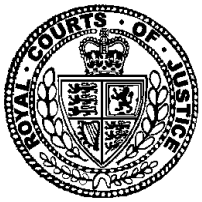

Neutral Citation Number: [2019] EWHC 3350 (QB)

Case No: HQ17X03818

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2019

Before :

MR JUSTICE JOHNSON

- -

Between :

(1) VERICA TOMANOVIC
(2) SNEZANA MILENKOVIC
(3) VESNA KONTIC
(4) DANIJELA TODOROVIC
(5) OLGA MILOVANOVIC
(6) ZLATA VESELINOVIC
(7) ZIVORAD JOVANOVIC
(8) MARIKA PERIC **Claimants**

- and -

THE FOREIGN AND COMMONWEALTH OFFICE **Defendant**

- -
- -

Fergus Randolph QC (instructed by Savic & Co) for the Claimants
Sir James Eadie QC, Brendan McGurk and Amy Sander (instructed by the Government Legal Department) for the Defendant

Hearing date: 28 November 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE JOHNSON

Mr Justice Johnson :

1. In the course of the violence that took place in Kosovo in 1999 and 2000 many people were killed or abducted never to be seen again. The Claimants are immediate family members of nine such people, all of them ethnic Serbs. There has been no investigations of the crimes, and in the case of the First Claimant she does not know what has become of her husband, with all of the anguish that brings. As Murray J observed in related proceedings (*Tomanovic and others v The European Union and others* [2019] EWHC 263 (QB) at [8]):

> "The circumstances giving rise to this claim are tragic and distressing. The emotional suffering of the claimants as a result of the crimes committed against their family members cannot be imagined."

2. The Claimants' distress and suffering is not in doubt. What is in issue is whether they have a viable legal claim against the Foreign and Commonwealth Office ("the FCO"). The Claimants say that:

   (1) Mr Ratel, the Head of the Special Prosecutions Office of the Republic of Kosovo ("SPRK") during the period January 2013 – March 2016, failed to investigate the offences that had been committed against their loved ones.

   (2) This failure amounted to a breach of the obligation to investigate unlawful killing and abduction that arises under section 6 of the Human Rights Act 1998 read with articles 2 and 3 of the European Convention on Human Rights ("ECHR").

   (3) A claim lies against the FCO which was Mr Ratel's employer and had seconded him to work as a prosecutor in Kosovo.

3. The FCO says that the Claimants have no real prospect of succeeding in their claims for seven separate reasons:

   (1) Mr Ratel is immune from legal process and that immunity cannot be circumvented by an action against the FCO.

   (2) The Claimants were not within the jurisdiction of the United Kingdom ("UK") for the purposes of article 1 ECHR so as to permit a claim under the Human Rights Act 1998.

   (3) Mr Ratel's conduct of his official functions as Head of the SPRK is not attributable to the UK.

   (4) The Human Rights Act 1998 is not applicable to the claim because the deaths/disappearance in question took place before that Act came into force.

   (5) No investigative duty arose under articles 2 and/or 3 ECHR.

   (6) The claim is *res judicata* and an abuse of process.

   (7) The claim is time barred.

4. The FCO says that there is no other reason why the claim should proceed to trial, and that summary judgment should therefore be entered against the Claimants on the whole of the claim.

The Facts

The Claimants and their deceased relatives

5. At the heart of this case are 9 human tragedies arising out of the murders (or in one case abduction and likely murder) of Dr Andrija Tomanovic, Dimitrije Milenkovic and his son Aleksandar Milenkovic, Zoran Kontic, Predrag Todorovic, Miroljub Milovanovic, Slavko Veselinovic, Nebojsa Jovanovic and Srdjan Peric.

6. Dr Andrija Tomanovic: The First Claimant, Verica Tomanovic, was married to Dr Tomanovic. He was the Director of Surgery at Pristina Hospital where he had worked since 1963. He was abducted from Pristina Hospital on 24 June 1999. His body has never been found.

7. Dimitrije and Aleksandar Milenkovic: The Second Claimant, Snezana Milenkovic, is the widow of Dimitrije Milenkovic. They had four children, one of whom was Aleksandar who was born in May 1984. On 16 June 1999 Dimitrije and Aleksandar Milenkovic were abducted. The Second Claimant says she spoke to British troops and was told that her husband and son were alive and detained by the international peacekeeping force ("KFOR") and that they would be released the next day. That was not correct. They had been shot. Some days later the Second Claimant identified their bodies.

8. Zoran Kontic: The Third Claimant, Dr Vesna Kontic, is the widow of Zoran Kontic. He was an engineer and was the production general manager of a power plant "Kosovo A, Obilic". In 1999 they lived together in Pristina in a block of flats opposite a KFOR base. They sought help from the KFOR base and were, for a period of time, given shelter. On 1 July 1999 they left Kosovo because of the threats, but Mr Kontic was told to return to work because "British troops required assistance in restarting the power plant." He therefore returned to the family home. On 5 July 1999 Mr Kontic was stabbed at home. According to Mr Kontic, the assailants were two named Albanian workers at the power plant. Mr Kontic died from his injuries.

9. Predrag Todorovic: The Fourth Claimant, Danijela Todorovic, is the widow of Predrag Todorovic. They had four children. Mr Todorovic had been employed at the Public Enterprise Pit Mines Kosovo ("the mines"). The family had moved to Obilic where they thought they would be safe. On 30 June 1999 Mr Todorovic was at home with his brother. They heard women screaming for help, saying that they were being attacked by the Kosovo Liberation Army. Mr Todorovic stepped out of his house to help. He was shot dead. The Fourth Claimant has been told that there were 30 gunshots to his body.

10. Miroljub Milovanovic: The Fifth Claimant, Olga Milovanovic, was the mother of Miroljub Milovanovic. He was a mechanic, also employed at the mines. On 27 June 1999 he was driving in a car with a friend. Armed men stepped out from a roadside ditch and fired several shots, killing Mr Milovanovic and his friend.

11. Slavko Veselinovic: The Sixth Claimant, Zlata Veselinovic, is the widow of Slavko Veselinovic. He too worked at the mines. On 13 June 1999 he was shot dead by NATO/KFOR soldiers. A CNN report states that he was killed by German KFOR troops. The Sixth Claimant has not received any communication from Germany or any other authority about the death of her husband.

12. Nebojsa Jovanovic: The Seventh Claimant, Zivorad Jovanovic, is the brother of Nebojsa Jovanovic. He was an electrician, also employed at the mines. On 8 July 1999 he was shot by five armed men. His family tried to take him to hospital but they were stopped by British forces. They attempted to provide medical assistance, but he died.

13. Srdjan Peric: The Eighth Claimant, Marika Peric, is the widow of Srdjan Peric. He was also employed at the mines. The family lived in the village of Donja Brnica, in the borough of Pristina. On 11 March 2000 Mr Peric was inspecting his land on the outskirts of the village when he was shot in the head and killed.

14. Each of these killings, and the disappearance of Dr Tomanovic, took place after the establishment of an international presence in Kosovo under the authority of the United Nations ("UN"). Nobody has been brought to justice for the killings/disappearance. They have not been investigated. There has been a finding (see paragraph 43 below) that the failure to investigate amounts to a breach of articles 2 and 3 ECHR. Despite extensive legal processes over many years the Claimants have not secured any substantive relief for these breaches of articles 2 and 3 ECHR. Their cases do not stand alone. Very many others (both Serbs, and those from other ethnic groups) were also killed without the assailants being apprehended and without any substantive relief for investigative failings.

UN Interim Administration Mission in Kosovo ("UNMIK")

15. On 24 March 1999 NATO commenced a military air campaign in Kosovo following the failure of international diplomatic efforts to resolve the violence. On 8 June 1999 the Federal Republic of Yugoslavia agreed to withdraw its forces from Kosovo. NATO ended the air strikes.

16. On 10 June 1999 the UN Security Council adopted Resolution 1244. This authorised the Secretary-General, with the assistance of international organisations, to establish an international civil presence in Kosovo, UNMIK. The main responsibilities of UNMIK included the maintenance of civil law and order through the deployment of international police personnel to serve in Kosovo.

The Special Prosecution Office of the Republic of Kosovo ("SPRK")

17. The SPRK is an independent prosecution service operating under the laws of Kosovo. It was established by article 1 of Law No 03/L-052 of 13 March 2008. By article 9.1(h), (k) and (l) of that Law it has competence to investigate and prosecute (amongst other crimes) crimes of murder, kidnapping and torture. Its prosecutors are a combination of Kosovo public prosecutors and EULEX prosecutors (see below), both operating under the law of 13 March 2008.

EULEX Kosovo

18. In 2008, so some 9 years after the disappearance of the Claimants' relatives, the Council of the EU's Joint Action 2008/124/CPFSP ("the Joint Action") established "an European Rule of Law Mission in Kosovo, EULEX KOSOVO."

19. EULEX's mission statement, by article 2 of the Joint Action, was to:

> "assist the Kosovo institutions… and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system…"

20. EULEX's tasks, by article 3(d) of the Joint Action, included ensuring that cases of "inter-ethnic crimes" and "other serious crimes" were "properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges…" Article 10 made the following provision in respect of the status of EULEX Kosovo and of its staff:

> "**Status of EULEX KOSOVO and of its staff**
>
> 1. The status of EULEX KOSOVO and its staff, including the privileges, immunities and further guarantees necessary for the completion and smooth functioning of EULEX KOSOVO, shall be agreed as appropriate.
>
> 2. The State or EU institution having seconded a member of staff shall be responsible for answering any claims linked to the secondment, from or concerning the member of staff. The State or EU institution in question shall be responsible for bringing any action against the seconded person.
>
> 3. The conditions of employment and the rights and obligations of international and local civilian staff shall be laid down in the contracts between the Head of Mission and the members of staff."

21. EULEX was administered by the European External Action Service ("EEAS"). Prosecutors were seconded from their home states to EULEX, where they worked alongside local Kosovan prosecutors in the SPRK.

22. The legal relationship between EULEX and those seconded to EULEX was the subject of analysis by the Court of Appeal in *Foreign and Commonwealth Office and others v Bamieh* [2019] EWCA Civ 803 [2019] IRLR 736. That case concerned whether the whistle-blower provisions in the Employment Rights Act 1996 applied, extra-territorially, to an FCO employee seconded to EULEX. The Court explained that the Joint Action is analogous to a treaty between member states – *per* Gross LJ at [10]. The position of EULEX personnel was explained as follows:

"12. A large number of contributing states second personnel to EULEX… The UK cohort of seconded staff members was not particularly dominant.

13. Inevitably, as with any secondment, there is a degree of duality. Thus, as provided by the EULEX Personnel Handbook (para 1.4) and Operational Plan ("the OPLAN", see para 5.2.1), all staff members were obliged to carry out their duties following the:

> '…Mission chain of command and shall act in the sole interest of the Mission.'

However, while disciplinary control over staff rested with EULEX, disciplinary action would be exercised by, and the responsibilities of employer remained with, the seconding home state: OPLAN, para 5.2.2. The Joint Action provided (in arts 8.6 and 10.2):

> '8.6: the Head of Mission shall be responsible for disciplinary control over the staff. For seconded staff, disciplinary action shall be exercised by the National or EU Authority concerned…
>
> 10.2: the State… having seconded a member of staff shall be responsible for answering any claims linked to the secondment, from or concerning a member of staff. The State shall be responsible for bringing any action against the seconded person.'

14. A 'Code of Conduct and Discipline' ('COC') was annexed to OPLAN. It was complementary to the obligations of staff members under international law and the law of the staff member's home jurisdiction: COC, para 1.3. It was to be considered as a written order to all staff members, backed by disciplinary sanction for non-compliance. The COC provided that staff members would observe 'the law applicable to the place of deployment' (para 2.1)…

69. …[Secondees to EULEX] were in Kosovo, to act… in the 'sole interest of the mission' and… to report to and take lawful instructions from [their] EULEX manager. Thus, Mr Ratel became the respondent's line manager in succession to a line manager who was not a FCO secondee, and himself reported to a Czech line manager, also not a FCO secondee. …

71. …Put starkly, EULEX was an international mission, not a UK mission. … the base of the respondent and the co-workers was '… the international world that was EULEX not the territorial bubble of the UK.' Insofar as EULEX was an enclave at all, it was an international enclave not a UK enclave…"

23. Thus, prosecutors had a high level of independence. They had very little contact with the FCO and were not "micro manage[d]" by the FCO - see at [22].

24. The Court considered the impact of article 10(2) of the Joint Action (which I set out at paragraph 20 above) – see at [86]:

> "In all this, I have not overlooked art 10.2 of the Joint Action… As Simler P put it [in the judgment of the Employment Appeal Tribunal], art 10.2 'attributes responsibility for seconded staff members to the seconding state'… However, given the duality of the secondment arrangements, the question remains as to 'responsibility' for what? In my judgment this question leads back to the fundamental divide already expressed: the distinction between the relationships between secondees and their respective seconding states, and the relationships between seconded EULEX staff *inter se* relating to the conduct of the Mission. The former comes within art 10.2 and gives rise to claims properly described, in this context, as 'linked to the secondment'. The latter falls on the other side of the line, outside art 10.2 and… is correctly categorised as giving rise to 'theatre level' questions… Article 10.2 does no more than emphasise the divide occasioned by the duality of the secondment and underline the sphere of responsibility of the seconding state;…"

25. Mr Randolph QC, for the Claimants, argues that this shows that it is only "relationships between seconded EULEX staff *inter se*" (what he described as "horizontal relationships") that are excluded from the seconding state's responsibility, and that article 10(2) recognises that seconding states retain responsibility for the operational decision making of its staff (what he described as "vertical relationships"). I disagree. The reference to "relationships between seconded EULEX staff *inter se*" was the particular relationship that was in issue in the case, but it is not the fulcrum of the critical distinction that was being made. The important distinction is whether the claim in question relates to the "conduct of the Mission". If so, that falls within the responsibility of EULEX rather than the seconding state.

Appointment of Mr Ratel as a EULEX prosecutor

26. In late 2009 EEAS published a Call for Contributions to the member states of the European Union, seeking contributions to the EULEX mission in Kosovo, including in respect of appointment to the post of EULEX prosecutor. The FCO vetted and nominated Mr Ratel for that post. He was appointed by the EEAS. On 1 March 2010 he entered into a contract with the FCO whereby he agreed to be a "UK government funded secondee" employed by the FCO and seconded to EULEX. Paragraph 2 of the contract stated:

> "You will report to, and be obliged to take lawful instructions from, the manager appointed to you by EULEX Kosovo."

27. The contract required Mr Ratel to remain in contact with the British Embassy. He had to check FCO travel advice before travelling to other countries, and, in certain cases, to seek authorisation before embarking on such travel. He was required to conduct himself

in a manner "consistent with [his] position as a representative of Her Majesty's Government" and not to "act in a manner, which might bring discredit… upon… Her Majesty's Government." In the event of such misconduct, the FCO reserved a right to terminate the secondment and to bring disciplinary proceedings. It also imposed restrictions on Mr Ratel's freedom of expression about his work, with potential disciplinary consequences.

28. The FCO therefore reserved residual disciplinary powers and a power to terminate the secondment. However, nothing in the contract suggests that the FCO could or would exercise any form of direction or control in the manner in which Mr Ratel discharged his functions as a prosecutor. It says the opposite – that he would fall under the direction and control of EULEX.

Mr Ratel's role as Head of SPRK

29. In late 2012 Mr Ratel was appointed as Head of SPRK, again by way of a secondment from the FCO to EULEX. His contract with the FCO was amended accordingly. In *Bamieh* the Court of Appeal said this in relation to Mr Ratel at [24]:

> "On 1 January 2013, Mr Ratel, a dual UK/Canadian national and (as already indicated) a FCO secondee to EULEX took over… from a predecessor who was not a FCO secondee… Mr Ratel, reported to Ms Novotna, who was Czech (thus not a FCO secondee);… Mr Ratel was employed by the FCO, pursuant to a series of secondment contracts… he was engaged as 'Head of Special Prosecutions in Kosovo' for EULEX. Mr Ratel's work was performed wholly outside the UK and wholly in Kosovo. At the material times, he was not resident in the UK for tax purposes; the ET held (in 2016) that he had spent very little time in the UK in the previous seven years."

30. Mr Ratel describes his duties and responsibilities as the Head of SPRK as follows:

> "My duties and responsibilities as the new Head of SPRK were defined under the *Law on the SPRK*. My duties included directing the activities of the SPRK and its staff under the legal authority of the Kosovo State Prosecutor; however, the EULEX prosecutors at the SPRK and the local Kosovo prosecutors were provided a significant degree of discretion and independence concerning their activities and investigations. As the Head of the SPRK, I had the authority to assign all SPRK prosecutors' cases, review their performance, provide guidance and, if required, provide direction on SPRK cases assigned to them. My further duties as the Head of the SPRK included representing the SPRK to outside agencies and authorities, including press and managing the office and related administrative duties.
>
> As the Head of the SPRK, I was not directly involved in active SPRK investigations, nor did I conduct SPRK prosecutions in my personal capacity; this aspect of my role was discussed during my recruitment and was further agreed during my

> interview as a candidate for the post, in light of the requirements of the Head to direct the activities of the SPRK."

31. Mr Ratel confirms in his statement that, as reflected in his contract, he was required to report to and take lawful instructions from his EULEX manager. He also states that he was required "to follow the directions of the chain of command and senior management, as designated by EULEX". Mr Randolph points out that there is no explicit provision precisely to this effect within the exhibited contract. However, it is entirely consistent with the contractual requirement to report to and take lawful instructions from the EULEX manager. It is also consistent with the OPLAN (see paragraph 22 above). There is no evidence to contradict Mr Ratel's account on this point, notwithstanding the extensive litigation of related issues in *Bamieh*.

32. Mr Ratel then says that he was not, in the event, subject to any direction by the FCO or the British Embassy in Kosovo:

> "a. During the entirety of my secondment to EULEX, the Defendant did not provide guidance, advice or direction to me or exercise any degree of command or control concerning my duties or responsibilities as the Head of SPRK, or any other matter, whatsoever;
>
> b. The terms of my contract with the Defendant provided that I was required to follow the lawful instructions of the manager assigned to me by EULEX and follow the directions of the chain of command and senior management, as designated by EULEX;
>
> c. As the Head of the SPRK, I had no duty to report to the Defendant concerning the activities of the SPRK. Indeed, it is my belief that reporting to the Defendant on the activities of the SPRK may have constituted a breach of the law in Kosovo, including the *Law on the SPRK*. It is my further belief that any undue interference by the Defendant may have constituted a fettering of my discretion and infringement on my judicial independence;
>
> d. Consistent with that information and belief, the Defendant was not provided with any report concerning active investigations of the SPRK by myself, or any other UK seconded staff within the SPRK, except information provided by press release as authorised by myself, as the Head of SPRK;
>
> e. It is my information and belief that the Defendant was generally adverse to any direct or indirect contact with myself, or other EULEX seconded staff due to general concerns arising with EU seconding states having close contact with their seconded staff at EULEX;
>
> f. It is my information and belief that the Defendant, in particular, was extremely wary of any direct or indirect contact with UK seconded staff assigned to the SPRK. I further believe

> this concern by the Defendant was primarily due to the appearance of any contact with the SPRK and the proper administration of justice; and
>
> g. It is my information and belief the Defendant was not informed or competent to receive the activities of the SPRK, due to the complex nature of the SPRK investigations and the legal issues arising."

33. The first part of point b of this account is an accurate reflection of the contract under which Mr Ratel was operating. There is, again, no evidence to contradict or undermine Mr Ratel's evidence that the factual reality reflected this legal arrangement, in that he worked within a EULEX chain of command and acted as an independent head of SPRK under Kosovan law.

34. Insofar as Mr Ratel's account could be taken as suggesting that there was no reporting to the FCO (see c, d, e and f at paragraph 32 above), this is positively and strongly contradicted by evidence given by Maria Bamieh and Catherine Fearon.

35. Ms Bamieh was also an FCO secondee to EULEX and was the claimant in *Bamieh*. Mr Ratel was her line manager. Ms Bamieh points out, correctly, that the contract between the FCO and FCO secondees made provision for payment to the secondee by the FCO and imposed certain obligations on secondees in respect of the FCO (see paragraph 27 above). Ms Bamieh says that Mr Ratel is wrong to say that the FCO did not require reporting on the work of the SPRK. She says that she was required to report to the FCO once a month on matters such as the progress of cases on which she was working. She was informed that the reports were important and useful and that she should continue to send them. Mr Ratel would likewise have provided monthly reports back to the FCO. Ms Bamieh has provided examples of the reports that she submitted. These do indeed deal with individual cases on which she was working, but they do so in very brief terms and at a high level of generality. For example, her report for the month of December 2011 amounts (in respect of her account of her activities for that month) to 7 short sentences, such as "I had to meet with Chief prosecutor… on the Kula Exlim Customs fraud case" and "I also dealt with issues relating to the Llamkos case." One of the example reports dates from the period when Mr Ratel was Head of the SPRK. It is similar in form and detail.

36. Ms Fearon was also an FCO secondee to EULEX. Mr Randolph says that her evidence is entirely independent of these proceedings and should be given substantial weight. I am content to proceed on that basis, not least because of the nature of the summary judgment jurisdiction. Ms Fearon explains that EULEX prosecutors operated under Kosovan law. During her period of secondment she had 1-2 meetings with the FCO each year and she had weekly meetings at the UK Embassy in Pristina. She says that Mr Ratel attended meetings at the British Embassy in Kosovo. However, Ms Fearon also says she had virtually no contact with the FCO in respect of her day to day work and that Mr Ratel did not report directly to the FCO on the exercise of his executive functions because "his role as a Prosecutor is to be independent." She describes the position of EULEX staff at the SPRK as follows:

> "The EULEX staff at the SPRK are embedded in the local institution, meaning the appointments of the Deputy Head of

> SPRK and the EULEX prosecutors have to be endorsed by the local authorities, and they are vested with the same powers and bound by the same laws as their Kosovo counterparts. At the same time, the EULEX staff are also obliged towards EULEX as a Mission and have to respect EULEX internal regulations...
>
> The SPRK is an independent and distinct entity from EULEX in Kosovo. It is an administrative entity attached to the Republic of Kosovo. It reports to the Kosovo Chief State Prosecutor in Kosovo and operates out of a separate building which belongs to the Kosovo police. Approximately 50% of SPRK's staff are local staff and 50% are engaged by EULEX (both directly contracted staff and seconded staff from across the world)."

37. Gergo Pasqualetti, a legal adviser to the EEAS, provided evidence in the *Bamieh* litigation which the Claimants rely on. He pithily explains the "role and status" of staff seconded to EULEX:

> "All seconded staff remain under the full command of the national authorities of the Seconding State; Union Institution; or EEAS. National authorities transfer the operational control of their personnel, teams and units to the Civilian Operations Commander.
>
> The Head of Mission exercises command and control over personnel, teams and units from contributing States as assigned by the Civilian Operations Commander."

38. In response to this evidence Mr Ratel filed a second statement. He said that reports were made to the National Contingent Leader ("NCL") who was a UK seconded staff member of EULEX and was the go-between for communications between EULEX and seconding authorities. He also agrees that he had contact with staff at the British Embassy. He stresses, however:

> "At no point during my deployment in Kosovo, did the Defendant seek to provide guidance, advice or direction to me or exercise any degree of influence, command or control concerning my duties or responsibilities as the Head of SPRK. Any attempt by the Defendant would have been met with a clear and vigorous rejection."

39. Mr Randolph says that it is difficult to reconcile Mr Ratel's earlier account that the FCO was "generally adverse to any direct or indirect contact [with him]", with his later account that he regularly attended the British Embassy and provided briefings via the NCL.

40. Insofar as there is a factual dispute between Mr Ratel on the one hand, and Ms Bamieh (and Ms Fearon and Mr Pasqualetti) on the other hand (eg in relation to the degree of contact between seconded staff and the FCO) I am not able to resolve this on the material before me. Certainly, I am not in a position to reject Ms Bamieh's account and I do not do so. In determining whether the test for summary judgment is satisfied, I

therefore proceed on the basis that the Claimants have a real prospect of persuading a Court that the evidence of the Claimants' witnesses on his point is (if and to the extent that it differs from Mr Ratel) to be preferred to that of Mr Ratel.

The litigation history

41. In 2008 Madam Carla Del Ponte, the former chief prosecutor before the International Criminal Tribunal of the former Yugoslavia, published a set of memoirs in which she suggested that there had not been adequate investigations of the abductions and deaths that had taken place. This animated sustained attempts by the Claimants to secure such investigations.

42. The UNMIK Human Rights Advisory Panel ("HRAP") was established pursuant to UNMIK Regulation No. 2006/12, with the responsibility for examining complaints of human rights violations that are attributable to UNMIK. On 17 April 2009 the First Claimant complained to the HRAP that UNMIK had failed to investigate Dr Tomanovic's abduction. On 23 April 2013 the HRAP found that UNMIK had violated the First Claimant's rights under articles 2 and 3 ECHR – see *Tomanovic v UNMIK* Cases Nos 248/09, 2509/09 and 251/09.

43. The Human Rights Review Panel ("HRRP") was established by the EU in order to review alleged human rights violations by EULEX in the conduct of its executive mandate. On 11 June 2014 the HRRP registered a complaint from the First Claimant that EULEX had failed to investigate Dr Tomanovic's abduction. It was argued on behalf of EULEX that "all complaints concerning actions or inactions of the Government of the United Kingdom… fall outside [the Panel's] competence and should be rejected as inadmissible". EULEX accepted "that actions of the EULEX Prosecutors before the initiation of judicial proceedings fall in principle within the Panel's jurisdiction." For its part the Panel referred to its earlier decisions whereby it had "already established that the actions of the EULEX Prosecutors… are part of the executive mandate of the EULEX Kosovo and therefore fall within the ambit of the Panel's mandate." On 11 November 2015 it decided that EULEX had violated the First Claimant's rights under articles 2, 3, 8 and 13 ECHR. It reached the same decision in respect of the Second to Eighth Claimants in a decision of 19 October 2016.

Kontic and others v MOD

44. The First, Second and Third Claimants brought proceedings against the Ministry of Defence ("MOD") seeking damages for a breach of (amongst other provisions) articles 2 and 3 ECHR. One of the grounds on which the FCO seeks summary judgment is that these proceedings amount to an abuse of process on grounds of *res judicata*. The FCO say that the issues that arise in these proceedings could and should have been litigated in *Kontic*. It is therefore necessary to address what was litigated and decided in those proceedings.

45. The proceedings were preceded by a letter of claim addressed to both the MOD and the FCO. In the event, the claim was brought only against the MOD.

46. The Re-Re-Re-Amended Particulars of Claim are dated 23 October 2015. They sought damages for breach of articles 2, 3 and 8 ECHR and in negligence and for breach of foreign law. The summary of the factual basis for the claim included the following:

> "13. The Defendant continues to violate the Claimants' rights protected by articles 2, 3, 8 and 13 of the ECHR because the Defendant refused to disclose information about the circumstances in which their family members were killed and abducted to both the Claimants and… EULEX, the body presently responsible for police and justice in Kosovo, thus preventing the Claimants from discovering the truth and securing justice.
> …
> 16. The Defendant retained command of British troops in Kosovo and as such the acts and/or omissions of United Kingdom Forces are properly attributable to the Defendant and are justiciable in the domestic courts of the United Kingdom.
>
> 17. On 29 July 2014… the Chief Prosecutor of the Special Investigative Task Force (SITF) confirmed there was sufficient evidence to charge senior members of the KLA for crimes against humanity and other crimes…."

47. There is then a detailed account which is said to form the factual basis for the claim. This included the following:

> "45. …the subsequent lack of investigation into the crimes occurred when the Defendant was exercising authority and control and standing in the shoes of the national police. That liability continues as highlighted by the fact that the Defendant removed all records relating to investigations into the Claimants' family members (or paucity of investigations) from Kosovo."

48. The claim under articles 2 and 3 ECHR was then put as follows:

> "154. The procedural duties to carry out effective investigations… continue to date… The Defendant continues to breach the procedural duties.
> …
> 161. …the responsibility to investigate the murder and abductions of the Claimants' family members fell square on the Defendant as *de facto* and *de jure* authority in charge of the material area at all material times because the Defendant was tasked by the Security Council to provide public safety, security and order under the international civil presence was deployed.
> …
> 163. …
>
> (3) The Defendant failed in its procedural obligation to conduct an effective investigation of deaths and disappearances in breach of Article 2.
>
> …
> 176. Further or alternatively… each of the Claimants… has been subject to inhuman and/or degrading treatment or punishment on account of the failure by the Defendant to properly investigate the deaths and abductions… The failure of the Defendant to

> properly investigate and comply with its article 2 obligations is further inhuman and degrading treatment and/or punishment."

49. The damages alleged include loss occasioned as a result of the fact that "nothing has been done to investigate" the murders and disappearance.

50. A number of issues were identified for separate and preliminary determination, including whether the conduct alleged against the MOD was attributable to the UK or the UN, whether the claims under the Human Rights Act 1998 were time barred, whether the 1998 Act applied to deaths which pre-dated 2 October 2000, whether the Claimants were within the jurisdiction of the UK for the purposes of article 1 ECHR, and whether an investigative duty arose under articles 2 and/or 3 ECHR.

51. The hearing of the trial of the preliminary issues took place before Irwin J from 23 to 26 May 2016. In the course of the hearing the solicitors for the claimants sought to introduce a document, entitled "supplemental submissions on jurisdiction and attribution." In those submissions it was asserted that "The United Kingdom retains jurisdiction in Kosovo… as the employer of the Chief Prosecutor of the Special Prosecution Office of the Republic of Kosovo." Counsel then acting for the Claimants (not Mr Randolph) informed Irwin J that they had no instructions in relation to those submissions (see *Kontic and others v Ministry of Defence* [2016] EWHC 2034 (QB) at [10]). Following the hearing, the Claimants' solicitors filed a further version of the same submissions, dated 31 May 2016, which included the following:

> "The violations of Articles 3, 4, 8 and 13 ECHR, as found by the HRRP in its Decision of 11 November 2015, is attributable to the UK on the following grounds.
>
> First, the mission consists of, amongst others, staff seconded from member States who are still linked to national authorities… In this context it is important to note that the Chief Prosecutor of the Special Prosecution Office of the Republic of Kosovo is a secondment from the United Kingdom."

52. On 7 June 2016 the FCO wrote to the Court and objected to the submissions being received on the grounds that they were late, not filed with permission, and did not relate to the matters set down for determination at the preliminary hearing. The letter included the following:

> "…the Defendant has not had an opportunity to address this new argument; and does not propose to do so at this stage. It is submitted that, if the Claimants' Solicitor wishes to pursue these matters, the proper approach is, subject to the outcome of the preliminary issues trial, for the Claimants to apply to re-amend the Amended Particulars of Claim, and seek to have those further issues determined at a future hearing or trial."

53. Irwin J gave judgment on 4 August 2016. He declined to read the submissions that had been filed following the hearing "[i]n the light of the irregular way in which these submissions have been produced, and the Defendant's objections. To [read them] would be to encourage an incoherent process" (see at [10]). He determined the preliminary

issues against the Claimants and in the favour of the MOD. This resulted in an order dismissing the claims. Irwin J found that:

(1) the acts and omissions of KFOR were attributable to the UN not the UK (see the conclusion at [135] following the analysis at [79]-[134]).

(2) The Claimants were not within the jurisdictional competence of the UK for the purpose of the European Convention (see the conclusion at [184] following the analysis at [136]-[183]).

(3) No investigative duty arose under article 2 or 3 ECHR (see at [187]-[203]).

(4) The Human Rights Act 1998 did not apply to the deaths and disappearance, since these occurred before 2 October 2000 (see at [206]-[218]).

54. The claimants sought permission to appeal. The original Grounds of Appeal included the following:

> "the refusal to consider the submissions made by the conducting solicitor, after the close of proceedings, amounts to an error of law. However, the Claimants reserve their position with regard to raising this as a ground of appeal, pending further negotiation with the Defendant and advice from Counsel."

55. Irwin J refused permission to appeal. The application for permission to appeal was renewed, but in a form that did not include any complaint about the decision not to consider the late submissions. Limited permission to appeal was granted by Lloyd-Jones LJ on 27 June 2017. The grant of permission was limited to the resolution of claims founded on Kosovan law (which is not relevant to these proceedings) and also the question of attribution (see paragraph 53(1) above). On the question of attribution Lloyd-Jones LJ had "great difficulty in seeing how the matters complained of could be attributable to the respondent" but nonetheless granted permission to appeal because of controversy over the decision in *Behrami and Saramati v France and Norway* (2007) 45 EHRR SE10 and because the issue might be of practical significance if the claimants had a viable cause of action under Kosovan law. Permission to appeal on the question of jurisdiction under article 1 ECHR was refused:

> "The judge was clearly correct in his conclusion that there was no jurisdiction under Art 1 ECHR on the basis of effective control of territory (at [170]-[180]).
>
> The judge does not appear to have given separate consideration in any detail as to whether jurisdiction within Article 1 ECHR could be founded on the exercise of public powers normally exercised by the government of the territory in question. He observed that it was unclear whether the claimants relied on that head, save perhaps as an analogy (at [139]). It is, however, touched on at [147]. This head of jurisdiction is founded on the concept of State agent authority and control. It is not possible to accommodate the present claims within this head given that (1) the complaint is essentially of a failure to provide protection; (2)

> UK forces had no control over the victims; (3) UK forces had no control over or link with the third parties responsible for the disappearance and deaths; and (4) the conditions in Kosovo were such that there was no effective control over territory. It would also represent a massive extension of ECHR jurisdiction beyond that currently supported by the authorities.
> …
> This proposed ground of appeal would have no real prospect of success."

56. Permission to appeal was also refused on a separate ground of appeal which sought to challenge the conclusions of Irwin J that articles 2 and 3 (and 8 and 13) were neither engaged nor violated, and that the claims were time barred.

57. On 3 October 2016 (so 2 months after judgment in *Kontic*, and 9 months before the decision of Lloyd-Jones LJ) the Claimants sent a pre-action letter of claim in respect of the matters which form the subject matter of these proceedings. Proceedings were issued on 18 October 2017 against (1) the FCO, (2) the MOD, (3) the Department for International Development, (4) the Council of EU, (5) the EEAS, (6) EULEX, (7) the High Representative of the Union for Foreign Affairs and Security, and (8) the EU. The UN and UNMIK were named as "Interested Parties". In the event, the claim has proceeded only against the FCO. The brief details of claim were given as follows:

> "The claimants are persons whose fundamental human rights, protected by ECHR Articles 2 and 3, have been violated by the Defendants, whilst exercising public/executive powers in Kosovo, as found by the Human Rights Review Panel of EULEX on 11 November 2015 and 19 October 2016. The Panel made further decisions on 7 March 2017 and closed their file on this date.
>
> The Defendants enjoy immunity before the domestic courts of Kosovo and/or Serbia and have established a human rights monitoring mechanism, the Human Rights Review Panel of EULEX that cannot provide a remedy, in violation of ECHR Article 13 and Article 47 of the EU Charter on Fundamental Rights.
>
> This claim is brought under S.7 of the Human Rights Act 1998 and under Articles 2 and 47 of the EU Charter on Fundamental Rights against Defendants (1)-(3). Defendants (4) and (5) have agreed that the institutions of the European Union will not enjoy immunity before the Courts of a Member State in proceedings to which they are party. Paragraph 16 of the attached Observations of the Council of the European Union refer."

58. The Claimants say that the claim was lodged on 18 October 2017 "to protect the legal position of Claimants (2)-(8), as this date is within one year of the decision made by the [HRRP] on 19 October 2016, in which it found that EULEX had violated ECHR articles 2, 3 and 13 for failure to investigate the abduction and murders of the Claimants' immediate family members."

59. Separate proceedings were brought against the Council of the EU, the High Representative of the Union for Foreign Affairs and Security, and the EU. These also related to the failure to investigate the offences that had taken place against the Claimants' relatives. The European Commission applied to set aside service of the Claim Form, seeking a declaration that there was no jurisdiction to hear the claim brought against those Defendants. The application was successful – see *Tomanovic and others v The European Union and others* [2019] EWHC 263 (QB).

Approach to be taken to summary judgment application

60. Civil Procedure Rule 24.2 states:

> "**24.2 Grounds for summary judgment**
>
> The court may give summary judgment against a claimant… on the whole of a claim… if-
>
> (a) it considers that—
>
> (i) that claimant has no real prospect of succeeding on the claim…and
>
> (b) there is no other compelling reason why the case… should be disposed of at a trial.
>
> …"

61. A "real prospect" means a prospect that is "realistic" as opposed to "fanciful" – see *Swain v Hillman* [2001] 1 All ER 91. It requires some degree of conviction, and the claim should be more than merely arguable – see *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].

62. In order to decide whether a case has a real prospect of success the court "must not conduct a 'mini-trial' and should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by the trial process" – see *Global Asset Capital Inc v Aabar Block SARL & Others* [2017] EWCA Civ 37 [2017] 4 WLR 163 *per* Hamblen LJ at [27].

63. In reaching a conclusion as to whether a claim has real prospects of success it is necessary to take into account not only the evidence that is adduced on the application, but also the stage that the proceedings have reached, and the evidence that can reasonably be expected to be available at trial (eg following disclosure) – see *Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550.

64. Mr Randolph relies on the following passage in *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661 [2007] FSR 3 *per* Mummery LJ at [17]-[18]:

> "17. It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kinds of case. The classic instance is where there are conflicts of fact on relevant issues, which have to be resolved before a judgment

> can be given (see Civil Procedure Vol 1 24.2.5). A mini-trial on the facts conducted under CPR Pt 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice.
>
> 18. In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."

65. I approach the application on that basis.

Did the FCO direct or control Mr Ratel in his operational prosecutorial functions?

66. An important factual issue concerns the question of whether the FCO exercised any direction or control over Mr Ratel in the conduct of his operational prosecutorial functions.

67. The legal framework is such that it had no power to do so (see paragraphs 22 and 26 above). The SPRK was an independent prosecutorial service staffed by EULEX and local prosecutors. Mr Ratel was obliged to follow instructions given to him by EULEX and to act in the sole interest of the Mission.

68. There is no evidence that the FCO, in the absence of any legal power, nonetheless sought to direct Mr Ratel in the performance of his prosecutorial functions. There is no inconsistency between the evidence of Mr Ratel, Ms Bamieh, Ms Fearon and Mr Pasqualetti on this point. On the contrary, Ms Fearon and Mr Pasqualetti both strongly support Mr Ratel's contention that EULEX prosecutors acted under the operational direction of EULEX, not their home state. Nothing in the judgments of the Court of Appeal in *Bamieh* suggest that there was (or could be) any direction from the FCO as to how seconded EULEX prosecutors should perform their functions.

69. The conflict in the evidence (if, in truth, there is any conflict at all) concerns the extent of briefings to the FCO and meetings at the Embassy. However:

    (1) That is not, in itself, directly relevant to any issue that arises.

    (2) Examples of the briefings show that they contained no, or only very little, detail about individual cases, such as they did not provide a basis to enable the FCO to exert any form of operational control.

    (3) There is no evidence whatsoever that the FCO sought to exercise any such control.

    (4) The FCO would have had no reason (given the legal framework) to do so.

    (5) Any inconsistency between the first and second statements of Mr Ratel on the questions of briefings or meetings does not begin to throw doubt on his clear, consistent and corroborated evidence that he carried out his prosecutorial role entirely independently of the FCO.

(6) But there is no necessary inconsistency between the two statements if the first statement is read as being made in the context of Mr Ratel's prosecutorial functions (ie that he did not provide reports to the FCO or attend meetings with the FCO in respect of those matters).

(7) There is a sufficient body of evidence for it to be safely concluded that the Claimants have no real prospect of establishing that the FCO had any involvement in directing or controlling Mr Ratel's actions as a prosecutor.

70. Mr Randolph points out that Mr Ratel was required to produce a monthly confidential report to the Civil Operational Commander of EULEX. The Civil Operational Commander was, in turn, required by article 11(4) of the Joint Action to report to the Council of the EU. The UK is a member state of the EU. So, by that route, the UK might be said to be the recipient of confidential reporting by Mr Ratel. All of that is correct, but it does not begin to provide a basis to suspect that the UK was exercising control over the manner in which Mr Ratel discharged his prosecutorial functions.

71. Mr Randolph argues that summary judgment should be refused so that disclosure can take place, on the basis that this might throw greater light on these issues. I do not agree. I am satisfied that the Claimants do not have any real prospect of establishing that the FCO exercised direction or control over Mr Ratel, that that conclusion can safely and reliably be reached on the available evidence and without a full disclosure process, and there is no other compelling reason for this issue to proceed to trial.

72. This provides the factual context against which to assess the FCO's grounds for seeking summary judgment.

The grounds for seeking summary judgment

(1) Is Mr Ratel immune from legal process, and, if so, can that be circumvented by an action against the FCO?

73. UN Security Council Resolution 1244 (1999) authorised member states to establish an international security presence in Kosovo (see paragraph 7). It authorised the Secretary–General to establish an international civil presence in Kosovo with a range of responsibilities, including the maintenance of civil law and order (see paragraphs 10 and 11(i)).

74. UNMIK Regulation No 1999/1 was passed under the authority of Resolution 1244. It provided, by paragraph 1.1, that the law applicable in Kosovo should include the regulations promulgated by the Special Representative of the Secretary-General.

75. On 18 August 2000 the Special Representative of the Secretary-General promulgated Regulation No 2000/47 on the "status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo." Article 3 of the regulation states:

> "Status of UNMIK and its Personnel
>
> [3.1] UNMIK, its property, funds and assets shall be immune from any legal process.

> 3.2 The Special Representative of the Secretary-General, the Principal Deputy, and the four Deputy Special Representatives of the Secretary-General, the Police Commissioner, and other high-ranking officials as may be decided from time to time by the Special Representative of the Secretary-General, shall be immune from local jurisdiction in respect of any civil or criminal act performed or committed by them in the territory of Kosovo.
>
> 3.3 UNMIK personnel, including locally recruited personnel, shall be immune from legal process in respect of words spoken and all acts performed by them in their official capacity.
>
> 3.4 UNMIK personnel shall be immune from any form of arrest or detention. If erroneously detained, they shall be immediately turned over to UNMIK authorities.
>
> 3.5 UNMIK personnel shall respect the laws applicable in the territory of Kosovo and regulations issued by the special Representative of the Secretary-General, in the fulfilment of the mandate given to UNMIK by Security Council resolution 1244 (1999). They shall refrain from any action or activity incompatible therewith."

76. On 9 December 2008 the Special Representative decided, by Executive Decision No 2008/36 (and pursuant to the authority granted by Security Council resolution 1244), that:

> "The EULEX and its personnel shall enjoy the same privileges and immunities as are granted to UNMIK and its personnel under UNMIK Regulation No 2000/47."

77. Sir James Eadie QC, for the FCO, argues that Executive Decision No 2008/36, read with article 3.3 of UNMIK Regulation No 2000/47, grants Mr Ratel an immunity from legal process.

78. In response, Mr Randolph relies on article 3.2 of the Regulation. This, he says, makes it clear that the immunity afforded by article 3 is limited to an immunity from "local jurisdiction". It therefore does not, he says, grant an immunity in any jurisdiction outside Kosovo, including England and Wales. The immunity in article 3.3 does not therefore extend to these proceedings.

79. I reject that argument. Articles 3.2 and 3.3 create quite separate immunities. Article 3.2 creates an immunity that is broad in scope (it applies to any civil or criminal act) but narrow in application (it applies only to a small number of identified high-ranking officials) and it bites only on "local jurisdiction". By contrast article 3.3 creates a (separate) immunity that is narrow in scope (it applies only to words spoken and acts performed in an official capacity) but wide in application (it applies to all UNMIK Personnel) and it bites on any "legal process". The restrictions on the target of the article 3.2 immunity cannot be read as applying to the quite separate immunity under article 3.3.

80. Mr Randolph further relies on Council of Europe Resolution 1979 (2014) and recommendation 2037. The former invites Council of Europe member states to "ensure that international organisations are subject… to binding mechanisms to monitor their compliance with human rights norms and, where such internal accountability mechanisms exist, to ensure that their decisions are enforced." The latter encourages international organisations "to examine the quality and effectiveness of mechanisms aimed at ensuring compliance with their human rights obligations."

81. Neither of these instruments directly impact on article 3 of Regulation 2000/47. They have a different level of application and do not, in any event, have any binding legal effect.

82. I am therefore prepared to accept, for the purposes of this application, that article 3.3, as extended to EULEX by Executive Decision No 2008/36, affords Mr Ratel an immunity from any legal process. I am also prepared to accept that this forms part of the law of Kosovo (by virtue of paragraph 1.1 of UNMIK regulation 1999/1).

83. Sir James Eadie further argues that the immunity cannot be circumvented by seeking to maintain direct liability for Mr Ratel's conduct against the FCO. It is not necessary to reach a final decision on that argument, because the claim for summary judgment succeeds for other reasons (see paragraphs 89-117 and 129-150 below). However, if it were necessary to determine the point, I would refuse summary judgment on this ground for the following reasons.

84. First, I consider that the Claimants would have a real prospect of establishing that the immunity only applies to "legal process" in Kosovo (because UNMIK Regulation 1999/1 only gives UNMIK Regulation No 2000/47 effect as part of the law of Kosovo. I have not been shown anything which gives it effect as part of the law of England and Wales). Second, I consider that the Claimants would have a real prospect of establishing that the immunity only protects those identified in article 3.3 (as extended by Regulation No 2000/47) and that it does not therefore protect the FCO. Third, the significance of the point is such that it is more appropriately determined following trial (or, perhaps, a trial of a preliminary issue as to immunity), and this in itself would amount to a compelling reason for the case to proceed further (and cf paragraph 88 below).

85. The FCO separately relies on article 17 of the United Nations and International Court of Justice (Immunities and Privileges) Order 1974. This states:

> "…experts… performing missions on behalf of the United Nations shall enjoy:
>
> (a) immunity from suit and legal process in respect of things done or omitted to be done by them in the course of the performance of their missions…"

86. This provision gives effect to section 22 of the Convention on the Privileges and Immunities of the United Nations.

87. For reasons similar to those given at paragraph 84 above I would not grant summary judgment in the FCO's favour on the basis of an immunity afforded by article 17 of the

1974 Order. Although it was not the subject to argument before me, I note that in *Mohammed (Serdar) v Ministry of Defence* [2017] UKSC 1 [2017] AC 649 the Secretary of State argued that article 17 had the effect of granting an immunity to members of Her Majesty's Armed Forces who were acting as part of a multinational force established by a UN Security Council resolution. The Court of Appeal (Lord Thomas of Cwmgiedd CJ, Lloyd-Jones and Beatson LJJ) required that the Secretary-General of the UN be informed that the Secretary of State was seeking to rely on this immunity (see at [76]). This resulted in a letter from the Under Secretary-General for Legal Affairs and UN Legal Counsel which said:

> "…operations authorised by the Security Council and conducted under the control of states of regional organisations… are distinct and separate from the United Nations…The 1946 Convention on the Privileges and Immunities of the United Nations… does not… apply to operations authorised by the Security Council and conducted under the control of states or regional organisations."

88. The Court of Appeal considered that the Secretary of State's claim to immunity was misconceived for the reasons given in that letter – see at [81]. The subsequent appeal to the Supreme Court did not impact on this finding. In the light of this decision, if I were required to decide the point, I would conclude that the Claimants had a real prospect of establishing that article 17 does not apply. In any event, I consider that if this point were to be dispositive it would require further argument, and potentially the opportunity for input from the UN, and that this would amount to a compelling reason for the case to proceed further.

(2) Were the Claimants within the jurisdiction of the UK for the purposes of article 1 ECHR?

89. Article 1 ECHR requires member states to "secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention." The Human Rights Act 1998 applies where a public authority acts "within [the UK's] jurisdiction" in this sense – see *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26 [2008] 1 AC 153.

90. The events in question took place within Kosovo, and therefore outside the territory of the UK. The Claimants (and their loved ones) were accordingly not within the territorial jurisdiction of the UK. The word "jurisdiction" in article 1 is not, however, limited to territorial jurisdiction. It can, in certain limited circumstances, extend to events outside the state's territory. There are three categories where this can arise - see *Al Skeini v United Kingdom* (2011) 53 EHRR 18, as explained in *R (Al-Saadoon) v Secretary of State for Defence* [2016] EWCA Civ 811 [2017] QB 1015 at [18]-[23] and [38], and summarised by Longmore LJ in *R (K) v Secretary of State for Defence* [2016] EWCA Civ 1149 [2017] 1 WLR 1671 at [24]:

> "(i) state agent authority and control; (ii) effective control over an area; and (iii) a category described as "espace juridique" designed to ensure that, if one Convention state is occupied by the armed forces of another, the occupying state should be accountable for breaches of human rights within the occupied territory."

91. In *Kontic* Irwin J found that the First, Second and Third Claimants were not within the jurisdiction of the UK for the purposes of article 1. Permission to appeal on that issue was refused by Lloyd-Jones LJ. The additional feature that Mr Ratel had been seconded by the UK to EULEX (not considered by Irwin J because it was not raised), does not make a material difference to his reasoning, or that of Lloyd-Jones LJ.

92. I would, in any event, separately come to the same conclusion in the circumstances of the present claim, for the following reasons.

93. The Claimants' case is that:

> "HMG exercised extra territorial jurisdiction in Kosovo by way of exercising public powers ordinarily exercised by the State, both directly by UK personnel conducting policing, investigative and judicial functions and as a Member state of the United Nations and the European Union exercising the powers of a sovereign state."

94. This has a different focus from the case that was advanced before Irwin J (where it was unclear if this type of jurisdiction was being relied on "save perhaps as an analogy" – see at [139]). In principle, it could bring the Claimants within the jurisdiction of the UK for the purpose of article 1 of the Convention, by reason of the "state agent authority and control" gateway – see paragraph 90 above. That gateway includes state agent authority and control by reason of the exercise of public powers – see *K* at [26]-[28] and the Grand Chamber decision in *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 at [135]:

> "the court has recognised the exercise of extra-territorial jurisdiction by a contracting state when, through the consent, invitation or acquiescence of the government of that territory, it exercises all or some of the public powers normally to be exercised by that government. Thus where, in accordance with custom, treaty or other agreement, authorities of the contracting state carry out executive or judicial functions on the territory of another state, the contracting state may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial state."

95. So if, on the facts, the UK was carrying out executive or judicial functions in Kosovo (eg through FCO employees acting as prosecutors), then that might be sufficient to give rise to an exercise of extra-territorial jurisdiction under the Convention. It would, however, be necessary to show that the UK was exercising control over the Claimants (or their relatives). On any view of the facts, even taking the Claimants' portrayal of the facts at its highest, this feature is simply not present. That is one reason why Lloyd-Jones LJ refused permission to appeal in *Kontic* (see paragraph 55 above) and that reasoning likewise means that the Claimants have no prospect of establishing that they were within the jurisdiction of the UK for the purposes of article 1 ECHR.

96. In any event, the secondment of a public official by one State to perform public functions within the territory of another state does not, in itself, amount to the exercise

of extra-territorial jurisdiction by the sending state. In *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745 the issue arose as to whether France or Spain could be responsible for guaranteeing Convention rights (in that case the right to a fair trial under article 6) to the applicants, who had been tried in Andorra. The Tribunal de Corts included honorary judges of the Toulouse and Montpellier Courts of Appeal. Both had been appointed directly or indirectly by the French Co-Prince. The Court concluded that this did not amount to the exercise of jurisdiction by France (or Spain). Mr Randolph points out that the factual position in the present case is different from that in *Drozd*, and that some members of the court provided dissenting opinions. That is so, but the case is regularly cited as an illustration of the boundaries of the exercise of this form of extra-territorial jurisdiction. At [96] the court said:

> "…Whilst it is true that judges from France and Spain sit as members of Andorran courts, they do not do so in their capacity as French or Spanish judges. Those courts, in particular the Tribunal de Corts, exercise their functions in an autonomous manner; their judgments are not subject to supervision by the authorities of France or Spain.
>
> Moreover, there is nothing in the case file which suggests that the French or Spanish authorities attempted to interfere with the applicants' trial.
>
> Finally, it should be recalled that the secondment of judges or their placing at the disposal of foreign countries is also practised between member states of the Council of Europe, as demonstrated by the presence of Austrian and Swiss jurists in Liechtenstein."

97. Accepting, for these purposes, the evidence of Ms Bamieh, and giving it full weight, it follows that Mr Ratel was employed and paid by the FCO and was subject to a residual disciplinary control by the FCO. However, this does not come close to the UK exercising jurisdiction in Kosovo for the purpose of article 1 ECHR. The SPRK was a prosecution service established by and operating under the laws of Kosovo. The FCO did not have any power to direct Mr Ratel in the manner in which he exercised his prosecutorial functions. That would have been inconsistent with (1) the agreed contractual position and (2) the domestic law in Kosovo and (3) the instruments governing the organisation to which Mr Ratel was seconded. Nor is there any evidence that it sought to exercise any power of direction and control. The evidence of Ms Bamieh is limited, at its highest, to the imposition of a reporting function on Mr Ratel and the retention of residual disciplinary powers. This does not amount to the exercise of public power in Kosovo.

98. Nor is there any evidence that Kosovo (or EULEX) consented to, or invited, or acquiesced in the exercise by the UK of a prosecutorial authority within Kosovo. This is an essential feature that must be present before jurisdiction, by this route, can be established – see *Bankovic v Belgium* (2004) 44 EHRR SE75 at [58]-[60] and *Gentilhomme v France* (judgment 14 May 2002) at [20].

99. The fact that the Joint Action provided that the UK was responsible "for answering any claims linked to the secondment… concerning [Mr Ratel]" does not mean that Mr Ratel,

by undertaking his prosecutorial functions, was exercising any form of UK jurisdiction for the purpose of article 1 ECHR, whether in respect of the Claimants or anyone else (and cf paragraph 110 below).

100. It follows that the UK was not exercising jurisdiction over the Claimants in Kosovo within the meaning of article 1 ECHR. The Claimants' claims are entirely dependent on the Human Rights Act 1998, and therefore entirely dependent on establishing that they fell under the UK's jurisdiction within the meaning of article 1 ECHR. Accordingly, my conclusion that the UK was not exercising jurisdiction in Kosovo within the meaning of article 1 ECHR has the effect that the Claimants have no real prospect of success on their claims.

101. As Sir James Eadie pointed out, if the UK had been exercising jurisdiction then the consequences would be that:

(1) The country exercising jurisdiction for the purposes of article 1 ECHR would depend on the identity of the seconding state.

(2) Thus, the UK would here be exercising jurisdiction for the period that Mr Ratel was in post, but not in the period before or after.

(3) Where (as was here the case) the SPRK was made up of prosecutors from different seconding states then each state would potentially be exercising jurisdiction.

(4) Where (as is often the case in the context of investigative duties under the Convention) responsibility for an investigation is shared between different public authorities (eg police, prosecutor, coroner, judiciary) then again, jurisdiction would be a confused amalgam depending on which states had provided staff to each of the different public authorities.

102. This would be a surprising, and highly undesirable, legal landscape. It would create legal uncertainty on foundational, jurisdictional, responsibility. It would provide a significant disincentive against seconding staff to international organisations. The fact is that (certainly so far as SPRK is concerned) none of these actors were exercising their functions on behalf of their seconding states. They were seconded to an international organisation (EULEX) and were acting on behalf of that organisation and the SPRK, rather than their home states.

(3) Is Mr Ratel's conduct as Head of the SPRK attributable to the UK?

103. Even if the UK were exercising jurisdiction in Kosovo, the relevant conduct about which complaint is made must be attributable to the UK before the UK can have legal responsibility for it – see *Al-Skeini* at [135] quoted at paragraph 94 above ("the contracting state may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial state").

104. This issue is linked to that of jurisdiction, but it has a different focus. The jurisdictional issue is primarily concerned with the position of the victims (so, here, the Claimants and/or their relatives). In order for jurisdiction to arise it is the victims that must fall within the jurisdiction of the UK for the purpose of article 1 ECHR. The focus when

considering attribution is that of the conduct about which complaint is made – so here the conduct of Mr Ratel: is that conduct attributable to the UK rather than to EULEX or the SPRK?

105. The correct test for attribution was the subject of considerable debate in *Kontic*. In that case the question of attribution concerned action by KFOR. That had been addressed by the Grand Chamber of the European Court of Human Rights in *Behrami and Saramati v France and Norway* (2007) 45 EHRR SE10. The Grand Chamber concluded that action by KFOR within the scope of Security Council Resolution 1244 was attributable to the UN – see at [129] and [135]. It rejected the arguments of the applicants that the level of control over KFOR troops by their home states was such that their conduct was to be attributed to those states. The test it applied for attribution was derived from the draft Articles on the Responsibility of International Organisations ("DARIO") prepared by the International Law Commission:

> "The conduct of an organ of a State… 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."

106. As Irwin J explained in *Kontic* (see at [89]-[99]) the approach to attribution set out in *Behrami* was applied (albeit with a different result) by the House of Lords in *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332, and then by the Grand Chamber in *Al-Jedda v United Kingdom* (2011) 53 EHRR 23. Irwin J followed *Behrami* in finding that the action of KFOR was attributable to the UN not the UK. In doing so, he recognised that the decision in *Behrami* had been subject to significant criticism. That criticism concerned the application of the "effective control" test in DARIO and whether it was necessary to focus on the question of "ultimate" control (in the sense of "ultimate authority and control over the security mission") or "operational" control (in the sense of being able to direct or control the operational act that is in question).

107. Lloyd-Jones LJ granted permission to appeal on the question of attribution because the controversy over the decision in *Behrami* was such that the issue might properly be considered by the Court of Appeal, although he had "great difficulty in seeing how the matters complained of could be attributable to the [UK]."

108. Resistance to summary judgment on the grounds of the controversy over the application of the effective control test does not gain any traction on the facts of the present case. That is because the distinction between "ultimate" and "operational" control does not make any practical difference on the facts. As I have explained, Mr Ratel was seconded to the EULEX in a manner which did not give the UK any control over the overall mission of EULEX or SPRK, far less any ability to direct or control Mr Ratel in his prosecutorial functions. There was no ultimate control. And there was no operational control.

109. It follows that whichever test is correct, Mr Ratel's conduct is not attributable to the UK.

110. Mr Randolph relied on article 10(2) of the joint action (see paragraph 20 above). However, that provision merely allocates responsibility for answering any claims

"linked to the secondment… concerning [Mr Ratel]". Whatever the correct way of interpreting this provision, it does not amount to an attribution to the UK of Mr Ratel's prosecutorial functions. As the HRRP has said "Article 10 of the Joint Action cannot be read as to imply that the seconding state of a staff member takes over EULEX's institutional accountability for human rights violations" - see *Zahiti v EULEX* Human Rights Review Panel Case No 2012-14 decided on 4 February 2014 at [80].

111. Mr Randolph raised an interesting point as to whether the UK, as a participating member state within the Council of the EU and EULEX, should be required to take responsibility for the conduct of Mr Ratel given what he termed "the legal black hole" that might otherwise arise. This reflects an argument advanced in *Kontic* (see at [132]). Irwin J could "see no support for that approach in any of the leading cases." In that connection Mr Randolph drew attention to a decision of the Oberverwaltungsgericht NRW (the German Higher Administrative Court of North Rhine-Westphalia), given on 18 September 2014 (case 4 A 2948/11 (VG Köln 25 K 4280/09)). The claimant was a suspected Somali pirate who had been apprehended in international waters by the crew of a frigate "Rhineland-Palatinate" of the German Federal Navy and subsequently handed over to Kenyan law enforcement agencies as a result of a request from the German Government. The frigate was involved in military operations that were taking place pursuant to EU Joint Action (GA) 2008/851/CFSP which was implemented pursuant to UN Security Council Resolution 1814/2008. The claimant sought a declaration against the German state that his arrest and transfer to the Kenyan authorities was unlawful. The German government argued that the arrest of the claimant was to be attributed to the EU rather than Germany. The court rejected this argument and found that the arrest was properly attributable to Germany.

112. The court's first reason for this conclusion was that at the relevant time it was not possible to attribute liability to the EU because it did not have its own legal personality. That argument cannot arise in the present case. That is because the Treaty of Lisbon provided the EU with legal personality (see article 47 of the Treaty on European Union: "The Union shall have legal personality") and it came into force before Mr Ratel's secondment.

113. Secondly, the court found that even leaving aside the question of the EU's international legal capacity, the matters about which complaint was made were attributable to the German government. But that was an assessment made because of the particular facts: it was not clear whether the frigate was in principle subject to the operational command of the EU, but in any event the relevant decision-making had been made by a ministerial decision-making body, the composition of which was outside the scope of the EU mission. It could therefore only be understood as an action taken on behalf of the Federal Government of Germany. This fact-sensitive conclusion has no application here where, as I have found, the operational responsibility for Mr Ratel lay with EULEX/SPRK, not the UK.

114. Third, the court found at section 1.3, paragraph 106:

> "An der Zurechenbarkeit der Übergabe des Klägers an die kenianischen Behörden am 10. März 2009 zur Beklagten ändert sich vorliegend auch dann nichts, wenn man mit der Beklagten davon ausgeht, dass hierfür grundsätzlich die EUNAVFOR bzw. die EU zuständig war."

115. The translation of the judgment with which I was provided rendered the critical parts of this paragraph as "The attributability to the defendant does not change in the present case even if it is assumed… that… basically the… EU was responsible." Mr Randolph suggested that this was to be read as a finding that even if the EU had undertaken the transfer it was still to be attributed to the German government. I do not agree. Read in context, "zuständig" here means something closer to "jurisdiction" or "competence" than "responsible". The Court finding was that even if the EU would in principle have had jurisdiction to effect the transfer, nonetheless the transfer was attributable to Germany because it was the German government that in fact effected the transfer. I reach that conclusion not just because it fits more naturally with the clear factual assessment that underpinned the Court's entire reasoning, but also because:

    (1) the Court's second finding (see paragraph 113 above) had been made on the basis that it was not clear whether the EU did, in principle, have jurisdiction to effect the transfer (so this subsequent finding naturally proceeded on the hypothesis that the EU did have jurisdiction), and

    (2) the following paragraph in the judgment makes it clear that, irrespective of the question of whether the EU had jurisdiction to effect the transfer, on the particular facts it was undertaken by the German authorities in circumstances where no final decision had been made by the EU.

116. Accordingly, this decision does not assist the Claimants. On the contrary, when the logic of the reasoning of the Higher Administrative Court of North Rhine-Westphalia is applied to the present case it would lead to the conclusion that the conduct of Mr Ratel is to be attributed to EULEX, not the UK.

117. For all these reasons the Claimants do not have any real prospect of success on the attribution question, and do not therefore have (for this separate reason) any real prospect of succeeding on their claims.

(4) Is the Human Rights Act 1998 applicable to the claim, given that the deaths/ disappearance took place before that Act came into force?

118. There is no doubt that the deaths and disappearance took place before 2 October 2000 and therefore before the Human Rights Act 1998 came into force. There is likewise no doubt that at the time of the deaths and disappearance no investigative duty arose under the 1998 Act.

119. The question of whether (and the circumstances in which) an investigative obligation might arise under the 1998 Act in respect of events that took place before that Act came into force is the subject of a developing line of authority. In *Re McKerr* [2004] UKHL 12 [2004] 1 WLR 807 the House of Lords held that the Human Rights Act 1998 was not retrospective in its effect and did not therefore give rise to an investigative obligation in respect of a death that took place before 2 October 2000. In *Šilih v Slovenia* (2009) 49 EHRR 996 the Grand Chamber of the European Court of Human Rights concluded that the investigative obligation was "detachable" and could apply to a death that occurred (shortly) before the Convention came into force (so long as the investigation was, or should have been, conducted in the period after the Convention came into force). In *Re McCaughey* [2011] UKSC 20 [2012] 1 AC 725 the Supreme Court applied *Šilih* and held that, where a death had occurred before 2 October 2000

(in that case the deaths had occurred in October 1990) but the inquest took place after 2 October 2000, the Human Rights Act 1998 required that the inquest should comply with the investigative obligations under article 2. In *Kontic* Irwin J declined to express a view, one way or another, on the question of whether the investigative obligation could in principle apply in the cases of the First, Second or Third Claimant.

120. I, likewise, decline to enter summary judgment in the FCO's favour on this ground. In the light of *McCaughey* I consider that (subject to the jurisdiction and attribution points) the FCO has not discharged the burden of demonstrating that the Claimants have no real prospect of success on this ground. Further, the developing authorities (see, more recently, *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 [2015] AC 1355 and *Re Finucane* [2019] UKSC 7 [2019] 3 All ER 191), and the highly fact specific questions that arise on timing, taken together with the fact that the deaths took place shortly before the 1998 Act came into force, all amount to compelling reasons why these matters should not be subject to summary determination.

(5) Does any investigative duty arise under articles 2 and/or 3 ECHR?

121. If, as I have found, the Claimants are not within the jurisdiction of the UK for the purposes of article 1 ECHR, it follows that no duty arose under articles 2 or 3 ECHR. But even if the Claimants had been within the jurisdiction of the UK the FCO argues that the investigative duty only arises where there is reason to believe that there has been, or may have been, a violation of the substantive right. In other words, if (as is undoubtedly here the case) the UK had no responsibility for the deaths and disappearance of the Claimants' relatives then, it is submitted, it follows that there can be no arguable case of a breach of article 2 or 3. Reliance was placed on *R (Middleton) v West Somerset Coroner* [2004] UKHL 10 [2004] 2 AC 182 at [3], *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2010] UKSC 29 [2011] 1 AC 1 at [84], [97], [150] and [202], *Al Saadoon v Secretary of State for Defence* [2016] EWCA Civ 811 [2017] QB 1015 *per* Leggatt LJ at [282]-[283] and *R (Long) v Secretary of State for Defence* [2015] EWCA Civ 770 at [5].

122. Those cases amply establish the uncontroversial proposition that an investigative obligation arises where there has been an arguable breach of the state's substantive obligation under article 2 ECHR. The issue is whether an arguable breach of the substantive obligation is not just sufficient, but necessary, to trigger an investigative duty. Some of the passages that are relied on do, read in isolation, tend to indicate that an investigative duty cannot arise where there is no arguable breach of the substantive duty – see eg *Al Saadoon* at [282]: "the [investigative] duty arises only where there is reason to believe that there has been, or may have been, a violation of the substantive right…" However, in each of these cases the investigation that was required was an investigation into an allegation of some form of state responsibility for the death. It was in that context that the courts observed that such an investigation would only be required where there was some "reason to believe" that there was an arguable breach of the substantive right.

123. Mr Randolph relied on *Šilih v Slovenia* (2009) 49 EHRR 37. That was a case where it was alleged that a death was due to medical negligence. A criminal complaint was made against the doctor which was investigated but dismissed due to insufficient evidence. Later, after obtaining further evidence, the investigation was reopened but it was

eventually discontinued. The Court found that there had been a breach of the procedural obligation under article 2 ECHR. At [156] it observed that:

> "…the procedural obligation has not been considered dependent on whether the state is ultimately found to be responsible for the death. When an intentional taking of life is alleged, the mere fact that the authorities are informed that a death had taken place gives rise ipso facto to an obligation under art 2 to carry out an effective official investigation. In cases where the death was caused unintentionally and in which the procedural obligation is applicable, this obligation may come into play upon the institution of proceedings by the deceased's relatives."

124. Mr Randolph suggests that this demonstrates that there is a freestanding obligation (ie irrespective of any question of State involvement in the underlying death) to investigate intentional killings. Sir James Eadie responds that *Šilih* is concerned only with the extent to which the investigative obligation is a continuing obligation even after it is recognised that the State was not involved in the underlying killing (and that that is the basis upon which *Šilih* has been cited in subsequent authority – see eg *Kontic* at [197]).

125. On this issue, I prefer the submissions of Mr Randolph, at least to the extent of rejecting the FCO's contention that the Claimants have no real prospect of success on the point. The observation in *Šilih* at [156] does not stand alone. In *DSD v Commissioner of Police of the Metropolis* [2018] UKSC 11 [2019] AC 196 the domestic courts at every level roundly rejected a submission that because the state had not been involved in the underlying offences committed by a serial rapist no investigative duty arose. Sir James Eadie rightly points out that, when the case reached the Supreme Court, the core issue related to the content of the investigative duty, rather than its existence. However, the Court also authoritatively determined the existence of the duty which was also in issue – see [2019] AC 196 at p201A-B, and *per* Lord Kerr at [6(iii)] and at [59]:

> "The answer to the argument that the positive obligation to investigate is animated only where there is state involvement in the acts said to breach article 3 can be simply supplied by reference to [*MC v Bulgaria* (2003) 40 EHRR 20 at [151]]. The statement that positive obligations are not solely confined to cases of ill-treatment by state agents could not be clearer."

126. Sir James Eadie further argued that this was a case concerning the obligation to establish an appropriate "framework" for protecting the public within the territory of the UK, whereas in the present case the UK could not, on any view, be responsible for the system of law that was in place in Kosovo. I do not consider that this amounts to a significant basis for summarily rejecting the Claimants' case. The precise basis for the derivation of different positive obligations may be open to debate (see *DSD* at [125] *per* Lord Hughes), but it is clear that there are two discrete aspects of the relevant positive obligation - a duty to ensure that there is a sufficient system in place, and a duty to enforce that system by carrying out adequate investigations – see *per* Lord Kerr at [55]:

> "…the Strasbourg court in *MC* clearly specified that the state's duty had two aspects. The first was to enact criminal-law provisions which would effectively punish rape. The second,

> distinct but definite obligation was to carry out proper investigation and prosecution so that the laws could be applied effectively."

127. Different state bodies are responsible for fulfilling the two different aspects of the positive obligation. The fact that, in Kosovo, the investigating authorities inherited a system of laws does not mean that they should not be held responsible for enforcing those laws.

128. Accordingly, if the Claimants had been within the jurisdiction of the UK for the purposes of article 1 ECHR I would not have acceded to the argument that they had no real prospect of establishing that an investigative duty arose.

(6) Is the claim barred by res judicata and/or is it an abuse of process?

129. In the claim against the MOD it was alleged that the UK Government was liable to the First, Second and Third Claimants under articles 2 and 3 ECHR for the failure to investigate the abduction and murders of their relatives. The Court's findings in those proceedings were to the effect that (for a number of different reasons) no such cause of action arose – see paragraph 53 above. In these proceedings the First, Second and Third Claimants seek to establish what is, in effect, the same thing (albeit they focus on different or additional facts). The FCO say that they are barred from doing so by application of the legal principle *res judicata*.

130. Further, the FCO says that all of the Claimants could and should have brought all of the matters in these proceedings before the Court in the earlier proceeding, and that it is an abuse of process now to seek to (re-)litigate the issues – see the classic statement of principle of Sir James Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100:

> "I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time …."

131. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 [2014] AC 160 Lord Sumption JSC explained the ambit of, and the relationship between, the concepts of *res judicata* and re-litigation abuse of process – see at [17]-[26]:

"17. *Res judicata* is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. …Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles…

…

22. [*Arnold v National Westminster Bank plc* [1991] 2 AC 93] is… authority for the following propositions. (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action. (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised. (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.

…

24. …The principle in *Henderson v Henderson* has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. …*Johnson v Gore-Wood & Co* [2002] 2 AC 1… arose out of an application to strike out proceedings on the ground that the plaintiff's claim should have been made in an earlier action on the same subject matter brought by a company under his control. Lord Bingham of Cornhill… expressed his own view of the relationship between [abuse of process and *res judicata*] at p31 as follows:

> '*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be

> twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.'

…Lord Millett… dealt with the relationship between *res judicata* and the *Henderson v Henderson* principle at pp 58–59 as follows:

> 'Later decisions have doubted the correctness of treating the principle as an application of the doctrine of res judicata, while describing it as an extension of the doctrine or analogous to it. …But these various defences are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions. While the exact relationship between the principle expounded by Sir James Wigram V-C and the defences of res judicata and cause of action and issue estoppel may be obscure, I am inclined to regard it as primarily an ancillary and salutary principle necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented."

25. It was clearly not the view of Lord Millett in *Johnson v Gore-Wood* that because the principle in *Henderson v Henderson* was concerned with abuse of process it could not also be part of the law of *res judicata*. Nor is there anything to support that idea in the speech of Lord Bingham. The focus in *Johnson v Gore-Wood* was inevitably on abuse of process because the

> parties to the two actions were different, and neither issue estoppel nor cause of action estoppel could therefore run… *Res judicata* and abuse of process are juridically very different. *Res judicata* is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation...
>
> 26. It may be said that if this is the principle it should apply equally to the one area hitherto regarded as absolute, namely cases of cause of action estoppel where it is sought to reargue a point which was raised and rejected on the earlier occasion. But this point was addressed in *Arnold*, and to my mind the distinction made by Lord Keith remains a compelling one. Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims."

132. The burden is on the FCO to establish that the proceedings are an abuse of process.

133. Ultimately, the FCO accepted that this is not a case of cause of action estoppel or *res judicata* in the narrow sense explained by Lord Sumption. Although the legal right of claim that is relied on is the same in this case as that in *Kontic* (namely s6 of the 1998 Act read with articles 2 and 3 EHCR) the precise cause of action is different. That is partly because five of the claimants are different. More importantly, the offences in respect of which they claim there was a failure to investigate are different. In addition, the failings to investigate are themselves different. In *Kontic* the Claimants relied on asserted failings of the Royal Military Police and other British personnel. Here, the case is put entirely on the basis of failings alleged against Mr Ratel.

134. The issue, therefore, is whether these proceedings amount to re-litigation abuse of process in the sense explained in *Henderson v Henderson* and *Johnson v Gore Wood*.

135. The matters that are raised in these proceedings could have been raised in *Kontic*. Indeed, to an extent they were raised in *Kontic* (see paragraph 51 above).

136. The fact that they could have been raised in *Kontic* does not in and of itself mean that these proceedings are abusive (see paragraph 131 above - *per* Lord Bingham in *Johnson v Gore Wood*: "[i]t is… wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive").

137. It is therefore necessary to undertake "a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before".

138. I agree with a submission advanced by Sir James Eadie that the references to "all the facts of the case" and "all the circumstances" are to be understood as being references only to those facts and those circumstances that are relevant to the assessment of whether the proceedings are abusive: the exercise does not contemplate an entirely open textured assessment of matters that might be advanced on behalf of the Claimants in support of the overall justice of their case, but which have no relevance to the question of whether the proceedings are an abuse of the court's process.

139. It does not seem to me to be of any significance that these proceedings have been brought against the FCO rather than the MOD. In the first place it is well established that it can be abusive to bring repeat litigation even where the defendant is different – see *Aldi Stores Ltd v WSP Group PLC* [2007] EWCA Civ 1260 [2008] 1 WLR 748. In any event the Defendant in each case here is effectively the same – in each case the claim has been brought against the Crown, but by naming the relevant authorised Government department in accordance with s17 Crown Proceedings Act 1947. Because the precise factual basis on which the claim is put has changed, a different Government department has been sued. The reality, though, is that in each case the claim is against the Crown. And the Claimants agree that for these purposes the Crown is indivisible.

140. Mr Randolph argues that there is a significant difference between the two sets of proceedings in that in the MOD case it was admitted that the MOD was a public authority whereas in the present proceedings that is in issue. However, the fact is that both the FCO and the MOD are public authorities. The relevant point, which is firmly in issue in both cases, is whether the matters in question amounted to the exercise of UK jurisdiction within the meaning of article 1 ECHR. I do not read the defence in the current proceedings as distinctly denying that the FCO is a public authority – rather it denies a compendious series of averments in which the (surely, in itself, uncontroversial) statement that the FCO is a public authority is but one component.

141. Nor is it of great significance that there are some differences in the relief claimed in each of the cases. In both cases a declaration was sought that there had been a breach of the Claimants' rights under articles 2 and 3 ECHR, together with an award of damages under the Human Rights Act 1998.

142. Nor is it particularly significant (in the context of *Henderson* abuse as opposed to cause of action estoppel) that the Claimants are different. In some cases that might be critical, for example where the claimants in the second action could have had no knowledge of the first action. Here, however, all of the Claimants were represented by the same solicitors. Their solicitors have been acting for them since at least 8 November 2013 (when a letter of claim was sent on behalf of all Claimants). It is clear that the Fourth to Eighth Claimants were aware of the *Kontic* litigation but chose not to take part (or at least agreed to a litigation strategy whereby the claims of the First to Third Claimants would proceed first).

143. *Kontic* was being treated by all parties as being test case litigation. In other words, all parties were proceeding on the basis that the outcome in *Kontic* would apply to other litigants in a like situation. In this very particular context it seems to me that, for the purposes of the required "broad, merits-based judgment", there should be no practical distinction between those Claimants who were parties to *Kontic* and those who were not.

144. There is, however, one overarching point of distinction. That is that the factual basis for the present claim entirely focusses on the conduct of Mr Ratel who is said to be responsible for failing to discharge the UK's obligations under articles 2 and 3 ECHR. His conduct was not in issue in the MOD proceedings. That claim involved a more general obligation that the UK had failed to discharge its obligations under articles 2 and 3. It was no part of the Claimants' pleaded case that this was due to any fault on the part of Mr Ratel.

145. The Claimants were, however, well aware before they issued the *Kontic* proceedings that Mr Ratel had been the Head of the SPRK – that is clear from the letter of claim written by their solicitors in November 2013. They were also aware (at least by 7 March 2016 when the fact is referenced in a letter from their solicitor) that Mr Ratel was employed by the FCO. The Claimants could therefore have raised in *Kontic* the matters that are the subject matter of these proceedings.

146. There is a clear connection, and significant overlap, between the subject matter of the two sets of proceedings. The Claimants were required to help the court to further the overriding objective (see CPR 1.3). The overriding objective includes saving expense, ensuring that the case is dealt with expeditiously and allocating to a case an appropriate share of the court's resources (see CPR 1.1(2)(b), (d) and (e)). Having regard to this obligation it was incumbent on the Claimants, if they were to litigate this claim, to do so alongside *Kontic* (or, at the very least, to ensure that the Defendant and the Court were aware of their intention to bring these proceedings, so that the obvious case management consequences could be addressed).

147. Accordingly, not only could the Claimants have raised these matters within the *Kontic* litigation, they should have done so. Of course, their solicitors did, as I have said, advance submissions about Mr Ratel's role, albeit in a somewhat unconventional, or to use the word of Irwin J "incoherent", manner. Irwin J refused to countenance those submissions. The Claimants sought permission to appeal and relied, at least contingently (see paragraph 54 above) on the refusal to consider these submissions. In the event, however, they did not pursue any appeal on this ground, nor did they make any attempt to amend their pleadings. Limited permission to appeal was granted, albeit not on this point. The Claimants have not pursued that appeal, and have not sought to renew their application for permission to appeal. Nor did they put the Defendant (either the MOD or the FCO) on notice, in the course of the *Kontic* proceedings, that they intended to bring these proceedings.

148. Instead, judgment was given in *Kontic* on 4 August 2016 and the Claimants, having lost the points that were raised in *Kontic*, then embarked on the present litigation by way of a pre-action letter sent on 3 October 2016.

149. The Claimants suggest that the FCO should not be entitled to raise an abuse argument now (or at least that the argument should be given short shrift) because it positively objected to the Claimants relying on Mr Ratel's conduct in the MOD litigation. I do not agree. What the FCO objected to was the manner in which the submissions were advanced. It had proper grounds to do so, and its objection then does not prevent it from now complaining that the present proceedings are abusive. If the Claimants had sought, in an orderly way, to amend their pleadings in the MOD case to include the allegations that are now sought to be advanced, then the position may have been different.

150. Applying the broad merits-based assessment that is required, the present proceedings, in my judgment, amount to an abuse of the court's process so far as each of the Claimants is concerned.

(7) Is the claim time barred?

151. Section 7 Human Rights Act 1998 states:

> "**7 Proceedings**
>
> (1) A person who claims that a public authority has acted… in a way which is made unlawful by section 6(1) may-
>
> (a) bring proceedings against the authority under this Act…
>
> …
>
> (5) Proceedings under subsection (1)(a) must be brought before the end of-
>
> (a) the period of one year beginning with the date on which the act complained of took place; or
>
> (b) such longer period as the court… considers equitable having regard to all the circumstances.
>
> …"

152. Here, the deaths and disappearance took place in 1999 and 2000. Mr Ratel was in post between 2010 and March 2016. The HRRP decisions finding a breach of the investigative obligation under articles 2 and 3 were promulgated on 19 October 2016. Proceedings were issued on 18 October 2017.

153. Mr Randolph initially sought to argue that time did not start to run, for the purpose of s7(5)(a), until the promulgation of the HRRP decisions on 19 October 2016. Proceedings were brought within (exactly) one year of that date. They are therefore in time – see s7(5)(a). That argument is without merit. The "act complained of" within the meaning of s7(5)(a) means, in this context, the failure to investigate as opposed to any finding that there had been a failure to investigate. The argument was, rightly, abandoned. Ultimately, Mr Randolph's case was that the duty to investigate arose from June/July 2013 when Mr Ratel was informed of the deaths/disappearance. Even if it is to be regarded as a continuing failure to investigate, Mr Ratel's secondment finished in March 2016. On any view, the proceedings were not issued within the time period required by s7(5)(a). The Claimants would therefore need to persuade the Court that it would be equitable to allow a longer period having regard to all the circumstances. In the light of my ruling that summary judgment should, in any event, be entered in the FCO's favour there is no basis for an order allowing such a longer period (cf *Kontic* at [205]).

154. I would not, however, separately enter summary judgment in the FCO's favour on the basis that the claim is out of time as a stand-alone ground. An application under s7(5)(b) is acutely fact sensitive and is not necessarily apt for determination on hypothetical facts. If I had concluded that the Claimants had a real prospect of success on the claim, then a decision on s7(5)(b) would have fallen to be made against the backdrop of that

finding. I do not read Irwin J as having decided, in *Kontic* at [205], that there would be no prospect of a successful s7(5)(b) application if the Claimants had otherwise succeeded on the preliminary issues.

Should summary judgment be entered on the claim?

Has the FCO shown that the Claimants have no real prospect of success on the claim?

155. I have concluded that the Claimants do not have any real prospect of establishing that:

(a) they were within the jurisdiction of the UK for the purposes of article 1 ECHR, or

(b) Mr Ratel's conduct as Head of the SPRK is attributable to the UK.

156. I have also concluded that the claim is an abuse of the Court's process because it abusively seeks to re-litigate matters that were (or should have been) litigated in *Kontic*.

157. For each of these reasons the Claimants do not have a real prospect of success on the claim.

Is there some other compelling reason why the claim should proceed to trial?

158. The fact that the Claimants have no real prospect of success does not, in itself, entitle the FCO to summary judgment: the application for judgment must be refused unless the court is satisfied that there is no other compelling reason for the case to be disposed of at trial.

159. The legal responsibility for the failure to investigate has been the subject of extensive litigation over a period of 6 years, including the proceedings before the HRAP and HRRP, the *Kontic* claim, the separate claim in this Court against the EU, and proceedings before the Court of Justice of the EU. There is considerable force in the FCO's submission that if the case has no real prospect of success then it is now time to bring an end to this long drawn out litigation.

160. The Claimants argue that there are factual conflicts, the proceedings are at an early stage with disclosure not yet having been provided, the law is developing, and there is controversy at a high level as to the correct legal tests to be applied. I agree that each of these points (either alone or in aggregate) are capable, in appropriate circumstances, of providing a compelling reason to permit a claim to proceed to trial. That is not the case here. Such factual conflicts as exist are on points that are not materially relevant to the issues in the case. There is a sufficient factual basis (particularly against the backdrop of earlier litigation, including that in *Bamieh*) confidently to assess the Claimants' prospects on the critical factual issues. Disclosure will not make a material difference. Although some of the legal tests in play (such as for jurisdiction or attribution) may be capable of further development in the case law, the FCO's defence does not depend on any nuance in the jurisprudence. The claims are simply not capable of satisfying the tests for jurisdiction or attribution because of the basic and incontrovertible facts (including, in particular, that the FCO did not exercise any direction or control over Mr Ratel's prosecutorial functions).

161. Mr Randolph further argues that if the claims are not permitted to proceed then the breach of the Claimants' rights under articles 2 and 3 ECHR will not have any legal

remedy. I am prepared to assume that that will be so. But allowing the claims to proceed to trial would lead to the same result, with further delay and additional cost.

162. However much sympathy the Court has with the Claimants, and even if they have suffered a breach of their fundamental rights and the injustice of not receiving any remedy, that does not provide a compelling basis for the claim to proceed to trial – cf *Berntsen v Tait* [2015] EWCA Civ 1001 where the Court of Appeal held that there was no point in letting the case proceed to trial even though the underlying facts raised matters of considerable concern.

Outcome

163. The Claimants do not have any real prospect of success. That is because (a) the Claimants were not within the jurisdiction of the UK within the meaning of article 1 ECHR, and because (b) Mr Ratel's work as a prosecutor is not attributable to the UK, and because (c) the claim is an abuse of process. There is no other compelling reason why the claim should proceed to trial. In those circumstances it would not be just, or in accordance with the overriding objective, to allow the claim to proceed. Indeed, notwithstanding the understandable continued anguish suffered by the Claimants I do not consider that it would be in their interests to allow the claim to proceed. I therefore enter summary judgment on the claim in the FCO's favour.

164. I adopt the remarks of Irwin J in *Kontic* at [5]:

> "I wish to record that I understand the terrible impact of such killings. I readily comprehend the feelings of the Claimants at their losses, and at the lack of any final explanation of what happened. The Court has every sympathy with the position of the Claimants."