

# JUSTICE

## THE LAW AND WAR: HUMAN RIGHTS ACT, THE ECHR AND ACCOUNTABILITY

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# **Human Rights for soldiers on deployment**

**Jocelyn Cockburn - 14 October 2016**



## Introduction

- Human rights for soldiers is a topical issue given the recent Govt announcement to derogate from ECHR in future conflicts.
- Iraq and Afghanistan conflicts showed huge public support for properly equipping troops on deployment.
- Consensus in press for protection of soldiers (even fairly broad support for soldiers having human rights protections).
- Govt announcement falls on tried and tested narrative to portray human rights in a negative light – saying it protects foreign criminals and also fat cat ‘activist left wing lawyers’. This rhetoric is being applied in context of armed forces.
- Therefore its common ground that our soldiers need protecting but there are different ideas of how to achieve this.



## Protecting Soldiers from ‘Persistent Legal Claims’

At the Conservative party conference last week the Government heralded a *‘landmark measure’* to protect armed forces from *‘persistent legal claims in future overseas operations’*.

The plan is to introduce a presumption to derogate from (ie opt out of) the European Convention on Human Rights (ECHR) in future conflicts.

No mention was made about the impact on soldiers’ rights.

## Derogation in Time of Emergency

Article 15 ECHR: affords a state the *possibility* of derogating from the obligations under ECHR:

- *In exceptional circumstances*
- *Temporarily in a limited supervised manner*
- Only “*in time of war or other public emergency threatening the life of the nation*”
- only to the extent “*strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law*”.
- Cannot derogate from article 3 at all or from article 2 in the context of unlawful acts of war



The Law – human rights  
protections for our soldiers

## Article 1 ECHR -Obligation to respect human rights

*“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention”*

Section 1 - Rights and Freedoms

## Article 2 ECHR -Right to Life

*“Everyone's right to life shall be protected by law....”*



## Relevant Development of law on jurisdiction, Article 1

- Bankovic & Others v Belgium & Ors (App No. 52207/99) (2001) 44 EHRR

Leading Strasbourg authority on the '*essentially territorial*' nature of jurisdiction under Art 1 of the European Convention on Human Rights. (they set out exceptions to the territorial approach – ie where jurisdiction applies outside the territory).

- R (on the application of Al-Skeini v Secretary of State for Defence [2007] UKHL 26

House of Lords applied Bankovic ruling that the Baha Mousa (who was detained on base) came within jurisdiction by analogy to well established extra-territorial exception made for embassies. Five civilians who were shot by UK troops were outside jurisdiction.



## Relevant Development of law on jurisdiction, Article 1

- R (Catherine Smith) v SSD & HM Coroner for Oxford [2010] UKSC 29

Because of *Al-Skeini* the MoD conceded that, as Jason Smith died on UK military base, he was within the UK jurisdiction. House of Lords ruled that Jason Smith was within Article 1 jurisdiction (as an extra-territorial exception made for embassies – where there is a total and exclusive de facto control). The Court also considered the Catherine Smith's argument that soldiers remain within the UK jurisdiction wherever they are (ie also off base). The Court rejected this and found that jurisdiction was not conferred by virtue of their personal status as a member of the armed forces.

- *Al Skeini v UK (2011) 53 EHRR 589* –

Grand Chamber ruling that Convention applied extraterritorially where there was 'state agent authority and control' – they found that where a state agent exerts control and authority over an individual outside its territory it may bring the individual within the UK jurisdiction – it depends on the degree of control. Jurisdiction also applies extraterritorially where a state exercises effective control of an area through military action or occupation, or where territory falls in the legal space of the Convention

## Relevant Development of law on jurisdiction, Article 1

- Susan Smith & Ors v MoD [2013] UKSC 41

The Supreme Court overturned the earlier Supreme Court's decision in the *Catherine Smith* case. Ruled that in light of *Al-Skeini* jurisdiction must extend to British troops. They are in UK's jurisdiction when on duty by virtue of the fact that they remain under the authority and control of the UK throughout their service. As explained by Lord Hope, it would be illogical for troops to be deemed to confer jurisdiction on others (as state agents) whilst denying that they themselves are within the jurisdiction.

- Al-Saadoon & Others – v- SSD [2016] EWCA Civ 811

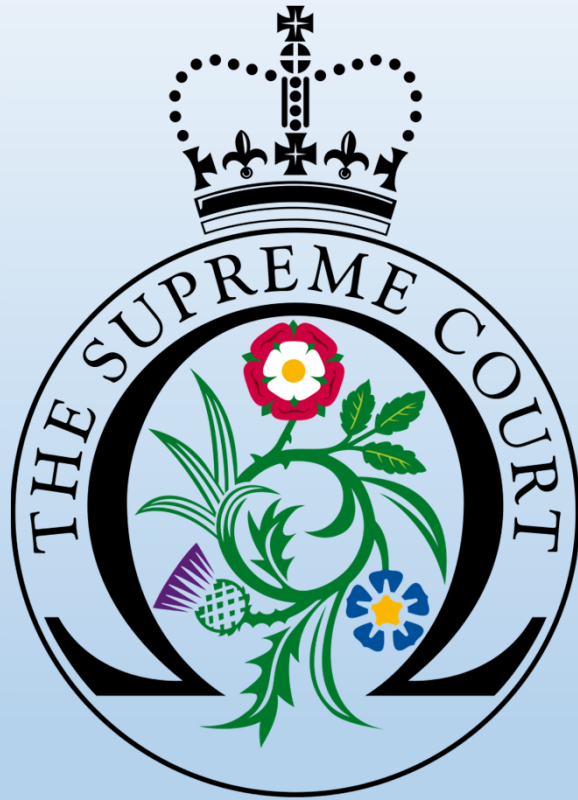
The Court of Appeal recently affirmed that jurisdiction could arise out of the fact of “state agency authority and control” over an individual (Iraqi civilians), further entrenching *Al-Skeini* in UK law. Also affirming that *Bankovic* remains good law. The presumption of jurisdiction is territorial, with narrow exceptions.

- Conclusion: Military families would say that it is common sense that Soldiers remain within the UK jurisdiction at all times on deployment.

## Article 2 – State obligations

Article 2 imposes the following duties on the State:

1. A substantive obligation, including a negative obligation to refrain from taking life save in exceptional circumstances; and a *positive obligation* to take appropriate steps *to safeguard the lives* of those within its jurisdiction. Within this general positive obligation there also exists an *operational obligation to take reasonable steps to protect an individual whose life is at known risk*; and
2. An investigative obligation to carry out an effective, official investigation into any death occurring in circumstances in which it appears that agents of the state or systemic defects in a state system are, or may be, in some way implicated.



## *Catherine Smith case - R (Smith) v SSD & Anor [2010]*

- Background: Jason Smith collapsed from heatstroke in camp in Al Amarah, Iraq and died on 13 August 2003. Case arose out of judicial review of first inquest in 2006. Coroner ruled article 2 did not apply as outside article 1 jurisdiction. There was a lack of disclosure and funding.
- Evidence of serious failings to protect soldiers from heat or follow guidelines on referral and medical treatment of those affected by the heat, wrong information given to soldiers on hydration and salt, inadequate acclimatization, failure to provide basic medical treatment and lack of training,

### Supreme Court ruling on Article 2:

- Supreme Court ruled that where there was a reason to suspect a breach of the substantive article 2 right to life then the inquest must comply with the investigative obligation
- An Article 2 inquest is wider, must provide a conclusion on the failings and involve family – ie disclosure

## Snatch Land Rover case - Susan Smith & Ors v MoD [2013]



Background : death of 3 soldiers in Iraq in Snatch land rovers. Designed to withstand small arms fire. Outmatched by IEDs in use by insurgents. The claimants alleged that more heavily armoured vehicles which were evidently needed and should have been provided, thereby saving lives.

Supreme Court ruling on **article 2**: majority. claims should not be struck out. These cases continue. Court gave guidance to lower courts. court must recognise **wide margin of appreciation** and **avoid imposing obligations which are unrealistic or disproportionate**. But must **give effect to those obligations** where it would be reasonable to expect article 2 protection.

Policy decisions –at high level of command and decisions on the battlefield would fall outside the scope of article 2. However there is a middle ground.

Supreme Court ruled on doctrine of **combat immunity (negligence)** should be construed narrowly. Not extended beyond scope of **planning of and preparation for active operations** against the enemy. Challenger claims are not within scope of doctrine as related to decisions taken away from theatre. Ellis claim not clear. Strike out applications failed.

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## R (on the application of Long) v Secretary of State for Defence – [2015] EWCA Civ 770

- In June 2003, the claimant's son was one of six British soldiers in the Royal Military Police (the RMP) who were unlawfully killed by members of a crowd at an Iraqi police station. His section had no iridium satellite phone despite an order requiring all patrols had them. The order was systematically ignored. As a result, they were not able to contact the commanders of a nearby paratrooper division who may have been able to assist.
- Family of deceased judicially reviewed inquest – citing a breach of investigative obligation under article 2.
- CA found that there had been a systemic failure by RMP in relation to provision of phones. There was therefore an arguable breach of article 2 and therefore an investigative obligation, however this was discharged by previous investigations.
- An arguable failure of a systematic nature ie adopting unsafe practices (rather than individual failures to operate properly with a system) falls within the middle ground in *Smith*.

# Do our soldiers need legally enforceable protections?

Iraq/ Afghanistan fought on basis of MoD assumption of no ECHR obligations to soldiers

# THE IRAQ INQUIRY

## Sir John Chilcot – Iraq Inquiry Report

July 2016 - Chilcot's Iraq Inquiry reported on the '*wholly inadequate*' preparation for the Iraq conflict both before and after the invasion.

He criticised the military:

- Unclear who had responsibility for identifying capability gaps, MoD failed to be pro active.
- Lack of UAV capability (drones) / reconnaissance
- MoD slow to react to developing threat of IEDs and replacing Snatch Land Rovers with medium protected patrol vehicles. These delays should not have been tolerated.
- Unrealistic assessments regarding fighting in two locations.





Ministry  
of Defence

## MoD response to Chilcot

14 July 2016 the Defence Secretary Michael Fallon in a speech in the House of Commons accepted the report and acknowledged: *‘[the MoD] failed to adapt to the changing situation on the ground and there were significant equipment shortfalls for our troops’.*

MoD is keen to stress that lessons are being learned. In a blog (“Learning from Chilcot”) on 8 Sept 2016 the MoD Permanent Secretary, Stephen Lovegrove wrote:

*“When we make [overseas] interventions, our commitment is to ensure that we do so on the basis of the best possible understanding of the situation, a robust decision-making process, and with the very best tools needed to do the job and a culture that does not stifle debate and challenge.”*

# Words v. Actions

- Words

- July 2016 Defence Secretary accepts Chilcot findings in relation to equipment and other failures
- September 2016 MoD said they would make changes including providing the very best tools for soldiers and instil a culture that *'does not stifle debate and challenge.'*
- October 2016 Govt announcement of plans to derogate from ECHR in future conflicts to protect soldiers from claims.

- Actions

- MoD continue to assert that Snatch land rovers were fit for purpose despite Chilcot
- Tendency to stonewall – disclosure / pii
- Legal Argument in *Smith* that soldiers were outside jurisdiction of article 1 (whilst conceding they could bring Iraqis within it). Also legal argument in *Smith* that it is too difficult to protect soldiers on battlefield so no duty should be imposed by court under article 2
- Plan to derogate involves removing ECHR protections from soldiers (also hints about legislating to restrict combat immunity and claims brought by soldiers against MoD)

# Conclusion

It is easy for the Government to throw mud at 'ambulance chasing lawyers' and 'human rights gone mad' and too often this obscures the real issues.

Wholly wrong how Government is conducting the debate.

Misleading the public about intention to remove soldiers rights.

Of course the MoD would find it easier to operate without legal scrutiny but its not in the national interest and it is certainly not in the interests of our soldiers.

Without the ability for individuals to hold the Government to account for their safety record there is a serious risk that standards will not improve and soldiers' lives will be lost unnecessarily.



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