order 17 made it impossible for the claimants to sue the British government in Iraq throughout the relevant period. Broadly stated, the question is whether the suspensory proviso in article 435(1) applies to the current proceedings in England. It is not suggested on this appeal that there has ever been any impediment preventing them from suing the British government in England.

9. The judge, Leggatt J, directed the hearing of a preliminary issue on this point, among others, and subsequently decided it in favour of the claimants. He regarded the question whether the relevant impediment had to affect Iraqi or English proceedings as turning on the territorial scope of article 435 as a matter of Iraqi law. He accepted the evidence of the claimants’ expert that an Iraqi court would construe article 435 of the Civil Code as referring to impediments making it impossible for the claimant to assert his claim in Iraq. He therefore concluded that because CPA Order 17 deprived and still deprives the Iraqi courts of jurisdiction to entertain proceedings against the British government, the limitation period was suspended indefinitely, subject only to section 2(1) of the Foreign Limitation Periods Act, which disapplies section 1(1) in a case where its application would cause undue hardship. The judge described this as a “very unattractive result”. However, he thought that the alternative was at least as irrational. This was because if there was an impediment to English proceedings which lasted until after the expiry of the Iraqi limitation period, but no such impediment in Iraq, the running of time would be

suspended in England and the action could subsequently proceed there notwithstanding that it would have been time-barred in Iraq. Leggatt J did not decide whether section 2(1) affected the position in this case, because it was not part of the preliminary issue which he had directed.

10. The Court of Appeal allowed the appeal. The leading judgment was given by Tomlinson LJ, with whom Lord Dyson MR and Vos LJ agreed. He rejected the judge's view that the answer turned on the territorial scope of article 435. In his view, an English court was bound to disregard any impediment arising from CPA Order 17. This was because that order was not a law with respect to limitation which the English courts were bound to apply by sections 1(1) and 4 of the 1984 Act. Nor was it a substantive rule of Iraqi law which applied by virtue of the ordinary principles of English private international law. It was a mere procedural bar to proceedings in Iraq which had no relevance in an English court.

11. The Court of Appeal was of course right to say that CPA Order 17 had no legal effect in an English court. It expressly confers immunity only in respect of Iraqi legal process. It is not a rule of limitation, but a particular form of state immunity, which serves as a limitation on the jurisdiction of the courts. It is therefore necessarily procedural and local in nature. It is inherent in the whole concept of state immunity that it does not confer immunity on a state in its own courts. However, although CPA Order 17 is devoid of *legal* effect outside Iraq its consequences may nonetheless be relevant as fact. It is as fact that those consequences affect the operation of article 435 of the Civil Code. The question posed by that article is whether CPA Order 17 was as a matter of fact an "impediment rendering it impossible for the plaintiff to claim his right." "Impediment" and "impossibility" are questions of fact. This is no less true because the impediment is the consequence of a rule of Iraqi law.

12. Left to my own devices, I might have doubted whether article 435 was concerned with problems of this kind. On the face of it, an "impediment" is something that prevents the litigant from asserting some right that he has or from invoking some jurisdiction that the court has, and not the absence of a relevant right to assert or a jurisdiction to invoke. But these are questions of Iraqi law on which the parties are agreed. It is common ground that CPA Order 17 was an impediment and that it did render it impossible for the claimants to sue in Iraq. Their agreement on this point is an agreement about the practical consequences of the Order. However, it does not follow from the fact that an English court recognises the consequences of a rule of Iraqi law that it is giving effect to the rule in question.

13. The real question is whether it is legally relevant when the claimants have brought proceedings in England what impediments might have prevented similar proceedings in Iraq. The judge, as I have observed, regarded that as depending on

the territorial ambit of article 435 as a matter of Iraqi law. On that footing it is obvious that a procedural time-bar arising under Iraqi law applied only in Iraq. But in my opinion, this was not a question of Iraqi law but of English law. In English proceedings, the relevant law is the Foreign Limitation Periods Act. Where the cause of action is governed by a foreign law, the Act requires an English court to ascertain the relevant rules of the foreign law of limitation and then to apply it to proceedings in England. Because the foreign law of limitation will have been designed for foreign proceedings, that necessarily involves a process of transposition. There may be facts which the foreign law of limitation would treat as relevant to foreign proceedings but which are irrelevant to proceedings in England.

14. It is sometimes said that the ascertainment of foreign law involves asking what the foreign court would decide. That is of course true, but the English court is concerned only with what the foreign court would decide to be the relevant foreign law. It is the function of the English court to apply that law to the relevant facts. In just the same way, where the foreign law confers a discretion on the foreign court, an English court exercising that discretion under section 1(4) of the 1984 Act would do so “in the manner in which it is exercised in comparable cases” by the foreign court, but taking account of those respects in which because the proceedings are being brought in England the facts are not comparable.

15. It follows that where the Iraqi law of limitation depends for its operation on some fact about the proceedings, the relevant fact is that applicable to the actual proceedings, viz those brought in England, and not some hypothetical proceedings that the claimants have not brought in Iraq, and in this case could not have brought in Iraq. We are concerned with impediment and impossibility affecting the bringing of legal proceedings. That depends on the personal situation of the claimants in relation the relevant proceedings, namely those brought in England.

16. The claimants’ submission, if accepted, would mean that there was no limitation period at all affecting the present proceedings in England, by reason of a consideration (CPA Order 17) which had no relevance to English proceedings because it has no application outside Iraq and has never impeded resort to the English court. The main argument advanced in support of it was that an English court applying the Act of 1984 must give effect to the whole of the relevant Iraqi law of limitation, and not just to part of it. This point was reinforced by reference to section 2 of the Act of 1984. Section 2(1) disapplies the relevant foreign law of limitation so far as its application would conflict with English public policy, and section 2(3) disapplies it so far as it suspends the running of time on account of “the absence of a party to the action or proceedings from any specified jurisdiction or country”. The point made is that where the Act disapplies some part of the foreign law of limitation, it does so expressly, thereby impliedly excluding its disapplication in any other circumstances. I reject the submission because it assumes that because the Iraqi law of limitation would treat certain facts as relevant to Iraqi proceedings,

to treat those facts as irrelevant to English proceedings involves disapplying part of Iraqi law. It does not. It simply involves applying the same principles of Iraqi law to different facts. The facts relevant to proceedings in England are not necessarily the same as those which would be relevant to proceedings in Iraq.

17. I should, finally, return to Leggatt J's view that it would be irrational for an English court to concern itself with impediments to English proceedings because if there was a temporary impediment in England but none in Iraq, a court applying the Iraqi law of limitation to an action in England might be bound to allow the action to proceed here when it was time-barred in Iraq. I have to say that I cannot see why this should be thought strange, let alone irrational. It simply reflects the fact that the Iraqi law of limitation is qualified by reference to practical impediments to the making of a claim, and those impediments may be greater in some jurisdictions than in others. On the judge's hypothesis, the reason why Iraqi proceedings would have been time-barred before corresponding proceedings in England, is that if the claimants had proceeded in Iraq, they would not have been impeded.

18. These reasons differ from those of the Court of Appeal, but the result is the same. In my opinion, the appeal must be dismissed and the order of the Court of Appeal affirmed.