

Supreme Court

**Smith and another v Ministry of Defence (JUSTICE and another intervening)**

**Redpath v Same**

**Ellis and another v Same (JUSTICE and another intervening)**

**Allbutt and others v Same (Same intervening)**

[2012] EWCA Civ 1365

[2013] UKSC 41

2012 June 25, 26, 27; Oct 19 Lord Neuberger of Abbotsbury PSC, Moses, Rimer LJJ  
 2013 Feb 18–21; June 19 Lord Hope of Craighead DPSC, Baroness Hale of Richmond, Lord Mance, Lord Kerr of Tonaghmore, Lord Wilson, Lord Carnwath JJSC, Lord Walker of Gestingthorpe

*Human rights — Life — Soldiers on active service abroad — Soldiers serving in Iraq killed by improvised explosive devices — Whether within scope of United Kingdom’s Convention jurisdiction — Whether Convention right to life extending to soldiers on active service outside British territory — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 2<sup>1</sup> — Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969), art 1<sup>2</sup>*

*Negligence — Duty of care — Soldiers serving overseas — Soldiers serving in Iraq killed by improvised explosive devices while driving Snatch Land Rovers or killed or injured inside tank when attacked by friendly fire — Whether state owing duty of care to serving soldiers in providing equipment subsequently used in conflict — Whether claims relating to procurement of equipment and adequacy of training justiciable — Whether claims within scope of combat immunity*

Between 2003 and 2009 the armed forces of the United Kingdom were deployed in Iraq to provide support and help to the interim government. The claimants in the first three actions were members of the families of three British soldiers who, while serving with those forces in Iraq, had been killed when improvised explosive devices had been detonated beside the Snatch Land Rovers in which they had been travelling. The claims alleged that the soldiers’ deaths had resulted from the defendant’s failure to provide suitably protective equipment for soldiers on active service in Iraq in breach of its obligation to safeguard the soldiers’ right to life guaranteed by article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In the third action a claim was also made in negligence for failure to provide suitable equipment. The fourth action arose following the death of one soldier and injuries to two others which had occurred in the course of the same deployment when the tank in which they had been serving had come under fire from another British tank. The claimants in that action, the widow of the deceased soldier and the two injured soldiers, alleged negligence by the defendant in failing to provide available technology to protect against the risk of “friendly fire”, and in failing to provide adequate vehicle recognition training. In each action the defendant applied under

<sup>1</sup> Human Rights Act 1998, Sch 1, Pt I, art 2.1: see post, Supreme Court judgments, para 56.

<sup>2</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (1953), art 1: see post, Supreme Court judgments, para 17.

- A CPR r 3.4(2)(a) to strike out the statement of case on the ground that it disclosed no reasonable grounds for bringing the claim, or in the alternative sought summary judgment under CPR r 24.2(a)(i) on the ground that the claim had no real prospect of success. The defendant asserted, inter alia, that the article 2 claims were bound to fail because the deaths had occurred outside the United Kingdom's jurisdiction conferred by article 1 of the Convention and that any alleged shortcomings in respect of military operations, procurement of military equipment or adequacy of training given to the armed forces was not justiciable. The judge struck out the article 2 claims on the ground that the soldiers had been outside the United Kingdom's Convention jurisdiction under article 1 when they died, but refused to strike out the negligence claims save for part of the claim in the third action. The claimants whose claims had been struck out in whole or in part appealed and the defendant cross-appealed in relation to the negligence claims which had not been struck out. The Court of Appeal affirmed the judge's determination in respect of the article 2 claims but, allowing the appeal of the claimants in the third action in relation to the negligence claim and dismissing the cross-appeals, decided that all the claims in negligence should go to trial. The claimants in the first and third actions appealed in respect of the article 2 claims and the defendant appealed in respect of the negligence claims.

On the appeals—

- D *Held*, (1) that, since the correct interpretation of the Convention could only be authoritatively expounded by the European Court of Human Rights, the duty of the domestic court was to keep pace with that court as its jurisprudence evolved over time and to construe article 1 as reaching only so far as the existing jurisprudence clearly indicated; that, although a state's jurisdiction was primarily territorial so that acts performed or producing effects outside its territory would only exceptionally fall within article 1, the threshold of what constituted "exceptional" was set low; that it would be a question of fact whether the particular circumstances required a finding that a state was exercising jurisdiction extraterritorially, and the list of circumstances justifying such a finding was not closed; that, since the United Kingdom had been present in Iraq to provide support and help to the interim government when the incidents which founded the first and third actions had occurred, the relevant exceptional category under which the state exercised extraterritorial jurisdiction was that of state agent authority and control; that in such circumstances the state was under an obligation under article 1 to secure to the individuals over whom it had such authority and control the rights and freedoms under section 1 of the Convention
- F relevant to their situation; that in such a case the package of Convention rights was not indivisible but might be divided and tailored in accordance with the particular circumstances of the extraterritorial act in question; that the premise on which such jurisdiction existed was that the state exercised such authority and control in the sense of article 1 over its own agents, namely, its armed forces; that, accordingly, the United Kingdom's jurisdiction under article 1 extended to securing the protection of article 2 rights to members of its armed forces when serving outside its territory; and
- G that, accordingly, in the first and third actions, the deceased at the time of their deaths had been within the jurisdiction of the United Kingdom for the purposes of that article (post, Supreme Court judgments, paras 29–32, 34–38, 42–49, 51–52, 55, 101, 102, 152, 153).
- Cyprus v Turkey (1975) 4 EHRR 482, Issa v Turkey (2004) 41 EHRR 567, Al-Skeini v United Kingdom (2011) 53 EHRR 589, GC and Hirsi Jamaa v Italy (2012) 55 EHRR 627, GC applied.
- H *Bankovic v Belgium* (2001) 11 BHRC 435, GC not applied.  
*R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2011] 1 AC 1, SC(E) departed from.
- (2) Allowing the claimants' appeals (Lord Mance, Lord Wilson and Lord Carnwath JJSC dissenting), that, having regard to the jurisprudence of the European Court of Human Rights, an assessment of the positive obligation to be implied under

article 2 required a fair balance to be struck between the competing interests of the individual and the community as a whole, and a wide margin of appreciation was to be accorded to the state in striking that balance; that the guarantee in article 2.1 was not violated, despite the inherent risk of death, simply by deploying soldiers as part of a military force abroad where it was properly equipped and capable of defending itself; that, although the adequacy of equipment, planning or training was not immune from scrutiny under the procedural obligation under article 2, the extent to which the substantive duty under the article might be applied to military operations would, given their unpredictability, vary according to the context; that an unrealistic or disproportionate positive obligation under article 2.1, in connection with planning or conducting military operations in armed conflict, should not be imposed on the state, but effect should be given to the obligation under article 2.1 where it was reasonable to expect an individual to be afforded protection; that allegations relating to matters of procurement, training or the conduct of operations linked to the exercise of political judgment or issues of policy, or to acts or omissions occurring during actual operational engagements, would be beyond the reach of article 2, but an exercise of judgment in the light of the individual fact was required in respect of claims falling between such areas; that, therefore, the question whether the allegations raised in the first two actions fell within article 2 could not be determined without a factual inquiry, and a decision on liability should be deferred until after evidence had been given at trial; and that, accordingly, those claims should not be struck out (post, Supreme Court judgments, paras 61, 62–65, 69–73, 76–81, 101).

*Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, *Grigoriades v Greece* (1997) 27 EHRR 464 and *Öneryildiz v Turkey* (2004) 41 EHRR 325, GC considered.

(3) Dismissing the defendant's appeals (Lord Mance, Lord Wilson and Lord Carnwath JJSC dissenting), that the doctrine of combat immunity constituted a special rule which, where it applied, removed the issue of liability in negligence from the court's jurisdiction altogether; that the doctrine was to be construed narrowly and applied only to action taken in the course of actual or imminent armed conflict, and there was no justification for extending it to failures at an earlier stage; that, since the claims raised in the third action related to activities which had taken place long before the commencement of hostilities, the rule did not apply in that case; that, although the negligence claims in the third action related to activity closer to the theatre of war, further detail was required before a determination could be reached on liability; that whether it would be fair, just or reasonable for a tortious duty of care to be imposed would depend on the circumstances in each case which could only be determined by evidence at trial; and that, accordingly, the claims in those actions would not be struck out (post, Supreme Court judgments, paras 83, 89–92, 95–96, 98–101).

Dictum of Elias J in *Bici v Ministry of Defence* [2004] EWHC 786 (QB) at [90] approved.

*Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344 and *Mulcahy v Ministry of Defence* [1996] QB 732, CA applied.

*Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 (QB) disapproved.

Decision of the Court of Appeal, post, p 68; [2012] EWCA Civ 1365; [2013] 2 WLR 27; [2013] 1 All ER 778 reversed in part.

The following cases are referred to in the judgments of the Supreme Court:

*A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68; [2005] 2 WLR 87; [2005] 3 All ER 169, HL(E)

*Al-Saadoon and Mufdhi v United Kingdom* (2009) 49 EHRR SE95

*Al-Skeini v United Kingdom* (2011) 53 EHRR 589, GC

*Andrejeva v Latvia* (2009) 51 EHRR 650, GC

- A *Attorney General for New South Wales v Perpetual Trustee Co Ltd* (1952) 85 CLR 237  
*Bankovic v Belgium* (2001) 11 BHRC 435; 44 EHRR SE75, GC  
*Banks v United Kingdom* (2007) 45 EHRR SE15  
*Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191; [1996] 3 WLR 87; [1996] 3 All ER 365, HL(E)  
*Barrett v Enfield London Borough Council* [2001] 2 AC 550; [1999] 3 WLR 79; [1999] 3 All ER 193, HL(E)
- B *Bici v Ministry of Defence* [2004] EWHC 786 (QB); *The Times*, 11 June 2004  
*Brooks v Comr of Police of the Metropolis* [2005] UKHL 24; [2005] 1 WLR 1495; [2005] 2 All ER 489, HL(E)  
*Brown v Stott* [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC  
*Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75; [1964] 2 WLR 1231; [1964] 2 All ER 348, HL(Sc)
- C *Caparo Industries plc v Dickman* [1990] 2 AC 605; [1990] 2 WLR 358; [1990] 1 All ER 568, HL(E)  
*Chember v Russia* (Application No 7188/03) (unreported) given 3 July 2008, ECtHR  
*Chrysostomos v Turkey* (1991) 34 YB 35  
*Cyprus v Turkey* (1975) 4 EHRR 482  
*Cyprus v Turkey* (2001) 35 EHRR 731, GC  
*Demir v Turkey* (2008) 48 EHRR 1272, GC
- D *Dorset Yacht Co v Home Office* [1970] AC 1004; [1970] 2 WLR 1140; [1970] 2 All ER 294, HL(E)  
*Drozdz and Janousek v France and Spain* (1992) 14 EHRR 745  
*Edwards v Attorney General for Canada* [1930] AC 124, PC  
*Elguzouli-Daf v Comr of Police of the Metropolis* [1995] QB 335; [1995] 2 WLR 173; [1995] 1 All ER 833, CA  
*Engel v The Netherlands (No 1)* (1976) 1 EHRR 647  
*Entick v Carrington* (1765) 19 State Tr 1029
- E *Feres v United States* (1950) 340 US 135  
*Finogenov v Russia* (2011) 32 BHRC 324  
*Gentilhomme, Schaff-Benbardji and Zerouki v France* (Applications Nos 48205/99, 48207/99 and 48209/99) (unreported) given 14 May 2002, ECtHR  
*Giuliani and Gaggio v Italy* (2011) 54 EHRR 278, GC  
*Grigoriades v Greece* (1997) 27 EHRR 464  
*Groves v Commonwealth of Australia* (1982) 150 CLR 113
- F *Hill v Chief Constable of West Yorkshire* [1989] AC 53; [1988] 2 WLR 1049; [1988] 2 All ER 238, HL(E)  
*Hirsi Jamaa v Italy* (2012) 55 EHRR 627, GC  
*Hristozov v Bulgaria* (Applications Nos 47039/11 and 358/12) (unreported) given 13 November 2012, ECtHR  
*Hughes v National Union of Mineworkers* [1991] ICR 669; [1991] 4 All ER 278  
*Issa v Turkey* (2004) 41 EHRR 567
- G *Jones v Kaney* [2011] UKSC 13; [2011] 2 AC 398; [2011] 2 WLR 823; [2011] 2 All ER 671, SC(E)  
*Kalender v Turkey* (Application No 4314/02) (unreported) given 15 December 2009, ECtHR  
*Keenan v United Kingdom* (2001) 33 EHRR 913  
*King v Sussex Ambulance Service NHS Trust* [2002] EWCA Civ 953; [2002] ICR 1413, CA
- H *Lawless v Ireland (No 3)* (1961) 1 EHRR 15  
*Loizidou v Turkey* (1995) 20 EHRR 99  
*M v Denmark* (1992) 73 DR 193  
*Marais v General Officer Commanding the Lines of Communication; Ex p Marais* [1902] AC 109, PC  
*Markovic v Italy* (2006) 44 EHRR 1045, GC

- Medvedyev v France* (2010) 51 EHRR 899, GC
- Mulcahy v Ministry of Defence* [1996] QB 732; [1996] 2 WLR 474; [1996] 2 All ER 705, CA
- Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 (QB); *The Times*, 29 May 2003
- Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (formerly Edward Erdman (an unlimited company) (No 2))* [1997] 1 WLR 1627; [1998] 1 All ER 305, HL(E)
- Öcalan v Turkey* (2005) 41 EHRR 985, GC
- Öneryildiz v Turkey* (2004) 41 EHRR 325, GC
- Osman v United Kingdom* (1998) 29 EHRR 245
- R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 AC 136; [2006] 2 WLR 772; [2006] 2 All ER 741, HL(E)
- R (Al-Jedda) v Secretary of State for Defence (JUSTICE intervening)* [2007] UKHL 58; [2008] AC 332; [2008] 2 WLR 31; [2008] 3 All ER 28, HL(E)
- R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26; [2008] AC 153; [2007] 3 WLR 33; [2007] 3 All ER 685, HL(E)
- R (Gentle) v Prime Minister* [2006] EWCA Civ 1689; [2007] QB 689; [2007] 2 WLR 195, CA; [2008] UKHL 20; [2008] AC 1356; [2008] 2 WLR 879; [2008] 3 All ER 1, HL(E)
- R (Middleton) v West Somerset Coroner* [2004] UKHL 10; [2004] 2 AC 182; [2004] 2 WLR 800; [2004] 2 All ER 465, HL(E)
- R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2010] UKSC 29; [2011] 1 AC 1; [2010] 3 WLR 223; [2010] 3 All ER 1067, SC(E)
- R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323; [2004] 3 WLR 23; [2004] 3 All ER 785, HL(E)
- Rabone v Pennine Care NHS Trust (INQUEST intervening)* [2012] UKSC 2; [2012] 2 AC 72; [2012] 2 WLR 381; [2012] PTSR 497; [2012] 2 All ER 381, SC(E)
- Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242; [1985] 2 All ER 985
- Rowling v Takaro Properties Ltd* [1988] AC 473; [1988] 2 WLR 418; [1988] 1 All ER 163, PC
- Savage v South Essex Partnership NHS Foundation Trust (MIND intervening)* [2008] UKHL 74; [2009] AC 681; [2009] 2 WLR 115; [2009] PTSR 469; [2009] 1 All ER 1053, HL(E)
- Şen v Turkey* (Application No 45824/99) (unreported) given 8 July 2003, ECtHR
- Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344
- Soering v United Kingdom* (1989) 11 EHRR 439
- Stovin v Wise* [1996] AC 923; [1996] 3 WLR 388; [1996] 3 All ER 801, HL(E)
- Stoyanovi v Bulgaria* (Application No 42980/04) (unreported) given 9 November 2010, ECtHR
- Sutherland Shire Council v Heyman* (1985) 60 ALR 1
- Taylor v United Kingdom* (1994) 18 EHRR CD215, ECtHR
- Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening)* [2008] UKHL 50; [2009] AC 225; [2008] 3 WLR 593; [2008] 3 All ER 977, HL(E)
- Vearncombe v United Kingdom* (1989) 59 DR 186
- W v Ireland* (1983) 32 DR 211
- Walker v Northumberland County Council* [1995] ICR 702; [1995] 1 All ER 737
- Watt v Hertfordshire County Council* [1954] 1 WLR 835; [1954] 2 All ER 368, CA
- Watts v United Kingdom* (2010) 51 EHRR SE66
- X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; [1995] 3 WLR 152; [1995] 3 All ER 353, HL(E)
- X v Federal Republic of Germany* (1965) 8 YB 158
- X v United Kingdom* (1977) 12 DR 73

- A *X and Y v Switzerland* (1977) 9 DR 57  
*Z v United Kingdom* (2001) 34 EHRR 97, GC

The following additional cases were cited in argument before the Supreme Court:

- A v HM Treasury (JUSTICE intervening)* [2010] UKSC 2; [2010] UKSC 5; [2010] 2 AC 534; [2010] 2 WLR 378; [2010] 4 All ER 745; [2010] 4 All ER 829, SC(E)
- B *A v United Kingdom* (2009) 49 EHRR 625, GC
- Al-Jedda v United Kingdom* (2011) 53 EHRR 789, GC
- Alejandro v Cuba* (1999) (Report No 86/99) 29 September 1999, IACHR
- Ambrose v Harris* [2011] UKSC 43; [2011] 1 WLR 2435, SC(Sc)
- Andronicou and Constantinou v Cyprus* (1997) 25 EHRR 491
- Angelova and Iliev v Bulgaria* (2007) 47 EHRR 236
- Ataman v Turkey* (Application No 46252/99) (unreported) given 27 April 2006, ECtHR
- C *Attorney General v Adelaide Steamship Co Ltd* [1923] AC 292, HL(E)
- Attorney General v The Queen* [2003] UKPC 22; [2003] EMLR 499, PC
- Baker v Quantum Clothing Group Ltd (formerly Taymil Ltd) (Guy Warwick Ltd intervening)* [2011] UKSC 17; [2011] 1 WLR 1003; [2011] ICR 523; [2011] 4 All ER 223, SC(E)
- Barber v Somerset County Council* [2004] UKHL 13; [2004] 1 WLR 1089; [2004] ICR 457; [2004] 2 All ER 385, HL(E)
- D *Ben el Mahi v Denmark* (Application No 5853/06) (unreported) given 11 December 2006, ECtHR
- Blain, Ex p; In re Sawers* (1879) 12 Ch D 522, CA
- Boumediene v Bush* (2008) 553 US 723
- Burdett v Abbot* (1812) 4 Taunt 401
- Burnip v Birmingham City Council* [2012] EWCA Civ 629; [2013] PTSR 117, CA
- Byrzykowski v Poland* (2006) 46 EHRR 675
- E *Cadder v HM Advocate (HM Advocate General for Scotland intervening)* [2010] UKSC 43; [2010] 1 WLR 2601, SC(Sc)
- Calvelli and Ciglio v Italy* Reports of Judgments and Decisions 2002-I, p 25
- Canada (Justice) v Khadr* 2008 SCC 28; [2008] 2 SCR 125
- Catan v Moldova and Russia* (2012) 57 EHRR 99, GC
- Celiberti de Casariego v Uruguay* (1981) 68 ILR 41
- Chagos Islanders v United Kingdom* (2012) 56 EHRR SE173
- F *Chalk v Ministry of Defence* [2002] EWHC 422 (QB)
- Civilian Casualty Court Martial, In re* (2011) 259 FLR 208
- Coard v United States* (1999) 9 BHRC 150
- Cyprus v Turkey* (1978) 13 DR 85
- D v East Berkshire Community Health NHS Trust* [2005] UKHL 23; [2005] 2 AC 373; [2005] 2 WLR 993; [2005] 2 All ER 443, HL(E)
- D v United Kingdom* (1997) 24 EHRR 423
- G *DH v Czech Republic* (2007) 47 EHRR 59, GC
- Donachie v Chief Constable of the Greater Manchester Police* [2004] EWCA Civ 405; [2004] Po LR 204; CA
- Drake, HMS* [1919] P 362, CA
- Dyer v Watson* [2002] UKPC DI; [2004] 1 AC 379; [2002] 3 WLR 1488, [2002] 4 All ER 1, PC
- Emms, Petitioner* [2007] CSOH 184; 2008 SLT 2; 99 BMLR 116, Ct of Sess
- H *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22; [1998] 2 WLR 350; [1998] 1 All ER 481, HL(E)
- Erikson v Italy* (1999) 29 EHRR CD152
- Fawdry v Ministry of Defence* [2003] EWHC 322 (QB)
- Georgia v Russia* (2011) 54 EHRR SE99

- Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15; [2004] 1 WLR 1057; [2004] 2 All ER 326, HL(E) A
- Hall (Arthur JS) & Co v Simons* [2002] 1 AC 615; [2000] 3 WLR 543; [2000] 3 All ER 673, HL(E)
- Hanks v Ministry of Defence* [2005] EWHC 3509 (QB)
- Hatton v Sutherland* [2002] EWCA Civ 76; [2002] ICR 613; [2002] 2 All ER 1, CA
- Hatton v United Kingdom* (2003) 37 EHRR 611, GC
- Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; [1963] 3 WLR 101; [1963] 2 All ER 575, HL(E) B
- Hermi v Italy* (2006) 46 EHRR 1115, GC
- Holland v Lampen-Wolfe* [2000] 1 WLR 1573; [2000] 3 All ER 833, HL(E)
- Hopps v Mott MacDonald Ltd* [2009] EWHC 1881 (QB)
- Hydra, The* [1918] P 78
- Ilaşcu v Moldova and Russia* (2004) 40 EHRR 1030, GC
- Isaak v Turkey* (Application No 44587/98) (unreported) given 28 September 2006 (Admissibility), 24 June 2008 (Merits), ECtHR C
- Isayeva v Russia* (2005) 41 EHRR 791
- Isayeva, Yusupova and Bazayeva v Russia* (Application Nos 57947/00, 57948/00 and 57949/00) (unreported) given 24 February 2005, ECtHR
- Jain v Trent Strategic Health Authority* [2009] UKHL 4; [2009] AC 853; [2009] 2 WLR 248; [2009] PTSR 382; [2009] 1 All ER 957, HL(E)
- James v United Kingdom* (1986) 8 EHRR 123 D
- Jordan v United Kingdom* (2001) 37 EHRR 52
- Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465; [2006] 2 WLR 570; [2006] 4 All ER 128, HL(E)
- Kilinç v Turkey* (Application No 40145/98) (unreported) given 7 June 2005, ECtHR
- Knightley v Johns* [1982] 1 WLR 349; [1982] 1 All ER 851, CA
- Kontrová v Slovakia* [2007] Inquest LR 286
- LCB v United Kingdom* (1998) 27 EHRR 212
- Lawson v Serco Ltd* [2006] UKHL 3; [2006] ICR 250; [2006] 1 All ER 823, HL(E) E
- Loizidou v Turkey* (1996) 23 EHRR 513 (Merits)
- López v Uruguay* (1981) 68 ILR 29
- MT (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; [2010] 2 AC 110; [2009] 2 WLR 512; [2009] 4 All ER 1045, HL(E)
- McCann v United Kingdom* (1995) 21 EHRR 97
- McCaughy, In re (Northern Ireland Human Rights Commission intervening)* [2011] UKSC 20; [2012] 1 AC 725; [2011] 2 WLR 1279; [2011] 3 All ER 607, SC(NI) F
- McClurg v Chief Constable of the Royal Ulster Constabulary* [2009] NICA 37, CA(NI)
- McGinley and Egan v United Kingdom* (1998) 27 EHRR 1
- Makaratzis v Greece* (2004) 41 EHRR 1092, GC
- Makharadze and Sikharulidze v Georgia* (Application No 35254/07) (unreported) given 22 November 2011, ECtHR
- Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2010] UKSC 45; [2011] 2 AC 104; [2010] 3 WLR 1441; [2011] PTSR 61; [2011] 1 All ER 285, SC(E) G
- Marckx v Belgium* (1979) 2 EHRR 330
- Martin v United Kingdom* (2006) 44 EHRR 652
- Matthews v Ministry of Defence* [2003] UKHL 4; [2003] 1 AC 1163; [2003] 2 WLR 435; [2003] ICR 247; [2003] 1 All ER 689, HL(E)
- Mitchell v Glasgow City Council* [2009] UKHL 11; [2009] AC 874; [2009] 2 WLR 481; [2009] PTSR 778; [2009] 3 All ER 205, HL(Sc) H
- Mousa v Secretary of State for Defence* [2010] EWHC 1823 (Admin) [2010] HRLR 860
- Nachova v Bulgaria* (2004) 39 EHRR 793
- New v Ministry of Defence* [2005] EWHC 1647 (QB)

- A *O v Ministry of Defence* [2005] EWHC 1645 (QB)  
*Officer L, In re* [2007] UKHL 36; [2007] 1 WLR 2135; [2007] 4 All ER 965, HL(NI)  
*Özgür Gündem v Turkey* (2000) 31 EHRR 1082  
*Pad v Turkey* (Application No 60167/00) (unreported) given 28 June 2007, ECtHR  
*Phelps v Hillingdon London Borough Council* [2001] 2 AC 619; [2000] 3 WLR 776;  
 [2000] 4 All ER 504, HL(E)  
*Powell v United Kingdom* (2000) 30 EHRR CD362
- B *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234; [1966] 3 All ER 77, HL(E)  
*R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147; [1999] 2 WLR 827; [1999] 2 All ER 97, HL(E)  
*R v Cambridge Health Authority, Ex p B* [1995] 1 WLR 898; [1995] 2 All ER 129, CA  
*R v Cook* [1998] 2 SCR 597
- C *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74; [1983] 2 WLR 321; [1983] 1 All ER 765, HL(E)  
*R (Al-Saadoon) v Secretary of State for Defence* [2009] EWCA Civ 7; [2010] QB 486; [2009] 3 WLR 957; [2010] 1 All ER 271, CA  
*R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] 1 AC 173; [2005] 2 WLR 1369; [2005] 4 All ER 545, HL(E)
- D *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees intervening)* [2004] UKHL 55; [2005] 2 AC 1; [2005] 2 WLR 1; [2005] 1 All ER 527, HL(E)  
*R (GC) v Comr of Police of the Metropolis (Liberty intervening)* [2011] UKSC 21; [2011] 1 WLR 1230; [2011] 3 All ER 859, SC(E)  
*R (Purdy) v Director of Public Prosecutions (Society for the Protection of Unborn Children intervening)* [2009] UKHL 45; [2010] 1 AC 345; [2009] 3 WLR 403; [2009] 4 All ER 1147, HL(E)
- E *R (Takoushis) v Inner North London Coroner* [2005] EWCA Civ 1440; [2006] 1 WLR 461, CA  
*Radcliffe v Ministry of Defence* [2009] EWCA Civ 635, CA  
*Rahman v Arearose Ltd* [2001] QB 351; [2000] 3 WLR 1184, CA  
*Renolde v France* (2008) 48 EHRR 969  
*Roche v United Kingdom* (2005) 42 EHRR 599, GC
- F *Rowley v Secretary of State for Work and Pensions* [2007] EWCA Civ 598; [2007] 1 WLR 2861, CA  
*Scholes v Secretary of State for the Home Department* [2006] EWCA Civ 1343; [2006] HRLR 1391, CA  
*Sejdovic v Italy* (Application No 56581/00) (unreported) given 1 March 2006, ECtHR  
*Sieminska v Poland* (Application No 37602/97) (unreported) given 29 March 2001, ECtHR
- G *Şimsek v Turkey* (Applications Nos 35072/97 and 37194/97) (unreported) given 26 July 2005, ECtHR  
*Slimani v France* (2004) 43 EHRR 1068  
*Smith and Grady v United Kingdom* (1999) 29 EHRR 493  
*Solomou v Turkey* (Application No 36832/97) (unreported) given 24 June 2008, ECtHR
- H *Stapley v Gypsum Mines Ltd* [1953] AC 663; [1953] 3 WLR 279; [1953] 2 All ER 478, HL(E)  
*Stephens v Malta (No 1)* (2009) 50 EHRR 144  
*Stokes v Guest Keen & Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776  
*Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] QB 405; [1984] 2 WLR 522; [1984] ICR 236; [1984] 1 All ER 881

- Three Rivers District Council v Governor and Company of the Bank of England* (No 3) [2001] UKHL 16; [2003] 2 AC 1; [2000] 2 WLR 1220; [2000] 3 All ER 1, HL(E)
- Uçar v Turkey* (Application No 52392/99) (unreported) given 11 April 2006, ECtHR
- Valentine v Ministry of Defence* [2010] CSOH 40; 2010 SLT 473, Ct of Sess
- Vo v France* (2004) 40 EHRR 259, GC
- Waters v Comr of Police of the Metropolis* [2000] 1 WLR 1607; [2000] ICR 1064; [2000] 4 All ER 934, HL(E)
- West v Ministry of Defence* [2005] EWHC 1646 (QB)
- Wright v Lodge* [1993] 4 All ER 299, CA
- The following cases are referred to in the judgment of Moses LJ in the Court of Appeal:
- Al-Jedda v United Kingdom* (2011) 53 EHRR 789, GC
- Al-Skeini v United Kingdom* (2011) 53 EHRR 589, GC
- Bankovic v Belgium* (2001) 11 BHRC 435, GC
- Barrett v Enfield London Borough Council* [2001] 2 AC 550; [1999] 3 WLR 79; [1999] 3 All ER 193, HL(E)
- Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; [1957] 2 All ER 118
- Brooks v Comr of Police of the Metropolis* [2005] UKHL 24; [2005] 1 WLR 1495; [2005] 2 All ER 489, HL(E)
- Chalk v Ministry of Defence* [2002] EWHC 422 (QB)
- Cyprus v Turkey* (1975) 2 DR 125
- Davies v Global Strategies Group (Hong Kong) Ltd* [2009] EWHC 2342 (QB)
- Fawdry v Ministry of Defence* [2003] EWHC 322 (QB)
- Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15; [2004] 1 WLR 1057; [2004] 2 All ER 326, HL(E)
- Hanks v Ministry of Defence* [2005] EWHC 3509 (QB)
- Hill v Chief Constable of West Yorkshire* [1989] AC 53; [1988] 2 WLR 1049; [1988] 2 All ER 238, HL(E)
- Hopps v Mott MacDonald Ltd* [2009] EWHC 1881 (QB)
- Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465; [2006] 2 WLR 570; [2006] 4 All ER 128, HL(E)
- Mulcahy v Ministry of Defence* [1996] QB 732; [1996] 2 WLR 474; [1996] 2 All ER 705, CA
- Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 (QB); *The Times*, 29 May 2003
- Phelps v Hillingdon London Borough Council* [2001] 2 AC 619; [2000] 3 WLR 776; [2000] 4 All ER 504, HL(E)
- Pritchard v United Kingdom* (Application No 1573/11) judgment pending
- R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26; [2008] AC 153; [2007] 3 WLR 33; [2007] 3 All ER 685, HL(E)
- R (Gentle) v Prime Minister* [2008] UKHL 20; [2008] AC 1356; [2008] 2 WLR 879; [2008] 3 All ER 1, HL(E)
- R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2010] UKSC 29; [2011] 1 AC 1; [2010] 3 WLR 223; [2010] 3 All ER 1067, SC(E)
- Rabone v Pennine Care NHS Trust (INQUEST intervening)* [2012] UKSC 2; [2012] 2 AC 72; [2012] 2 WLR 381; [2012] PTSR 497; [2012] 2 All ER 381, SC(E)
- Shaw Savill & Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344
- Soering v United Kingdom* (1989) 11 EHRR 439
- Stovin v Wise* [1996] AC 923; [1996] 3 WLR 388; [1996] 3 All ER 801, HL(E)
- Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening)* [2008] UKHL 50; [2009] AC 225; [2008] 3 WLR 593; [2008] 3 All ER 977, HL(E)

- A *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; [1995] 3 WLR 152; [1995] 3 All ER 353, HL(E)

The following additional cases were cited in argument before the Court of Appeal:

- Angelova and Iliev v Bulgaria* (2007) 47 EHRR 236  
*Anns v Merton London Borough Council* [1978] AC 728; [1977] 2 WLR 1024;  
 B [1977] 2 All ER 492, HL(E)  
*Ataman v Turkey* (Application No 46252/99) (unreported) given 27 April 2006, ECtHR  
*Baker v Quantum Clothing Group Ltd (formerly Taymil Ltd) (Guy Warwick Ltd intervening)* [2011] UKSC 17; [2011] 1 WLR 1003; [2011] ICR 523; [2011] 4 All ER 223, SC(E)  
*Banks v United Kingdom* (2007) 45 EHRR SE15  
 C *Bici v Ministry of Defence* [2004] EWHC 786 (QB); *The Times*, 11 June 2004  
*Bonz v France* (Application No 69869/01) (unreported) given 1 March 2005, ECtHR  
*Brown v Stott* [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC  
*Chember v Russia* (Application No 7188/03) (unreported) given 3 July 2008, ECtHR  
*D v United Kingdom* (1997) 24 EHRR 423  
*Demir v Turkey* (2008) 48 EHRR 1272, GC  
*Donachie v Chief Constable of the Greater Manchester Police* [2004] EWCA Civ  
 D 405; [2004] Po LR 204, CA  
*Drozd and Janousek v France and Spain* (1992) 14 EHRR 745  
*Finogenov v Russia* (2011) 32 BHRC 324  
*Georgia v Russia* (2011) 54 EHRR SE99  
*Hirsi Jamaa v Italy* (2012) 55 EHRR 627, GC  
*Isayeva v Russia* (2005) 41 EHRR 791  
*Issa v Turkey* (2004) 41 EHRR 567  
 E *Jones v Kaney* [2011] UKSC 13; [2011] 2 AC 398; [2011] 2 WLR 823; [2011] 2 All ER 671, SC(E)  
*Kalender v Turkey* (Application No 4314/02) (unreported) given 15 December 2009, ECtHR  
*Kilinc v Turkey* (Application No 40145/98) (unreported) given 7 June 2005, ECtHR  
*LCB v United Kingdom* (1998) 27 EHRR 212  
*Loizidou v Turkey* (1995) 20 EHRR 99  
 F *Lonrho plc v Tebbit* [1991] 4 All ER 973  
*MT (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; [2010] 2 AC 110; [2009] 2 WLR 512; [2009] 4 All ER 1045, HL(E)  
*McCann v United Kingdom* (1995) 21 EHRR 97  
*Öneryildiz v Turkey* (2004) 41 EHRR 325, GC  
*Osman v United Kingdom* (1998) 29 EHRR 245  
 G *Powell v United Kingdom* (2000) 30 EHRR CD362  
*R v Cambridge Health Authority, Ex p B* [1995] 1 WLR 898; [1995] 2 All ER 129, CA  
*R (Middleton) v West Somerset Coroner* [2004] UKHL 10; [2004] 2 AC 182; [2004] 2 WLR 800; [2004] 2 All ER 465, HL(E)  
*R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368; [2004] 3 WLR 58; [2004] 3 All ER 821, HL(E)  
 H *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323; [2004] 3 WLR 23; [2004] 3 All ER 785, HL(E)  
*Renolde v France* (2008) 48 EHRR 969  
*Roche v United Kingdom* (2005) 42 EHRR 599, GC  
*Rowling v Takaro Properties Ltd* [1988] AC 473; [1988] 2 WLR 418; [1988] 1 All ER 163, PC

- Savage v South Essex Partnership NHS Foundation Trust (MIND intervening)* [2008] UKHL 74; [2009] AC 681; [2009] 2 WLR 115; [2009] PTSR 469; [2009] 1 All ER 1053, HL(E) A
- Scholes v Secretary of State for the Home Department* [2006] EWCA Civ 1343; [2006] HRLR 1391, CA
- Stokes v Guest Keen & Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776
- Stoyanovi v Bulgaria* (Application No 42980/04) (unreported) given 9 November 2010, ECtHR B
- Taylor v United Kingdom* (1994) 79-A DR 127
- Tomašić v Croatia* [2012] MHLR 167
- X and Y v Switzerland* (1977) 9 DR 57

The following additional cases, although not cited, were referred to in the skeleton arguments before the Court of Appeal:

- A v United Kingdom* (2009) 49 EHRR 625, GC C
- Al-Saadoon and Mufdhi v United Kingdom* (2009) 49 EHRR SE95; (2010) 51 EHRR 212
- Álvarez Ramón v Spain* (Application No 51192/99) (unreported) given 3 July 2001, ECtHR
- Andronicou and Constantinou v Cyprus* (1997) 25 EHRR 491
- Attorney General v Adelaide Steamship Co Ltd* [1923] AC 292, HL(E) D
- British Broadcasting Corp'n v Sugar (No 2)* [2012] UKSC 4; [2012] 1 WLR 439; [2012] 2 All ER 509, SC(E)
- Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75; [1964] 2 WLR 1231; [1964] 2 All ER 348, HL(Sc)
- Calvelli and Ciglio v Italy* Reports of Judgments and Decisions 2002-I, p 25
- Caparo Industries plc v Dickman* [1990] 2 AC 605; [1990] 2 WLR 358; [1990] 1 All ER 568, HL(E) E
- Chahal v United Kingdom* (1996) 23 EHRR 413
- Ciechońska v Poland* (Application No 19776/04) (unreported) given 14 June 2011, ECtHR
- Cyprus v Turkey* (1976) 4 EHRR 482
- Cyprus v Turkey* (1992) 15 EHRR 509
- Drake, HMS* [1919] P 362, CA
- E v United Kingdom* (2002) 36 EHRR 519 F
- Edwards v United Kingdom* (2002) 35 EHRR 487
- Emms, Petitioner* [2007] CSOH 184; 2008 SLT 2, Ct of Sess
- Engel v The Netherlands (No 1)* (1976) 1 EHRR 647
- Entick v Carrington* (1765) 19 State Tr 1029
- Eremiasova and Pechova v Czech Republic* (Application No 23944/04) (unreported) given 16 February 2012, ECtHR
- Furdík v Slovakia* (2008) 48 EHRR SE 146 G
- Giuliani and Gaggio v Italy* (2011) 54 EHRR 278, GC
- HLR v France* (1997) 26 EHRR 29
- Hydra, HMS* [1918] P 78
- Isayeva v Russia* (2005) 41 EHRR 847
- Jordan v United Kingdom* (Application No 24746/94) (unreported) given 4 April 2000; (2001) 37 EHRR 52
- Keenan v United Kingdom* (2001) 33 EHRR 913 H
- Kemaloğlu v Turkey* (Application No 19986/06) (unreported) given 10 April 2012, ECtHR
- Kontrová v Slovakia* [2007] Inquest LR 286
- Leray v France* (Application No 44617/98) (unreported) given 16 January 2011, ECtHR

- A *McCaughy, In re (Northern Ireland Human Rights Commission intervening)* [2011] UKSC 20; [2012] 1 AC 725; [2011] 2 WLR 1279; [2011] 3 All ER 607, SC(NI)  
*Makaratzis v Greece* (Application No 50385/99) (unreported) given 20 December 2004, GC  
*Makharadze and Sikharulidze v Georgia* (2004) 41 EHRR 1092, GC  
*Mammadov v Azerbaijan* (Application No 4762/05) (unreported) given 17 December 2009, ECtHR
- B *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2010] UKSC 45; [2011] 2 AC 104; [2010] 3 WLR 1441; [2011] PTSR 61; [2011] 1 All ER 285, SC(E)  
*Marckx v Belgium* (1979) 2 EHRR 330  
*Mastromatteo v Italy* Reports of Judgments and Decisions 2002-VIII, p 151, GC  
*Matthews v Ministry of Defence* [2003] UKHL 4; [2003] 1 AC 1163; [2003] 2 WLR 435; [2003] ICR 247; [2003] 1 All ER 689, HL(E)
- C *Medvedyev v France* (2010) 51 EHRR 899, GC  
*Mitchell v Glasgow City Council* [2009] UKHL 11; [2009] AC 874; [2009] 2 WLR 481; [2009] PTSR 778; [2009] 3 All ER 205, HL(SC)  
*Molie v Romania* (Application No 13754/02) (unreported) given 1 September 2009, ECtHR  
*Mousa v Secretary of State for Defence* [2010] EWHC 1823 (Admin); [2010] HRLR 860
- D *Nachova v Bulgaria* (2005) 42 EHRR 933, GC  
*New v Ministry of Defence* [2005] EWHC 1647 (QB)  
*O v Ministry of Defence* [2005] EWHC 1645 (QB)  
*Öcalan v Turkey* (2005) 41 EHRR 985, GC  
*Officer L, In re* [2007] UKHL 36; [2007] 1 WLR 2135; [2007] 4 All ER 965, HL(NI)  
*Opuz v Turkey* (2009) 50 EHRR 695  
*Panaitescu v Romania* (Application No 30909/06) (unreported) given 10 April 2012, ECtHR
- E *Pereira Henriques v Luxembourg* (Application No 60255/00) (unreported) given 9 May 2006, ECtHR  
*R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin); [2010] HRLR 12, DC  
*R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51; [2004] 1 AC 653; [2003] 3 WLR 1169; [2003] 4 All ER 1264, HL(E)
- F *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees intervening)* [2004] UKHL 55; [2005] 2 AC 1; [2005] 2 WLR 1; [2005] 1 All ER 527, HL(E)  
*R (Takoushis) v Inner North London Coroner* [2005] EWCA Civ 1440; [2006] 1 WLR 461, CA  
*R (Wright) v Secretary of State for the Home Department* [2001] EWHC Admin 520; [2002] HRLR 1
- G *Rajkowska v Poland* (Application No 37393/02) (unreported) given 27 November 2007, ECtHR  
*Şimsek v Turkey* (Applications Nos 35072/97 and 37194/97) (unreported) given 26 July 2005, ECtHR  
*Slimani v France* (2004) 43 EHRR 1068  
*Tanribilir v Turkey* (Application No 21422/93) (unreported) given 16 November 2000, ECtHR  
*Trubnikov v Russia* (Application No 49790/99) (unreported) given 5 July 2005, ECtHR
- H *Uçar v Turkey* (Application No 52392/99) (unreported) given 11 April 2006, ECtHR  
*Valentine v Ministry of Defence* [2010] CSOH 40; 2010 SLT 473  
*Vearncombe v United Kingdom* (1989) 59 DR 186  
*Vo v France* (2004) 40 EHRR 259, GC  
*Watts v United Kingdom* (2010) 51 EHRR SE66

*West v Ministry of Defence* [2005] EWHC 1646 (QB)

*X v United Kingdom* (1978) 14 DR 31

*Younger v United Kingdom* (2003) 36 EHRR CD252

*Z v United Kingdom* (2001) 34 EHRR 97, GC

A

### APPEALS from Owen J

By a claim form issued on 29 January 2008 the claimant in the first action, Susan Smith, on her own behalf and as executrix of the estate of Phillip Hewett, deceased, brought an action against the defendant, the Ministry of Defence, alleging that the actions of the defendant's servants or agents had caused or contributed to the death of the deceased on 16 July 2005 as a result of which the claimant claimed, inter alia, damages for breaches of the deceased's rights under articles 2, 3 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. By an application notice filed on 31 January 2011 the defendant applied to strike out the claimant's statement of case under CPR r 3.4(2)(a) on the grounds that it disclosed no reasonable grounds for bringing the claim; alternatively for summary judgment under CPR r 24.2(a)(i) on the grounds that the claimant had no real prospect of succeeding on the claim and the defendant knew of no other compelling reason why the case should be disposed of at trial. On 30 June 2011 Owen J [2011] HRLR 795, inter alia, struck out the article 2 claims on the ground that the deceased were outside the jurisdiction of the Convention under article 1 at the time of their deaths.

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D

By a claim form issued on 5 August 2008 the claimant in the second action, Colin Redpath, on his own behalf and as executor of the will of Kirk James Redpath, deceased, brought an action against the defendant, the Ministry of Defence, alleging that the actions of the defendant's servants or agents had caused or contributed to the death of the deceased on 8 August 2007 as a result of which the claimant claimed, inter alia, damages for breaches of the deceased's rights under articles 2, 3 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. By an application notice filed on 28 January 2011 the defendant applied to strike out the claimant's statement of case under CPR r 3.4(2)(a) on the grounds that it disclosed no reasonable grounds for bringing the claim; alternatively for summary judgment under CPR r 24.2(a)(i) on the grounds that the claimant had no real prospect of succeeding on the claim and the defendant knew of no other compelling reason why the case should be disposed of at trial. On 30 June 2011 Owen J, inter alia, struck out the article 2 claims on the ground that the deceased were outside the jurisdiction of the Convention under article 1 at the time of their deaths.

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By a claim form issued on 28 February 2009 the claimants in the third action, Courtney Ellis, a minor by her litigation friend and paternal aunt, Karla Ellis, and Karla Ellis on her own behalf, brought an action against the defendant, the Ministry of Defence, alleging that the actions of the defendant's servants or agents had caused or contributed to the death of the deceased, Private Ellis, on 28 February 2006 as a result of which the claimant claimed (1) damages under the Law Reform (Miscellaneous Provisions) Act 1934; (2) damages for breaches of the deceased's rights under articles 2, 3 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms; (3) damages under the Fatal Accidents Act 1976; (4) damages for personal injury in negligence; (5) interest. By an

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A application notice filed on 28 January 2011 the defendant applied to strike out the claimants' statement of case under CPR r 3.4(2)(a) on the grounds that it disclosed no reasonable grounds for bringing the claim; alternatively for summary judgment under CPR r 24.2(a)(i) on the grounds that the claimants had no real prospect of succeeding on the claim and the defendant knew of no other compelling reason why the case should be disposed of at trial. On 30 June 2011 Owen J struck out the article 2 claims on the ground that the deceased were outside the jurisdiction of the Convention under article 1 at the time of their deaths but declined to strike out the common law claims in negligence, except for one claim concerning the re-introduction of Snatch Land Rovers which he held to come within the scope of combat immunity.

B By a claim form issued on 23 March 2006 in the fourth action (i) the first claimant, Deborah Allbutt, as widow and executrix of the estate of Stephen Allbutt, deceased, claimed damages on behalf of herself and the on behalf of the second and third claimants, Joshua Ashley Brassington and Connor Jacob Allbutt, as dependants of the estate of Stephen Allbutt, deceased, and (ii) the fourth and fifth claimants, Daniel Twiddy and Andrew Julien, claimed damages with interest on behalf of themselves, for personal injuries and consequential losses arising from the death and injuries sustained as a result of a "friendly fire" incident involving British Forces in Southern Iraq on 25 March 2003. The claimants alleged that that incident had been caused, *inter alia*, by the defendant's negligence and/or breach of obligations owed to the injured or deceased. By an application notice filed on 21 February 2011 the defendant applied to strike out the claimant's statement of case under CPR r 3.4(2)(a) on the grounds that the statement of case disclosed no reasonable grounds for bringing the claim; alternatively for summary judgment under CPR r 24.2(a)(i) on the grounds that the claimant had no real prospect of succeeding on the claim and the defendant knew of no other compelling reason why the case should be disposed of at trial. On 30 June 2011 Owen J, *inter alia*, declined to strike out the claims.

D By appellant's notices filed on 21 July 2011 the claimants in the first three actions appealed, pursuant to permission granted by the Court of Appeal (Dame Janet Smith) on 18 October 2011, against the judge's decision in so far as he had struck out their claims, on the following grounds, *inter alia*, (1) the judge had erred in striking out the claims under article 2 of the Convention on the basis that the claimants' relatives ("the soldiers") had died when on territory outside the jurisdiction of the United Kingdom and as such were not protected by the Human Rights Act 1998. The judge ought to have held that the soldiers were subject to United Kingdom jurisdiction, since they were operating under the authority and control of the United Kingdom at all times, in accordance with the judgments of the European Court of Human Rights in *Al-Skeini v United Kingdom* (2011) 53 EHRR 589 and *Al-Jedda v United Kingdom* (2011) 53 EHRR 789, in which it had been held that jurisdiction was established under article 1 of the Convention on the basis of state agent authority and control of individuals, which necessarily covered soldiers of a contracting state. (2) The judge had erred in rejecting the submission that the principle in *Soering v United Kingdom* (1989) 11 EHRR 439 in any event applied to decisions taken by contracting states within their territorial jurisdiction whereby individuals originally within their jurisdiction were put at foreseeable risk to their lives outside their jurisdiction; and a fortiori where

the individuals were under the control and authority of the state. The judge had erred in erroneously considering that that submission involved an extension of the *Soering* principle. (3) The judge had erred in holding that article 2 did not extend to cover operational decisions, in effect erroneously applying the principle of combat immunity to the positive obligation to protect life guaranteed by article 2. As the European Court of Human Rights had repeatedly emphasised, the positive obligation on states to protect life extended to cover the planning and implementation of security and military operations. (4) The judge had erred in striking out para 26.1 of the particulars of claim of the first claimant in the third case on the basis that it fell within combat immunity, whereas the decision to put Snatch Land Rovers back into front line use had been taken not in the battle or for the necessities of the battle but outside of active operations against the enemy. The judge, having recognised that the principle of combat immunity ought to be narrowly construed to exclude such decisions, had nevertheless proceeded to include just such a decision. In any event, the extent to which the decision had been in the battle was a matter of fact, which was more suitably determined by the trial judge.

By a respondent's notice filed on 17 November 2011 the defendant asked the court to uphold the judge's order on the different or alternative grounds that he ought to have granted the defendant's applications to strike out the claimants' claims under article 2 of the Convention or to enter summary judgment for the defendant on those claims on the following grounds. (1) The present cases were based on an alleged failure by the defendant to provide the deceased soldiers' commanders with medium armoured vehicles and they were not analogous to any of the situations in which either the European Court of Human Rights or the domestic courts had held that article 2 could give rise to an implied operational obligation to protect the life of a known individual. The implied operational obligation only arose in certain well-defined circumstances which did not exist in the present case. Further, there were compelling reasons for not imposing on states a positive obligation to take operational measures to protect members of the armed forces whose lives were at risk in the course of military operations from the risks that were inherent in them. (2) The substantive obligations which had been implied into article 2 (including any systems duty) did not extend to the imposition of obligations on a state in respect of the formulation or conduct of its political policies and/or military objectives and/or the funding and/or prioritisation of its military capabilities, which raised political issues not suitable for resolution by the courts. The judge had been wrong to consider that although the alleged failure to provide medium armoured vehicles for use by the deceased soldiers' commanders gave rise to questions which were essentially political in nature, in the light of *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1 he could not conclude that a positive systems duty could not arise on the pleaded facts. (3) The judge had failed to take any or any sufficient account of the particular complexity of the procurement decisions sought to be challenged in the present claims and other relevant factors which strongly militated against the imposition of a substantive duty under article 2.

By an appellant's notice filed on 20 July 2011 the defendant appealed, pursuant to permission granted by the Court of Appeal (Dame Janet Smith) on 18 January 2011, against the judge's decision in so far as he had refused

A to strike out the negligence claims, on the following grounds, inter alia.  
(1) The judge had erred in holding that the question whether negligence claims ought to be struck out or summary judgment entered should be approached on the basis that the doctrine of combat immunity was limited to situations in which the interests of the individual member of the armed services had of necessity to be subordinated to the attainment of the military objectives. That was too narrow an approach. The judge ought to have approached the matter on the basis of whether in the circumstances it would be fair, just and reasonable to impose a duty of care on the defendant in respect of the matters alleged. That approach required him to weigh up whether the interests of the whole community would be better served by not imposing the alleged duty of care, including in particular the suitability of the issues raised by the claims for resolution by the courts, and the potential adverse impact on vital public functions, as against the claimants' interests in pursuing their actions. (2) Although the judge had correctly recognised that issues of procurement and the allocation of finite resources could give rise to complex and difficult questions of an essentially political nature, he had erred in asking whether that of itself "demonstrated conclusively" that it would not be fair, just and reasonable to impose the duties of care for which the claimants contended. He ought to have weighed up all the factors pointing against the imposition of a duty of care, rather than considering whether each factor was of itself sufficiently compelling to preclude the imposition of such a duty. The judge had erred in holding that the answer as to whether it would be fair, just and reasonable to impose a duty of care was dependent upon disputed facts that would be resolved at trial. (3) The judge had erred in holding in the fourth case that establishing the necessary causal relationship between the facts alleged to amount to a breach of the duty of care and the deaths of the deceased would not involve an analysis or apportionment of blame, so that it could not be said that the imposition of the duty of care contended for was not in the wider interests of the community. To the contrary, in order to determine whether the alleged breach of duty had caused the deaths and injuries in question the court would have to examine in detail the circumstances which had led to the incident. The judge had further failed to have regard to the general conclusion that almost any allegation of failure on the battlefield could be re-packaged and represented as a alleged failure in respect of equipment and/or training. (4) The judge had erred in rejecting the submission that it would be very difficult, if not impossible, to set a standard of care which service personnel or the defendant could fairly be required to meet on the grounds that the claimants were not seeking to impose a standard of care in relation to events which had taken place in the heat of battle, or in circumstances where it was necessary to prepare troops and equipment speedily for deployment. The judge had failed to consider and/or had wrongly rejected the defendant's submission that if a court were to find that the defendant was under a duty of care to provide the equipment alleged it could not finally assess whether that duty had been breached. (5) The judge had erred in holding that the claims in the fourth case in respect of pre-deployment and in-theatre training should not be struck out and/or that summary judgment for the defendant should not be entered in respect of that part of the claim. The judge should have held that those claims in

respect of lack of training concerned the planning of and preparation for the particular military operations in which injury was sustained and accordingly fell within the doctrine of combat immunity. Similarly the judge should have held that the claims the fourth case in respect of pre-deployment training fell within the doctrine of combat immunity because the lack of opportunity for specific training was inextricably bound up with the speed and circumstances of deployment. The judge had erred in failing to take into account the lack of any realistic causative link between the Challenger claimants' pleaded case on training and the incident in question and/or failing to conclude that that pleaded case had no realistic prospect of success.

The facts are stated in the judgment of Moses LJ.

*Robert Weir QC* and *Jessica Simor* (instructed by *Hodge Jones & Allen*) for the claimants in the first three cases.

*Richard Hermer QC* and *Ben Silverstone* (instructed by *Leigh Day & Co*) for the claimants in the fourth case.

*James Eadie QC*, *Sarah Moore* and *Karen Steyn* (instructed by *Treasury Solicitor*) for the defendant.

19 October 2012. The following judgments were handed down.

#### MOSES LJ

1 Shortly after 1.15 a.m. on 16 July 2005, Private Hewett of the First Battalion, the Staffordshire Regiment, was on patrol in a Snatch Land Rover in Al Amarah in Iraq, when he was killed by an improvised explosive device detonated beside that vehicle. His mother claims that his death was the consequence of the failure of the Ministry of Defence (“MOD”) to provide suitably armoured equipment for soldiers on active service in Iraq, in breach of their obligation to safeguard his right to life, enshrined in article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998.

2 On 28 February 2006, Private Ellis of the Second Battalion, the Parachute Regiment, attached to the Royal Scots Dragoon Guards, was driving a Snatch Land Rover in the vicinity of Al Amarah when he, too, was killed by an improvised explosive device detonated beside his vehicle. His daughter and sister, the Ellis claimants, make a similar claim under article 2. They also allege negligence in failing to provide suitable equipment, and in particular, in re-introducing Snatch Land Rovers, despite having withdrawn them from use, following the death of Private Hewett and other soldiers seven months previously.

3 On 9 August 2007, Lance Corporal Redpath of the First Battalion, Irish Guards was killed when travelling north in a Snatch Land Rover, by an improvised explosive device detonated beside the vehicle. His father brings a similar claim under article 2.

4 These claims are known as the “Snatch Land Rover Claims”. In his judgment, dated 30 June 2011, [2011] HRLR 795, Owen J struck out the article 2 claims under CPR r 3.4(2)(a) on the grounds that the deceased were outwith the jurisdiction of the Convention under article 1 at the time they were killed. The claimants appeal. Owen J refused to strike out the claims made by the Ellis claimants in relation to a failure to provide suitable

A equipment, but struck out part of their claim relating to the re-introduction of the Snatch Land Rovers because it fell within the scope of “combat immunity”. The MOD appeals, asserting that all negligence claims should be struck out; Courtney and Karla Ellis cross-appeal.

B 5 On 25 March 2003, Corporal Allbutt, Trooper Twiddy and Trooper Julien, serving with the Royal Regiment of Fusiliers, in the course of the fourth day of the offensive on Basra, were in a Challenger II tank, hull down, at 1.15 a.m., when Corporal Allbutt was killed, and Troopers Twiddy and Julien injured by shells from a similar tank fired by soldiers of the First Battalion Black Watch. Corporal Allbutt’s wife and Troopers Twiddy and Julien bring claims in negligence alleging a failure to provide available technology to protect against the risk of “friendly fire”, and a failure to provide adequate vehicle recognition training.

C 6 These claims are known as the “Challenger Claims”. Owen J declined to strike them out. The MOD appeals.

#### *Convention jurisdiction*

D 7 Owen J founded his decision that the Snatch Land Rover claims did not relate to matters within the United Kingdom’s Convention jurisdiction on *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2011] 1 AC 1 and the authorities which it followed: *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2008] AC 153 and *Bankovic v Belgium* (2001) 11 BHRC 435.

E 8 Since his judgment, the Grand Chamber has delivered its judgment in *Al-Skeini v United Kingdom* (2011) 53 EHRR 589. It concluded that in south-east Iraq the United Kingdom had, through its soldiers, exercised such authority and control over civilians killed by United Kingdom soldiers as to bring those civilians within the United Kingdom’s Convention jurisdiction. This appeal, accordingly, raises the question whether this court is bound to follow the decision of the Supreme Court in the *Smith* case [2011] 1 AC 1, even if the decision of the Grand Chamber is authority for the claimants’ assertion of United Kingdom Convention jurisdiction over its armed forces when fighting abroad. If this court is bound by the *Smith* case, then the article 2 claims must fail. If a binding precedent is inconsistent with Strasbourg authority, this court must follow the binding precedent: *Kay v Lambeth London Borough Council* [2006] 2 AC 465, para 43.

F 9 But is the *Smith* case [2011] 1 AC 1 binding on this court? In the *Smith* case six out of nine of the Justices of the Supreme Court concluded that the Convention did not apply to the armed forces of the high contracting parties when operating outside their territories. The Snatch Land Rover claimants contend that the ruling of the Supreme Court was obiter. This gives rise to the interesting, if technical, question as to whether that ruling was part of the ratio decidendi in the *Smith* case and is, accordingly, binding on this court.

G 10 The decision in the *Smith* case was that a soldier who died on his army base was within the United Kingdom Convention jurisdiction and, accordingly, was entitled, during the course of an inquest, to the procedural protection implicit in article 2. The Secretary of State conceded that a fresh inquest should be held which satisfied the procedural requirements of article 2, particularly in relation to disclosure. Nevertheless, the Supreme Court chose to give its ruling on the question whether a soldier on military

service in Iraq outside his base was subject to the protection of the Human Rights Act 1998: Lord Phillips of Worth Matravers PSC, at para 2. A

11 Three of the justices suggested that the exercise on which the court had embarked was inappropriate. (Lord Walker of Gestingthorpe JSC, at para 129, referred to his disquiet that the court “may be going some way beyond what would be regarded as a proper exercise of judicial power”, Baroness Hale of Richmond JSC, at para 135, doubted whether “the interesting things which are said” were binding, and Lord Collins of Mapesbury JSC, at para 223, said that the question was academic and recognised the “obvious danger in giving what are in substance advisory opinions on hypothetical facts”.) Lord Phillips PSC, at para 2, thought the issue was “largely academic”, though the Secretary of State’s concessions did not bind the coroner; Lord Mance JSC, at para 159, said the issue was “of potential relevance” to the fresh inquest. B C

12 I do not accept, as Mr Weir QC, on behalf of the Snatch Land Rover claimants, suggested, that the Supreme Court had merely embarked on an exercise designed to engage in a dialogue with Strasbourg (as Lord Brown of Eaton-under-Heywood JSC, at para 114, had it in *Rabone v Pennine Care NHS Trust (INQUEST intervening)* [2012] 2 AC 72) and to communicate its views on the question of jurisdiction, in the hope that they would subsequently be adopted by the European Court of Human Rights (“ECtHR”). The jurisdiction issue was regarded as of public importance. It would be odd if the Supreme Court believed that it could satisfy the importance of the issue by a decision, after full argument, which was merely advisory and had no value as a precedent. D

13 It is somewhat difficult to understand the point of hearing full argument and of giving full and reasoned judgments on the jurisdiction issue unless the Supreme Court expected the lower domestic courts to follow their decision. It must have appreciated that Strasbourg might take a different view and Lord Phillips PSC, at para 60, recognised that the *Al-Skeini* case presented an opportunity for Strasbourg to do so. E

14 That recognition adds to the puzzle. Lord Phillips PSC, at para 60, acknowledged that Strasbourg was the proper tribunal to resolve the issue of jurisdiction. In the *Rabone* case [2012] 2 AC 72 Lord Brown JSC, at para 114, took the same view. If the issues as to jurisdiction, founded on the meaning of article 1, are ultimately for Strasbourg, then the “more fundamental reason” expressed by Lord Bingham of Cornhill in the *Kay* case for obliging lower domestic courts to follow the binding precedent of the Supreme Court, has no application. F

15 In the *Kay* case [2006] 2 AC 465 Lord Bingham identified, at para 55, “the more fundamental reason” for adherence to domestic rules of precedence as being the margin of appreciation accorded by Strasbourg to national authorities including national courts, who apply Strasbourg principles in the context of national legislation, law, practice and social conditions. But there is no margin of appreciation to be accorded to national authorities in relation to Convention jurisdiction. The jurisdictional scope of the Human Rights Act 1998 is identical to that of the Convention: *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153, paras 88, 150. H  
Either the United Kingdom armed forces are within the jurisdiction of the United Kingdom when serving outside its territory or they are not. That is a matter to be resolved by the correct interpretation of article 1. The effect of a

A margin of appreciation on domestic rules of precedence has no application to issues of jurisdiction. Accordingly, the more fundamental reason for applying those rules of precedence does not apply. This court is then left with the demands of certainty: per Lord Bingham [2006] 2 AC 465, para 43. But pending the authoritative ruling of Strasbourg on this issue, there can be no certainty.

B I6 I incline to the view that this court is not bound to follow the *Smith* case [2011] 1 AC 1 on a strict application of the rules of precedence, although, for reasons which will become apparent, it does not matter whether the *Smith* case is binding or not. Accordingly, I reach no concluded view. Even if it is not binding, non sequitur that the conclusion must be that the armed forces operating outside their base are within the United Kingdom Convention jurisdiction. Firstly, I suggest this court should be wary of reaching a view contrary to the considered conclusion reached by the majority in the Supreme Court. If the point of the exercise on which they embarked was merely to enter into dialogue with Strasbourg, it seems undesirable that lower courts should speak with a different voice: to whom is Strasbourg supposed to listen? That court is seized of the very issue decided by the *Smith* case in a pending application in *Pritchard v United Kingdom* (Application No 1573/11). It seems to me that, in those circumstances, this court should not differ from the *Smith* case unless the decision of the Grand Chamber in *Al-Skeini v United Kingdom* 53 EHRR 589 compels the conclusion that the decision of the majority of the Supreme Court was wrong.

E I7 Secondly, the claimants' invitation to this court not to follow the *Smith* case [2011] 1 AC 1 assumes that the *Smith* case is inconsistent with *Al-Skeini v United Kingdom* 53 EHRR 589. But whilst the issue in the *Smith* case was whether the United Kingdom forces operating outside its territorial jurisdiction were within its Convention jurisdiction, that was not the question in *Al-Skeini v United Kingdom*. *Al-Skeini v United Kingdom* related to Convention jurisdiction over third parties killed by armed forces acting outside their base. It remains to be resolved whether it follows that because civilians killed by armed forces of a high contracting party are within that country's Convention jurisdiction, the armed forces are themselves within that jurisdiction.

F I8 I turn, firstly, to the majority's construction of article 1 in the *Smith* case [2011] 1 AC 1. Article 1 provides: "The high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention."

G I9 Their starting point was that article 1 reflects the territorial notion of jurisdiction. Other bases of jurisdiction are exceptional and require special justification: see Lord Collins JSC, at para 305, and Lord Phillips PSC, at para 47, founded on the decision of the Grand Chamber in *Bankovic v Belgium* 11 BHRC 435, para 61. This view was based in part on an analysis of the travaux préparatoires: see Lord Collins JSC [2011] AC 1, para 303. H They were of particular importance since article 1 is not to be interpreted as a living instrument: see Lord Collins JSC [2011] 1 AC 1, para 303 and the *Bankovic* case, at para 65. This essentially territorial notion of jurisdiction is consistent with public international law and state practice: see Lord Collins JSC, at paras 241–246, and the *Bankovic* case, at para 60.

20 Accordingly, to extend Convention jurisdiction beyond the territorial jurisdiction of the high contracting parties is exceptional and requires special justification: see Lord Collins JSC, at para 258, and the *Bankovic* case, at para 67. The majority found no sufficient reason for such an extension in relation to the United Kingdom armed forces operating outside their base, and good policy reasons for not doing so: see Lord Phillips PSC, at paras 52–60, and Lord Hope of Craighead DPSC, at paras 91, 104. Paramount in the justices’ reasoning was their opinion that issues relating to armed hostilities were essentially non-justiciable and outwith the scope of questions likely to arise in relation to the article most likely to be invoked, namely article 2: see Lord Roger of Earlsferry JSC, at paras 12, 127 and Lord Collins JSC, at para 308.

21 The conclusion of the majority in the *Smith* case found support not only in Strasbourg jurisprudence (apart from the one passage in the decision of the commission in *Cyprus v Turkey* (1975) 2 DR 125, para 8, cited and dismissed by Lord Phillips PSC at para 49) but also in *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153 in the House of Lords and *R (Gentle) v Prime Minister* [2008] AC 1356, see Lord Phillips PSC, at paras 21, 31. It is this reliance on the *Al-Skeini* case [2008] AC 153 which, so the claimants contend, affords an opportunity for this court to disagree with the *Smith* case [2011] 1 AC 1. Now that the Grand Chamber has reached a conclusion contrary to that of the House of Lords, it is submitted that this court should, like the Supreme Court in the *Smith* case, follow the sign-post of *Al-Skeini v United Kingdom* 53 EHRR 589, even though, after the Grand Chamber decision, it points in the opposite direction.

22 It is, therefore, of value to consider whether the Grand Chamber’s decision in *Al-Skeini v United Kingdom* does require this court to rule that the armed forces in the instant appeal come within the scope of the United Kingdom Convention jurisdiction.

23 It is important, at the outset of any analysis of *Al-Skeini v United Kingdom*, to recognise that the Grand Chamber did not abandon the principle that Convention jurisdiction under article 1 is primarily territorial and that extension outside territorial boundaries requires exceptional circumstances which justify extraterritorial jurisdiction: see paras 131 and 132.

24 The Grand Chamber identified two features which, in combination, justified extraterritorial jurisdiction. The first is where state agents use force to bring an individual under the control of the state’s authorities: see para 136. The examples given by the Grand Chamber were all of those detained and for that reason under the control of the state. “What is decisive in such cases is the exercise of physical power and control over the person in question”, see para 136.

25 The claimants based their submissions on the paragraph which followed that expression of decisive principle:

“137. It is clear that, whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation under article 1 to secure to that individual the rights and freedoms under section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights

A can be ‘divided and tailored’.” (The reference to the division of rights is noted as a departure from *Bankovic* 11 BHRC 435, para 75.)

26 That passage is no authority for the proposition that because a state’s armed authorities may be said to be under the control and authority of the state it follows that they too are within the scope of the state’s Convention jurisdiction. As the Grand Chamber makes clear in the preceding paragraph and, in particular, in the passage I have cited from  
 B para 136, its reference to “authority and control” is a reference to bringing individuals within the power and control of a state in circumstances analogous to detention and internment. In essence the source of the Convention jurisdiction is the action of the state in bringing an individual within its custody, power and control. It is worth recalling that in a  
 C subsequent case, *Al-Jedda v United Kingdom* (2011) 53 EHRR 789, it is that very para 136 which is cited as authority for the proposition that where internment took place in a detention facility, the internee was within the authority and control of the United Kingdom and thus within its jurisdiction: see para 85.

27 The armed forces of a state are under a state’s authority and control, but not in the sense described by the Grand Chamber. The civilians killed  
 D came within the United Kingdom’s Convention jurisdiction by analogy with the situation of those detained in custody. It is not possible to extend that analogy to the armed forces who killed them.

28 Often the state’s authority and control in the sense of *Al-Skeini v United Kingdom* 53 EHRR 589 will be exercised through the use of force by the state’s armed forces, but the relevance of the armed forces is only that it is through their agency that an individual is brought into the custody of the  
 E state and thereby within its Convention jurisdiction. That is the inwardness of the title given by the Grand Chamber to paras 133–137: “*General principles relevant to jurisdiction under article 1 of the Convention: state agent authority and control.*” The heading is a reference not merely to authority and control but that which is exercised by a state agent. It does not matter whether the state is acting through soldiers, a member of MI6 or a  
 F freelance bounty hunter. The situation of the civilians killed in security operations in Basra was analogous to those detained in custody; there is no analogy to be drawn with the armed forces who killed them.

29 The second feature which the Grand Chamber identified was the effective control exercised over the area in question: see paras 138–148. That affords no support to the claimants. It was the combination of both those two elements, the control over the individual and over the territory,  
 G which led to the Grand Chamber’s conclusion, at para 149:

“It can be seen, therefore, that following the removal from power of the Ba’ath regime and until the accession of the Interim Government, the United Kingdom . . . assumed authority and responsibility for the maintenance of security in South-East Iraq. In these exceptional  
 H circumstances, the court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of article 1 of the Convention.”

30 Analysis of the Grand Chamber’s reasoning demonstrates that jurisdiction was not conferred, *ratione personae*, that is, by the status of armed forces owing allegiance to one of the high contracting parties, but by virtue of the exercise of physical power and control by the state through the agency of its armed forces in an area over which it exercised effective control. On that analysis, *Al-Skeini v United Kingdom* is not inconsistent with the *Smith* case. It is no impediment to following the ruling of the Supreme Court.

31 The claimants advance a separate argument based on *Soering v United Kingdom* (1989) 11 EHRR 439. The claimants sought to liken the case of armed forces sent to fight abroad to the German whose extradition was sought by United States of America where he faced a capital sentence: this would have been a violation of article 3. Owen J said all that needs saying in order to reject that argument [2011] HRLR 795, para 45: “There is nothing in the ECtHR jurisprudence since *Soering* to suggest that it is a principle of general application outside forcible removal cases.”

32 For those reasons I would dismiss the appeal in relation to article 2. The soldiers did not fall within the scope of the United Kingdom’s Convention jurisprudence. That conclusion makes it unnecessary to resolve the detailed and lengthy debate as to the extent of the substantive obligations in relation to safeguarding the lives of the armed forces implicit within article 2. The rival arguments were described with clarity in Owen J’s judgment between paras 49–81. They may be resolved in the application of the *Pritchard* case.

### *Negligence*

33 It is important to identify the nature of the claims in negligence brought by the Challenger claimants and by two of the Snatch Land Rover claimants, the Ellis claimants. Although the soldiers died whilst serving in battle, the claims do not allege any act or omission of members of the armed forces acting in the heat of battle.

34 The Challenger and the Ellis claimants allege that the MOD was in breach of its duty of care as an employer to provide safe equipment and technology. The Challenger claimants allege that the tank in which they were killed or injured should have been equipped with available technology to protect them adequately against the risk of friendly fire.

35 The Ellis claimants allege that the MOD was negligent in:

“26.1 Failing to limit the patrol to better/medium/heavily armoured vehicles. Snatch Land Rovers had been taken out of front line use in Al Amarah following the death of soldiers in a Snatch Land Rover hit by an [improvised explosive device] on 16 July 2005 and should not have been put back into such use.

“26.2 Failing to provide any or any sufficient better or medium armoured vehicles for use by [Private Ellis]’s commander. Had such vehicles been provided, they would or should have been used for [Private Ellis]’s patrol in place of the Snatch Land Rovers.

“26.3 Failing to ensure that Element A had been fitted to the [engine control module] on [Private Ellis]’s Snatch Land Rover. [Private Ellis] should not have been permitted to leave the camp without this equipment.”

36 Additionally, the Challenger claimants allege that the MOD failed to provide adequate vehicle recognition training.

A 37 As I have already recalled, the MOD appeals against Owen J's refusal to strike out the Challenger claims and paras 26.2 and 26.3 of the claim of the Ellis claimants; the Ellis claimants appeal against his order that para 26.1 should be struck out because it fell within the scope of "combat immunity". The MOD's appeal rests on two submissions: first, that it is not fair, just or reasonable to impose on the MOD a duty of care in the provision of suitable equipment, and secondly, that the principle of combat immunity precludes the imposition of any duty of care in the circumstances of these claims.

B 38 It is beyond dispute, and the MOD did not purport to dispute, that it owed a duty of care at common law to members of the armed forces as their employer. Nor was it disputed that health and safety provisions contained in sections 2–4 and 6–7 of the Health and Safety Act at Work 1974 and in regulations made under section 15 imposed statutory duties on the MOD. For example, it is required to secure suitable personal protective clothing and adequate information, instruction and training about such equipment under the Personal Protective Equipment at Work Regulations 1992 (SI 1992/2966), to construct or adapt work equipment so that it is fit for purpose under the Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306), to make a suitable and sufficient assessment of risks to health and safety, and to secure adequate health and safety training on recruitment, or when exposed to new or increased risks, under the Management of Health and Safety at Work Regulations 1999 (SI 1999/3242). The territorial scope of those regulations is limited to Great Britain: section 84(1), extended to Northern Ireland by Order in Council under section 84(3) of the 1974 Act.

E 39 The employer's duty of care, at common law and statutory duties imposed under regulation, have been deployed against the MOD in numerous previous cases: in *Chalk v Ministry of Defence* [2002] EWHC 422 (QB) (injury caused by avalanche to member of a RAF rescue team on training exercise), *Fawdry v Ministry of Defence* [2003] EWHC 322 (QB) (ill-fitting helmet causing injury on exercise to trainee at Sandhurst), *Hanks v Ministry of Defence* [2005] EWHC 3509 (QB) (injury to neck caused by breach of the 1992 Regulations during naval flight training exercise), *Hopps v Mott MacDonald Ltd* [2009] EWHC 1881 (QB) (electrical engineer, working under the protection of the MOD in Iraq, injured by an improvised explosive device due to failure to provide suitable armoured vehicle). Most of these cases failed on their facts, but their significance lies in the MOD's acceptance of the duties alleged.

G 40 Nowhere are the principles more clearly explained and established than in Owen J's judgment in *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 (QB); *The Times*, 29 May 2003. The MOD was held to be in breach of duty in failing to provide safe systems of work, by, inter alia, monitoring the health of service personnel so as to prevent psychiatric injury and to secure the diagnosis and treatment of psychiatric illness.

H 41 But the instant cases are different, submits the MOD. The claims relating to inadequate equipment give rise to issues of procurement. Such issues involve consideration of questions as to the scarcity and allocation of resources, and questions of policy. The courts ought not to trespass, warns the MOD, into such territory, which is the province of those in command, and of politicians answerable to Parliament. In short, no duty of care should

be imposed in relation to the procurement of equipment; such issues are not justiciable. A

42 It is necessary to appreciate that this argument is deployed by the MOD to deny the very existence of any duty of care in relation to the procurement of equipment subsequently used in conflict, however long before the conflict was envisaged and however remote the decisions were from the heat and smoke of battle. The authorities on which Mr Eadie QC, on behalf of the MOD, relies, relate to policy reasons for rejecting the existence of any duty of care. The underlying principle is that: B

“the courts will not permit a claim for negligence to be brought where a decision on the existence of negligence would involve the courts considering matters of policy raising issues which they are ill-equipped and ill-suited to assess and on which Parliament could not have intended that the courts would substitute their views for the views of ministers or officials”: see *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 580H–581A, per Lord Hutton. C

Lord Hutton referred by way of example to discretionary decisions on the allocation of scarce resources (at p 581D–F) and the weighing of competing financial or economic interests (at p 582D–E). Accordingly, the existence of a statutory power under the Highways Act 1980 to remove a potential source of danger did not give rise to a common law duty of care because the creation of such a duty would expose budgetary decisions to judicial enquiry: see *Stovin v Wise* [1996] AC 923. D

43 Similarly, although primarily because of fears of detriment to the investigation of crime, public policy dictates that the police owe no duty to victims or witnesses when investigating suspected crimes: see *Hill v Chief Constable of West Yorkshire* [1989] AC 53, *Brooks v Comr of Police of the Metropolis* [2005] 1 WLR 1495. In *Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening)* [2009] AC 225, despite the fact that the Human Rights Act 1998 gives rise to a cause of action for violation of a fundamental right, the wider public interest demanded the maintenance of the “full width” of the *Hill* principle: para 139. E

44 Mr Eadie contends that issues relating to procurement of equipment for the armed services raise the very issues of the allocation of scarce resources and policy decisions which precluded the imposition of a duty of care on public authorities in those cases. He invoked those passages in the *Smith* case [2011] 1 AC 1 which refer to the essentially political nature of the issues as a reason for rejecting claims by members of the armed services under article 2. They can be summarised by reference to the judgment of Lord Rodger JSC, at para 127: F

“But questions, say, as to whether it would have been feasible to fit stronger protection, or as to why those vehicles, as opposed to vehicles with stronger protection, were originally purchased by the Ministry of Defence . . . all raise issues which are essentially political rather than legal. That being so, a curious aspect of counsel’s submissions before this court was the complete absence of any reference to Parliament as the forum in which such matters should be raised and debated and in which ministers should be held responsible.” H

A 45 There is, however, a fatal flaw in the MOD's argument, as  
Mr Hermer QC for the Challenger claimants demonstrated, in submissions,  
the force of which was matched only by their brevity. The MOD proceeds  
from the wrong starting point. It seeks to persuade the court that it should  
not recognise the existence of any duty in relation to the procurement of  
equipment. All the cases on which it relies are dealing with circumstances  
B where no duty of care had hitherto been recognised. The claimants in those  
cases were asserting a new or novel duty, or, for example in the highway  
cases, a new duty to be inferred at common law from the existence of a  
power conferred by statute.

C 46 But in the instant cases, the claimants have no need to make any such  
assertion. The duty of care owed by the MOD, as employer, to the members  
of the armed forces, as employees, *does* exist and has been recognised,  
without demur, by the courts. It includes a duty to provide safe systems of  
work and safe equipment, as I have demonstrated. There was no suggestion  
that the courts were ill-equipped to deal with such issues, or that the  
resolution of the claims would be detrimental to the troops. The question  
whether a duty of care owed by the MOD to armed forces should be  
recognised has long since been answered. There is no basis for asking it in  
D the instant appeals.

E 47 There are many cases where courts have been able to assess the  
discretionary judgments of public authorities and have not, by reason only  
of the existence of a discretion, refused to recognise the existence in tort of a  
duty to take care: see *Craig, Administrative Law*, 5th ed (2003), p 898 cited  
with approval by Lord Steyn in *Gorringe v Calderdale Metropolitan*  
*Borough Council* [2004] 1 WLR 1057, para 5.

F 48 In such cases the mere fact that questions might arise as to policy,  
and as to the allocation of scarce resources, did not preclude the existence  
of a duty to take care. In the *Barrett* case [2001] 2 AC 550 the House of  
Lords accepted that the existence of a duty of care owed by a local  
authority to a child in care was arguable even though the case raised policy  
questions as to defensive conduct by care authorities, and the exercise of  
discretion in a difficult field: see Lord Slynn of Hadley at p 568E–G and  
Lord Hutton at p 591A–D. In *Phelps v Hillingdon London Borough*  
*Council* [2001] 2 AC 619, the House of Lords recognised a duty of care in  
the provision of education where difficult professional judgement is  
required.

G 49 The mere existence of discretionary powers usually conferred by  
statute, and inevitably involving policy considerations, does not preclude the  
existence of liability in negligence. This is implicit in the courts' reminder  
(which was, at one time, in danger of being forgotten) that: it is neither  
helpful nor necessary "to introduce public law concepts as to the validity of a  
decision into the question of liability at common law for negligence": see  
Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council*  
H [1995] 2 AC 633, 736F, cited by Lord Steyn in the *Gorringe* case [2004]  
1 WLR 1057 and Lord Hutton in the *Barrett* case [2001] 2 AC 550. If no  
such duty existed in cases involving questions of policy and discretionary  
power, then the possibility of introducing public law concepts into questions  
of liability in negligence would simply not arise.

50 Two recent examples can be found in *Davies v Global Strategies Group (Hong Kong) Ltd* [2009] EWHC 2432 (QB) (a husband shot by insurgents when travelling in Iraq) and *Hopps v Mott MacDonald Ltd* [2009] EWHC 1881 (QB) (electrical engineer injured by an improvised explosive device in Basrah, whose security was the responsibility of the MOD). Those cases make good the proposition that the mere fact that policy questions, including the allocation of scarce resources, might surface, affords no warrant for denying the existence of a duty of care.

51 That is not to say that such policy issues are irrelevant. On the contrary, they are relevant but *not* to the question whether there exists a duty of care but as to whether it has been breached. They are relevant to the standard of care to be applied: see *Craig, Administrative Law*, 5th ed, p 898, the *Phelps* case [2001] 2 AC 619, 672H–673A, per Lord Clyde, the *Barrett* case per Lord Slynn [2001] 2 AC 550, 572F. The standard against which the acts or omissions are to be measured takes account of the complexities of the decisions made, the detriment to those involved in the decision-making process, and the scarcity of resources: cases involving the medical profession are rarely free from such considerations, leading to the imposition of the high standard in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

52 The fact that policy considerations and the scarcity of resources will arise in relation to allegations of negligence against the MOD provides no basis for distinguishing the MOD from any other public body in relation to the duty it owes to its employees. That no such distinction is to be drawn is further underlined by the absence of any statutory prohibition against making claims for negligence.

53 The exemption from liability of the Crown in tort under section 2 of the Crown Proceedings Act 1947 by virtue of section 10 was abolished by section 1 of the Crown Proceedings (Armed Forces) Act 1987. It is significant to recall that the effect of section 10 may be revived by order made by the Secretary of State under section 2(2) of the 1987 Act, but not unless

“it appears to him expedient to do so— (a) by reason of any imminent national danger or of any great emergency that has arisen; or (b) for the purposes of any warlike operations in any part of the world outside the United Kingdom or of any other operations which are or are to be carried out in connection with the warlike activity of any persons in any such part of the world.”

The section allows for orders to be applied to particular circumstances and persons by section 2(3), and no order made can have retrospective effect by section 2(4).

54 These provisions show that Parliament cannot have thought that the imposition of liability in negligence was detrimental to the troops, and the absence of any application for an order shows that the Secretary of State did not think it necessary, in order to protect his ministry or the high command, to abrogate the laws of tort when conflict in Iraq was imminent. It is difficult to see why, in those circumstances, the courts should be expected to know better.

55 It is not possible to distinguish consideration by the courts of the duty of care owed by the MOD to its employees, the armed forces, from the

A duty owed by other public authorities, save in one well-recognised respect: combat immunity. But the very existence of that immunity fortifies the view that in respect of actions or omissions outside its scope there is no reason to preclude an action in negligence.

B 56 The second limb of the MOD's argument sought to bring these actions within the scope of "combat immunity". It sought to rely on the fact that the deaths and injuries undoubtedly occurred in combat. Whether that fact alone justifies the immunity depends on its rationale.

57 The rationale justifying the immunity was explained in *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344, 361:

C "It could hardly be maintained that during an actual engagement with the enemy or a pursuit of any of his ships the navigating officer of a King's ship of war was under a common law duty of care to avoid harm to such non-combatant ships as might appear in the theatre of operations . . . It would mean that the courts could be called upon to say whether a soldier on the field of battle or the sailor fighting on his ship might reasonably have been more careful to avoid causing civil loss or damage. No one can imagine a court undertaking the trial of such an issue, either during or after a war."

D 58 Owen J explained [2011] HRLR 795, para 87ff how the immunity was applied by the Court of Appeal in *Mulcahy v Ministry of Defence* [1996] QB 732, in the first Iraq conflict, to strike out a claim based on the negligence of a gun commander and the failure of the MOD to provide a safe system of work. Neill LJ at p 749 referred to "battle conditions", Sir Iain Glidewell at p 750G to "the course of hostilities".

E 59 It is in the emphasis on "actual engagement" or "the heat of battle" that the rationale lies. Courts cannot adjudicate on decisions made in active operations. The rationale extends to the full width of active operations. But the question whether a decision alleged to have been negligent was a decision made during the course of active operations is a question of fact to be determined at trial.

F 60 Whatever the meaning and extent of "active operations" the allegations of breach are *said* to relate to acts or omissions which occurred well before, and in some cases many years before, the active operations in which death or injury were caused. The acts or omissions are alleged not to have occurred during the course of active operations. That allegation is a question of fact requiring the court's judgment on the evidence and it must be assumed to be correct for the purpose of striking the claims out or summary judgment. It is not possible, without considering the evidence, to say, as a matter of legal principle, precisely when "active operations" start and when they finish. Nor should a court do so. The extent of that concept will vary from conflict to conflict and from case to case. The instant cases may not fall within the scope of active operations, as Owen J recognised. Adjudication on those acts or omissions, and decisions by the court as to whether they were negligent cannot assume, at this stage, that they will involve any judgment on decisions made during active operations.

H 61 It is true that in relation to issues of causation, a decision will have to be made as to events on the battlefield leading to the deaths or injuries. But such findings of fact may not trench upon decisions made in active

operations. They may require no judgment by the court on the actions of service personnel on active service or of the MOD during the course of the active operations. They may require no more than findings of fact as to what happened. Such findings do not undermine the rationale for combat immunity. After all, there are many situations in which public inquiries, boards of inquiry or inquests are required to find facts relating to events in active operations.

62 It seems to me that both the equipment and training claims arguably fall outwith the scope of combat immunity. The MOD seeks to prove too much. If, without hearing any evidence, these claims fall within the scope of combat immunity it must be because the decisions as to the equipment to be provided and the training to be given relate to active operations to be conducted sometime in the future. If that is the extent of the reach of the immunity, it is difficult to see how anything done by the MOD falls beyond it.

63 Owen J expressed reservations about the allegation that Private Ellis was permitted to leave camp without Element A fitted (in para 26.3 of the particulars of claim). Rightly, in my view, he thought [2011] HRLR 795, para 111 that the issue as to whether that was a decision made in the heat of battle, or was attributable to earlier acts or omissions, should be left to trial. But it seems to me that he did err in striking out the allegation at para 26.1: see paras 112, 113. That did not, as explained to this court, relate to decisions made in active operations, and does not purport to do so. It is an allegation of failures of the MOD away from the theatre of war. Accordingly, if that allegation is made good, it is arguable that it would not fall within the scope of combat immunity. I would allow the appeal in relation to Private Ellis in that respect. There may be factual questions arising as to the circumstances in which decisions were made which would permit the MOD to raise the immunity at trial, on a particular view of the facts, as Owen J recognised in relation to deficiencies in in-theatre training: see para 111. But it is premature to strike out the claims on that basis.

64 I would dismiss the MOD's appeal and allow the cross-appeal by the Ellis claimants.

**RIMER LJ**

65 I agree.

**LORD NEUBERGER OF ABBOTSBURY PSC**

66 I also agree.

*Claimants' appeals in relation to article 2 claims and defendant's appeal in relation to negligence claims dismissed with costs.*

*Appeal of claimants in third action against striking out of part of their negligence claim allowed with costs.*

*Permission to appeal in relation to jurisdictional reach of article 2 only.*

SUSAN DENNY, Barrister

## A APPEALS

Pursuant to permission to appeal granted by the Court of Appeal on 19 October 2012 and by the Supreme Court (Lord Hope of Craighead DPSC, Baroness Hale of Richmond and Lord Mance JJSC) on 19 December 2012 and 24 January 2013 respectively, the claimants in the first and third actions appealed on the issues relating to article 2 of the Convention and the defendant appealed in the third and fourth actions on the issues relating to the negligence claims. The issues for the Supreme Court raised in the statements of facts and issues agreed between the parties were (1) whether at the time of their deaths, Private Ellis and Private Hewett were within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention; (2) whether the court was satisfied on the facts as pleaded that the defendant did not owe a duty to those deceased soldiers at the time of their deaths pursuant to article 2 of the Convention; (3) in relation to the third and fourth actions, whether, on the facts pleaded in the particulars of claim, the complaints of negligence were covered by the doctrine of combat immunity and/or it would otherwise not be fair just and reasonable to impose a duty of care on the defendant in the circumstances of the case. JUSTICE and the Equality and Human Rights Commission intervened in the appeal by permission of the court.

D The facts are stated in the judgment of Lord Hope of Craighead DPSC.

*Robert Weir QC and Jessica Simor* (instructed by *Hodge Jones & Allen LLP*) for the claimants in the first and third actions.

In concluding in *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2011] 1 AC 1 that British soldiers serving the United Kingdom overseas did not fall within its jurisdiction for purposes of article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Supreme Court, by a majority, wrongly considered that the proper approach was for them (1) to construe article 1 as not having any further reach than that already established by the Grand Chamber of the European Court of Human Rights in *Bankovic v Belgium* (2001) 11 BHRC 435 and (2) to follow that authority, in line with *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2008] AC 153. In consequence the majority wrongly held that (1) the contracting states would not have intended the Convention to apply to their armed forces when operating outside their own territories; (2) the principle of territorial jurisdiction, which was central to the Convention, did not admit of any exception which could be applied to the case; (3) certain decisions, notably *Issa v Turkey* (2004) 41 EHRR 567, were inconsistent with the *Bankovic* case and should not be applied; and (4) the rights and freedoms defined in section 1 of the Convention provided a whole package which could not be divided and tailored in accordance with the circumstances of the extraterritorial act in question. [Reference was made to *X v United Kingdom* (1977) 12 DR 73; *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745; *Vearncombe v United Kingdom* (1989) 59 DR 186; *Cyprus v Turkey* (1975) 4 EHRR 482; *Cyprus v Turkey* (1978) 13 DR 85; *McGinley and Egan v United Kingdom* (1998) 27 EHRR 1; *W v Ireland* (1983) 32 DR 211; *Loizidou v Turkey* (1996) 23 EHRR 513 (Merits); *Ilaşcu v Moldova and Russia* (2004) 40 EHRR 1030; *Al-Saadoon and Mufdhi v Turkey* (2009) 49 EHRR SE95; *Öcalan v Turkey* (2005)

41 EHRR 985; *Medvedyev v France* (2010) 51 EHRR 899; *Markovic v Italy* (2006) 44 EHRR 1045; *Sejdovic v Italy* (Application No 56581/00) (unreported) given 1 March 2006; *Issa v Turkey* 41 EHRR 567; *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 and *Stephens v Malta (No 1)* (2009) 50 EHRR 144.]

The guidance given in the subsequent judgment of the Grand Chamber in *Al-Skeini v United Kingdom* (2011) 53 EHRR 589, which supports the dissent of the minority (Lord Mance JSC, with whom Baroness Hale of Richmond and Lord Kerr of Tonaghmore JJSC agreed) in the *Smith* case, has now established, in particular at paras 133–142, a clear and consistent line of European Court of Human Rights authority which should be followed: see also *Hirsi Jamaa v Italy* (2012) 55 EHRR 627 and *Catan v Moldova and Russia* (2012) 57 EHRR 99. The approach applied in *Soering v United Kingdom* (1989) 11 EHRR 439 is not in point. The broad principles now enunciated by the Grand Chamber are not inconsistent with the *Bankovic* case. They provide that a contracting state’s jurisdiction, being primarily territorial, is presumed to be exercised normally throughout that state’s territory; but that acts of the state which are performed or produce effects outside its territory can, only in exceptional circumstances, constitute an exercise of extraterritorial jurisdiction within article 1. Two main exceptions are recognised. The first arises where there is state agent authority and control, producing effects outside the state’s own territory: see *Drozdz and Janousek v France and Spain* 14 EHRR 745, para 91; *X v Federal Republic of Germany* (1965) 8 YB 158; *Cyprus v Turkey* 4 EHRR 482; *X and Y v Switzerland* (1977) 9 DR 57 and *W v Ireland* 32 DR 211. [Reference was made to *Chagos Islanders v United Kingdom* (2012) 56 EHRR SE173.] That exception includes authority and control exerted through legislation, executive act or judicial control, and will encompass (a) acts of a state’s diplomatic or consular agents who are present in a foreign territory under international law and exert authority and control over others; (b) where, through consent, invitation or acquiescence of the government of that territory, the state exercises all or some of the public powers normally to be exercised by its government in accordance with custom, treaty or other agreement: see *Gentilhomme, Schaff-Benhardji and Zerouki v France* (Applications Nos 48205/99, 48207/99 and 48209/99) (unreported) given 14 May 2002 and *X and Y v Switzerland* 9 DR 57; (c) in certain circumstances where the use of force by a state’s agents operating outside its territory brings the individual under the control or power of that state’s authorities: see *Cyprus v Turkey* 4 EHRR 482, para 8; *Öcalan v Turkey* 41 EHRR 985; *Issa v Turkey* 41 EHRR 567; *Al-Saadoon and Mufdhi v Turkey* 49 EHRR SE95 and *Medvedyev v France* 51 EHRR 899. Whenever the state, through its agents, exercises control and authority over an individual and thus jurisdiction, the state is under an obligation under article 1 to secure the rights and freedoms in section 1 of the Convention which are relevant to that individual’s situation and in that sense the Convention rights can be divided and tailored; the fact that the contracting state may be unable to secure all the rights and freedoms within a particular area, or to a particular individual, does not bar the establishment of extraterritorial jurisdiction under article 1: see *Drozdz and Janousek v France and Spain* 14 EHRR 745; *X v United Kingdom* 12 DR 73; *X and Y v Switzerland* 9 DR 57; *Martin v United Kingdom* (2006) 44 EHRR 652; *M v Denmark* (1992)

A 73 DR 193; *X and Y v Switzerland* 9 DR 57; *Solomou v Turkey* (Application No 36832/97) (unreported) given 24 June 2008; *Isaak v Turkey* (Application No 44587/98) (unreported) given 28 September 2006 (Admissibility); *Issa v Turkey* 41 EHRR 567; and *Pad v Turkey* (Application No 60167/00) (unreported) given 28 June 2007 and *Stephens v Malta (No 1)* 50 EHRR 144. Article 1 jurisdiction, founded on that exception, is established where the relevant state action affects the rights of an individual

B in circumstances where a jurisdictional link between that individual and the state exists: it is not enough that the individual is merely affected by the act or omission. Whether jurisdiction is so established will depend on the particular facts of the case: see the *Al-Skeini* case, at paras 149–150 and *Ben el Mahi v Denmark* (Application No 5853/06) (unreported) given 11 December 2006.

C The second main exception arises where, as a consequence of lawful or unlawful military action, a contracting state exercises effective control over an area outside its own national territory, either through its own armed forces or through a subordinate local administration. In such a case “the whole package principle” applies and the contracting state is responsible for securing the entire range of substantive Convention rights. None of the exceptional bases of extraterritorial jurisdiction under article 1 is confined to the espace juridique, although where extraterritorial jurisdiction is exercised within the espace juridique it may be to fill a vacuum which would otherwise exist. The possibility for a state to extend territorial jurisdiction under article 56 (ex rel article 63) has no bearing on this issue.

D It is not open to the defendant to submit that the jurisprudence is still not sufficiently clear. The Grand Chamber in the *Al-Skeini* case has now put the clear and constant jurisprudence beyond doubt and the apparent inconsistencies, identified by the majority in the *Smith* case [2011] 1 AC 1, do not arise when state agent authority and control, as now explained, are properly applied. The court should now depart from its judgment in the *Smith* case: see *R (Purdy) v Director of Public Prosecutions (Society for the Protection of Unborn Children intervening)* [2010] 1 AC 345. A previous decision based on a view of the European Court of Human Rights jurisprudence which no longer appears correct must be departed from: see *In re McCaughey (Northern Ireland Human Rights Commission intervening)* [2012] 1 AC 725; *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2011] 2 AC 104 and *Ambrose v Harris* [2011] 1 WLR 2435.

F A sufficient jurisdictional link is established in the present case to show that the soldiers, relatives of the present claimants, were acting under exclusive de facto and de jure control of the United Kingdom to which they had sworn allegiance. The premise on which the Grand Chamber in the *Al-Skeini* case found jurisdiction was that the soldiers were themselves within the jurisdiction of the sending state and thus able to exercise public powers and bring others within it. It is not in dispute that British soldiers are subject to the complete authority and control of the United Kingdom: legislative, executive and judicial. There is therefore no logical basis or political reason for holding that jurisdiction extends to British soldiers for every purpose save for the Convention. But the Convention is to be interpreted objectively and according to the natural meaning of its wording; the idea that the signatories could not have intended to agree to such jurisdiction is

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unsustainable: see article 31(1) of the Vienna Convention on the Law of Treaties (1969) (Cmnd 4140); the *Bankovic* case; *Andrejeva v Latvia* (2005) 51 EHRR 650; *Marckx v Belgium* (1979) 2 EHRR 330; *Demir v Turkey* (2008) 48 EHRR 1272; Council of Ministers of European Union Recommendation 24 February 2010 and the Explanatory Memorandum; Parliamentary Assembly of the Council of Europe on Recommendation 1742 (2006) on the Human Rights of Members of the Armed Forces (CM/Rec (2020) 4).

Article 2 is to be interpreted in light of the subsequent agreements, by way of resolutions and recommendations, made by the United Kingdom after adopting the Convention: see article 31(3) of the Vienna Convention on the Law of Treaties and *Marckx v Belgium* 2 EHRR 330. Those agreements show a clear intention to include soldiers in the protection afforded under article 2. The state's positive obligation to protect life arises by way of implication from numerous contexts and derives from the state's duty under article 1 to secure rights which are real and effective to everyone within their jurisdictions: see *Watts v United Kingdom* (2010) 51 EHRR SE66. Soldiers do not forgo their human rights when they enlist. There is no "carve out" which would enable the state to say that no duty arises under article 2, albeit that the duty may be modified in the military context, given the inherently dangerous nature of military activities. A policy argument that soldiers on military operations are to be excluded from a positive obligation to protect their lives would amount to unlawful discrimination and be untenable: see *MT (Algeria) v Secretary of State for the Home Department* [2010] 2 AC 110, para 210. It is not unreasonable to impose such obligations on the state; reliance on any analogy with article 8 and the concomitant case law (see *Roche v United Kingdom* (2005) 42 EHRR 599) is misplaced. While reasonableness and proportionality are relevant to the assessment of whether the positive obligation has been discharged (see *Renolde v France* (2008) 48 EHRR 969), there is no additional requirement, where the state would otherwise be under a positive obligation, for the court to be satisfied that it is reasonable and proportionate for the obligation to exist. There is no basis in the Convention jurisprudence for a test analogous to the "fair, just and reasonable" analysis expounded in respect of imposition of a duty of care: see *Caparo Industries Ltd v Dickman* [1990] 2 AC 605. Only if there is a specific derogation under article 15 of the Convention, or the state entered a reservation at the time of signing the Convention, can soldiers' rights be in any way curtailed beyond the limits imposed by the specific exigencies of military duties: see *Georgia v Russia* (2011) 54 EHRR SE99, para 73; *Isayeva v Russia* (2005) 41 EHRR 791, paras 173–175, 178, 189, 191, 198–201 and *Isayeva, Yusupova and Bazayeva v Russia* (Applications Nos 57947/00, 57948/00 and 57949/00) (unreported) given 24 February 2005, paras 170–173, 199.

The state's duty is to take all reasonable measures to protect the lives of its soldiers and not to put them at unreasonable or unnecessary risk: see *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647; *Şen v Turkey* (Application No 45824/99) (unreported) given 8 July 2003; the *R (Smith)* case [2011] 1 AC 1, paras 79–80, 87, 106–108, 118–122, 137, 146, 195–196, 216–217, 309, 340; *Mitchell v Glasgow City Council* [2009] AC 874, para 66; *Rabone v Pennine Care NHS Trust (INQUEST intervening)* [2012] 2 AC 72, paras 22–24; Council of Ministers of European Union Recommendation

A 24 February 2010 and the Explanatory Memorandum; Parliamentary Assembly of the Council of Europe on Recommendation 1742 (2006) on the Human Rights of Members of the Armed Forces (CM/Rec (2020)). The soldiers in the current cases, acting on behalf of the state for whom the state necessarily assumes responsibility, fall within that category (see the *Rabone* case) whether they are conscripts or volunteers: see *Kilinç v Turkey* (Application No 40415/98) (unreported) given 7 June 2005 and *Ataman v Turkey* (Application No 46252/99) (unreported) given 27 April 2006.

B The duty under article 2 applies in a wide range of circumstances and requires systems or rules to be put in place to ensure that the ordinary duties of soldiers, to the extent that they involve inherently dangerous activities, do not give rise to unnecessary risks to life: see *Stoyanovi v Bulgaria* (Application No 42980/04) (unreported) given 9 November 2010, para 61; *Şen v Turkey* (Application No 45824/99) (unreported) given 8 July 2003 and *Kalender v Turkey* (Application No 4314/02) (unreported) given 15 December 2009, paras 43–47. The obligation also arises to take reasonable steps to mitigate a heightened risk resulting from the violent or unlawful acts of third parties: see *Stoyanovi v Bulgaria* (unreported) given 9 November 2010, para 62 and *LCB v United Kingdom* (1998) 27 EHRR 212, para 36. Provisioning, procurement, planning and training programmes must be adequate and proper systems must be in place for their care; where they are deployed on active service they must be properly equipped and capable of defending themselves: see *Chember v Russia* (Application No 7188/03) (unreported) given 3 July 2008, para 50; *Savage v South Essex Partnership NHS Foundation Trust (MIND intervening)* [2009] AC 681, paras 34–38, 82–84; *A v Secretary of State for the Home Department* [2005] 2 AC 68, paras 39–42; *X v United Kingdom* 12 DR 73; the *R (Smith)* case [2011] 1 AC 1, para 10; *R (Gentle) v Prime Minister* [2008] AC 1356, para 19; *McCann v United Kingdom* (1995) 21 EHRR 97, paras 147–150, 192–194, 201–203; *Andronicou and Constantinou v Cyprus* (1997) 25 EHRR 491, paras 171–172, 181, 186; *Finogenov v Russia* (2011) 32 BHRC 324, paras 207–209, 212–216, 243, 266; *Nachova v Bulgaria* (2004) 39 EHRR 793, paras 99–109; *Şimsek v Turkey* (Applications Nos 35072/97 and 37194/97) (unreported) given 26 July 2005, paras 99–109; *Giuliani and Gaggio v Italy* (2011) 54 EHRR 278, paras 99–113 and *Makaratzis v Greece* (2004) 41 EHRR 1092, paras 54–55, 58–59, 66–71, 73, 77.

E While the executive may, in some circumstances, be afforded a margin of appreciation in the context of the assessment of reasonableness (see *Finogenov v Russia* 32 BHRC 324), in the context of human rights adjudication, the executive does not enjoy exclusive constitutional competence for certain categories of decisions that immunise it from review, even though the courts may pay respectful attention to the primary decision-maker in areas of special competence such as military decision-making. Having regard to the obligations imposed by article 1, the European Court of Human Rights jurisprudence knows no forbidden areas of review: see *R (Gentle) v Prime Minister* [2008] AC 1356, paras 18, 60; *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, paras 9, 20; *A v United Kingdom* (2009) 49 EHRR 625; *Issa v Turkey* 41 EHRR 567 and the *R (Smith)* case [2011] 1 AC 1, para 196. Allegations of systemic violations of article 2 committed in the course of armed conflict are justiciable: see *Mousa v*

*Secretary of State for Defence* [2010] HRLR 860 and section 6 of the Human Rights Act 1998. A

The procedural requirements of article 2 also impose an investigatory obligation on the state (see *Angelova and Iliev v Bulgaria* (2007) 47 EHRR 236) to ensure effective domestic criminal, civil and disciplinary laws to protect the right to life: see *Jordan v United Kingdom* (2001) 37 EHRR 52; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 and *R (Gentle) v Prime Minister* [2008] AC 1356. Where deaths arise in the context of state operations, including military activities, the question is whether the state did all that could reasonably be expected of it to protect its soldiers' lives; if it is arguable that the state failed in that obligation, the procedural requirements of article 2 must be met by the appropriate investigation, irrespective of whether the issue is labelled "political" and the state lacks the necessary resources: see *McCann v United Kingdom* 21 EHRR 97, paras 192–194; *Finogenov v Russia* 32 BHRC 324, paras 212–216, 243; *Al-Skeini v United Kingdom* 53 EHRR 589, paras 162–163, 164 and *Makharadze and Sikharulidze v Georgia* (Application No 35254/07) (unreported) given 22 November 2011. B C

The submissions made on behalf of the claimants in the fourth action are adopted on the negligence claims raised by the claimants in the third action. The defendant, as employer, owes a duty of care to its soldiers to protect them from injury. Part of that general duty is a duty to provide safe equipment and a safe system of work, unless the principle of combat immunity applies. That principle does not apply here. The correct starting point is the existence of an orthodox duty of care between an employer and employee. Since the claimants can found their case on that duty it is unnecessary to contend for an incremental increase in the law of negligence: contrast *Stovin v Wise* [1996] AC 923 and *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, para 38. [Reference was made to *D v East Berkshire Community Health NHS Trust* [2005] 2 AC 373.] If the court were to consider that an employee's claim would not stand, it would have to be certain that the issue was entirely outside the remit of the common law duty and that the claim was therefore not justiciable: see *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 586–587 and *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, 653, 672. D E F

No sharp-edged distinction can be drawn between policy and operational decisions. In consequence there is no clear line beyond which it can confidently be said that a negligence claim cannot be run. No intention to exclude such a claim can be derived from the statutory context: see section 2 of the Crown Proceedings (Armed Forces) Act 1987. The existence of a no-fault compensation scheme within the armed forces does not militate against imposition of a duty of care. Parliament, in the 1987 Act, elected to provide a right for a soldier to sue the Ministry of the Defence, and, in doing so, did not consider that such a duty would be detrimental to the troops. Parliament plainly intended that there should be a right to damages for negligence in addition to any claim a soldier had under the no-fault scheme: see *Rowley v Secretary of State for Work and Pensions* [2007] 1 WLR 2861. The nature of the particulars of claim and the defence in the present cases do not touch prominently on issues of policy or military judgment and they can proceed to trial on the facts. G H

A The doctrine of combat immunity is shorthand for recognition that in certain circumstances and, on the basis of public policy, no relevant duty arises. In those circumstances, even though the requirements of foreseeability and proximity are made out, it is not fair, just and reasonable that such a duty should arise. Since the soldiers are owed a duty of care under orthodox principles, it is for the defendant (a) to establish that public

B policy operates to deny the existence of the duty and (b) that such immunity is proportionate: see *Jones v Kaney* [2011] 2 AC 398, para 113; *Arthur JS Hall & Co v Simons* [2002] 1 AC 615; *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 110, 169 and *Bici v Ministry of Defence* [2004] EWHC 786 (QB) at [104]; *The Times*, 11 June 2004. The rationale behind the doctrine relates to the adverse impact that imposing a duty of care in a combat

C role: see *Mulcahy v Ministry of Defence* [1996] QB 732; *Groves v Commonwealth of Australia* (1982) 150 CLR 113 and *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344, 361.

The scope of combat immunity has consistently been drawn tightly around the heat of battle: see *The Hydra* [1918] P 78; *HMS Drake* [1919] P 362; *Attorney General v Adelaide Steamship Co Ltd* [1923] AC 292; the

D *Shaw Savill* case; the *Bici* case and *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 (QB). There is no good reason for the doctrine to apply to anterior breaches of duty which relate to actions taken or decisions made outside combat. In such cases imposition of a duty of care will not impact adversely on the conduct of military operations and the court is well placed to assess liability. The assessment whether the impugned decisions or actions fall within the scope of the immunity is fact-sensitive. On the

E pleadings in the claim in the third action none of the issues bears on the heat of battle so does not fall within it. [Reference was made to *Hughes v National Union of Mineworkers* [1991] ICR 669.]

The doctrine cannot be extended so as to extinguish part of the orthodox common law duty of care by taking a broad view of what is in the interests of the community at large. In any event the court is not well placed to make

F such an assessment. That is better left to Parliament: see *Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening)* [2009] AC 225, para 102. Parliament has spoken here, through the 1987 Act, and has expressly left the door open for negligence claims by soldiers against their employers.

The court should exercise great caution before accepting that litigation arising out of combat operations would be liable to inhibit decision-making by commanders on the ground or undermine troop morale and confidence in their commanding officers. The reverse is the more likely result since recognition of a duty of care should improve standards and encourage enlistment: see *Waters v Comr of Police of the Metropolis* [2000] 1 WLR 1607, 1619–1620; contrast *Hill v Chief Constable of West Yorkshire* [1989] AC 53 and *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619.

H *Richard Hermer QC* and *Ben Silverstone* (instructed by *Leigh Day & Co*) for the claimants in the fourth action.

The common law and statute have long imposed private law duties to protect soldiers from foreseeable risk of injury. Health and safety legislation applies to members of the armed forces throughout the United Kingdom,

imposing a range of duties on the defendant in relation to, inter alia, the provision of suitable protective personal and work equipment and the securing of adequate training for health and safety purposes. The nexus of common law and statutory duties has formed the foundation of a number of claims for negligence and breach of statutory duty brought by service personnel against the defendant: see the Health and Safety at Work etc Act 1974; Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306); Personal Protective Equipment at Work Regulations 1992 (SI 1992/2966); *Radclyffe v Ministry of Defence* [2009] EWCA Civ 635; *Chalk v Ministry of Defence* [2002] EWHC 422 (QB); *Fawdry v Ministry of Defence* [2003] EWHC 322 (QB); *Hanks v Ministry of Defence* [2005] EWHC 3509 (QB); *Valentine v Ministry of Defence* 2010 SLT 473; *Hopp v Mott MacDonald Ltd* [2009] EWHC 1881 (QB); *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 (QB); *O v Ministry of Defence* [2005] EWHC 1645 (QB); *West v Ministry of Defence* [2005] EWHC 1646 (QB); *New v Ministry of Defence* [2005] EWHC 1647 (QB) and *Rowley v Secretary of State for Work and Pensions* [2007] 1 WLR 2861. The claimants are not therefore asking the court to recognise a novel duty of care.

The claims are not about battlefield failures; they are exclusively premised on allegations of breach of duty that pre-dated active operations and occurred away from active combat operations. They involve no allegation of negligence against any member of the armed forces involved in combat operations and the trial court will not proceed to attribute liability in such circumstances. Since the case reaches the court by way of an appeal against a refusal to strike out the claim or enter summary judgment for the defendant, it will be necessary for the defendant to satisfy the high test set out in CPR rr 3.4(2) and 24.2: see *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 and *Barrett v Enfield London Borough Council* [2001] 2 AC 550. Since the defendant has submitted no supporting evidence, the court has no evidential basis for testing its factual assertions as to the nature and complexity of the questions arising for decision at trial and the harm to battlefield effectiveness which would be caused by the hearing of the claim.

Since the defendant presumably accepts that the imposition of blanket immunities to classes of tort claims under the principle of combat immunity might well infringe a litigant's rights under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the more nuanced assessment as to whether it would be fair, just and reasonable to impose such a duty is to be preferred: see *Osman v United Kingdom* (1998) 29 EHRR 245 and *Z v United Kingdom* (2001) 34 EHRR 97. In any event the combat immunity jurisprudence is strictly confined to cases where the breach of duty occurs during the heat of battle: it is the locus of the breach, not of the consequential damage that determines its application. Accordingly the task for the defendant is to demonstrate that the combat immunity principle applies to the claims but rather that it should be materially extended beyond previously recognised boundaries.

The source in English law of the combat immunity principle is *Mulcahy v Ministry of Defence* [1996] QB 732: see *Matthews v Ministry of Defence* [2003] 1 AC 1163. Neither the *Mulcahy* case, nor any of the relevant

A case law, is authority for the defendant's far broader proposition that as a result of combat immunity no duty of care will lie whenever the proximate cause of death or injury is due to active military operations against the enemy. Such an extension is not sanctioned by public policy. The court's approach is to apply a far more circumscribed principle, very narrowly defined and tightly applied, aimed at ensuring that the exclusion achieves no less, but certainly no more, than is justified by its purpose, namely, to prevent harm to the armed forces by the attribution of civil liability in respect of acts taken or omissions made in the heat of battle. Accordingly the limits of the principle are jealously confined: see *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344; *Groves v Commonwealth of Australia* (1982) 150 CLR 113; *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75; *Hughes v National Union of Mineworkers* [1991] ICR 669; *Bici v Ministry of Defence* The Times, 11 June 2004 and *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 (QB). Contrast *The Hydra* [1918] P 78. [Reference was made to *Entick v Carrington* (1765) 19 State Tr 1029.]

Combat immunity is justified by the imperative that, in the public interest, service personnel should not go into action accompanied by the law of civil negligence and courts should not be called on to say whether a soldier on the field of battle might reasonably have been more careful to avoid causing civil loss or damage. The doctrine is an exception to the dual principles that the first claim on the loyalty of the law is that wrongs should be remedied and that the common law does not recognise the defence of state necessity. The principle therefore takes effect only in so far as is required to ensure that members of the armed forces do not face civil liability in respect of their acts or omissions in the heat of battle. "Heat of battle" comprises all active operations against the enemy and it may be fact sensitive whether a particular operation falls within the term. Breaches of duty taking place outside the scope of active operations against the enemy do not fall within the principle because it is not necessary to exclude them from civil liability in order to safeguard the public interest which the immunity protects. The need to protect service personnel acting in the heat of battle does not therefore apply to the defendant in the course of its decision-making outside combat operations.

The consequence of the defendant's submission would be that any claim of negligence in respect of equipment or training is barred from the courts' consideration if that equipment or aspect of training could be deployed in active combat. On that basis the principle of combat immunity would extinguish the defendant's duty of care in respect of such equipment or training whatever the circumstances of the injury. No evidential basis is put forward for that submission. In any event, as in the present case, the suitability of equipment or training is routinely considered by investigative and judicial authorities. The existence of a duty of care in respect of peacetime acts or omissions of the defendant would be beneficial to morale and may well spur improved standards: see *Smith and Grady v United Kingdom* (1999) 29 EHRR 493; the *Groves* case, 150 CLR 113, 137, per Brennan J; *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, 672 and *Barrett v Enfield London Borough Council* [2002] 1 AC 550, 568.

The terms of section 2 of the Crown Proceedings (Armed Forces) Act 1987 lend support on policy grounds to the narrow interpretation of the immunity, focussing on the circumstances of the breach rather than the injury. Given the Secretary of State's power under the Act to exclude liability in a broad range of circumstances, there can be no need for the court to extend the immunity in the far-reaching way contended for by the defendant. The courts below were therefore correct to reject that contention and to conclude that, in so far as any dispute existed as to whether a particular alleged breach of duty fell within the immunity, that was a matter to be determined at trial.

Courts have long recognised that the Ministry of Defence owes a duty to service personnel to protect them from foreseeable harm. The task for the defendant is therefore to persuade the court, without evidence, that the law should not be developed so as to limit that protection. The question whether the existence of a duty of care should be endorsed by the courts under the fair, just and reasonable test related, unlike the present cases, to a new duty of care. Application of the line of authority based on *Caparo Industries plc v Dickman* [1990] 2 AC 605 is not relevant: see *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Stovin v Wise* [1996] AC 923; *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, 672; *Barrett v Enfield London Borough Council* [2001] 2 AC 550; *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057; *Brooks v Comr of Police of the Metropolis* [2005] 1 WLR 1495; *Waters v Comr of Police of the Metropolis* [2000] 1 WLR 1607 and *Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening)* [2009] AC 225. [Reference was made to *Donachie v Chief Constable of the Greater Manchester Police* [2004] Po LR 204 and *Knightley v Johns* [1982] 1 WLR 349.]

It is not open to the court at the preliminary stage to conclude that the relationship between the defendant and the service personnel is such that no duty of care can exist in respect of the development of equipment or the provision of training. Even if the authorities deriving from the *Caparo* case were relevant, they are unhelpful to the defendant, in particular, because in cases where a defendant has assumed responsibility for a claimant courts have stressed that the fair, just and reasonable test is not necessary to establish a duty of care: see the *Brooks* case [2005] 1 WLR 1495, para 20; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 and the *Van Colle* case [2009] AC 225, para 135. In providing equipment and training to its forces the defendant plainly assumes a responsibility for them, and accordingly that test is otiose.

The principle of combat immunity and the Secretary of State's power under the 1987 Act to immunise acts of the Ministry of Defence where they relate to wartime operations provide sufficient protection. No broader immunity can be achieved by application of the fair, just and reasonable analysis. The fair, just and reasonable test should rule out the claim on the basis, as the defendant asserts, that it raises complex questions of policy, expert military judgment and the prioritising of scarce resources on which the court should not adjudicate. However the nature of the claim relates to allegations of negligent failings in respect of both equipment and training. It will be a matter of evidence whether those allegations raise such issues. In any event the court will not surrender

A jurisdiction over a claim simply because of a need to adjudicate on questions of policy, expert judgment or discretionary resource allocation: see *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057; *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, 672 and *Barrett v Enfield London Borough Council* [2002] 1 AC 550. The standard of care owed by an employer to an employee is eminently capable of application to the evaluation of steps taken or not in the defendant's development of its protective equipment and target identification training whether injury is sustained on the training ground or the battlefield: see *Stokes v Guest Keen & Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776; *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] QB 405; *Baker v Quantum Clothing Group Ltd (formerly Taymil Ltd) (Guy Warwick Ltd intervening)* [2011] 1 WLR 1003; *Hatton v Sutherland* [2002] ICR 613, approved in *Barber v Somerset County Council* [2004] 1 WLR 1089; *King v Sussex Ambulance Service NHS Trust* [2002] ICR 1413; *McClurg v Chief Constable of the Royal Ulster Constabulary* [2009] NICA 37 and *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 (QB).

D The courts are not institutionally or constitutionally incapable of adjudicating on allegations of defective equipment or training; see the health and safety legislation long in place and the numerous claims already brought against the defendant. The fair, just and reasonable principle accordingly adds nothing to the defendant's case and forms no barrier to the establishment of an arguable duty of care.

E *Helen Mountfield QC* and *Elizabeth Prochaska* (instructed by *Equality and Human Rights Commission, Corporate Law and Governance*) for the second intervener.

F Members of the armed forces are under the effective jurisdictional authority and control of the state and should be subject to the obligations and benefits imposed by the Convention for the Protection of Human Rights and Fundamental Freedoms wherever they are in the world. That position reflects fundamental principles of international law. Principled application of the decision of the Grand Chamber in *Al-Skeini v United Kingdom* (2011) 53 EHRR 589 necessitates that conclusion. The Court of Appeal in the present case was wrong to conclude that the Grand Chamber's decision could be reconciled with the majority in *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2011] 1 AC 1.

G The Convention must be read and given effect in the context of international law as a whole: see *Bankovic v Belgium* (2001) 11 BHRC 435 and *Burnip v Birmingham City Council* [2013] PTSR 117. As a matter of international law, "jurisdiction" is a word associated with the exercise of authority. Its reach is not merely territorial; it may include "personal jurisdiction" by reference to the relationship between the individual and the state rather than to a place in relation to a violation of human rights: see article 2(1) of the International Covenant on Civil and Political Rights and the Second Optional Protocol to that instrument abolishing the death penalty; *López v Uruguay* (1981) 68 ILR 29; article 7 of the International Covenant on the Protection of the Rights of All Migrant Workers and Members of their Families (1990); United Nations Human Rights

Committee General Comment No 31 (CCPR/C/21/Rev 1/Add 13 (29 March 2004)); Canadian Charter of Fundamental Rights and Freedoms; *R v Cook* [1998] 2 SCR 597; *Canada (Justice) v Khadr* [2008] 2 SCR 125 and *Boumediene v Bush* (2008) 553 US 723.

Under the Convention too, jurisdiction is a question of authority and control, regarded as primarily territorial, but subject to exceptions where states have extended the exercise of their authority extraterritorially: see *Bankovic v Belgium* 11 BHRC 435; *R (Al-Jedda) v Secretary of State for the Home Department (JUSTICE intervening)* [2008] AC 332; *R (Al-Saadoon) v Secretary of State for Defence* [2010] QB 486; *Al-Saadoon and Mufdhi v United Kingdom* (2009) 49 EHRR SE95; *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2008] AC 153; *Ilaşcu v Moldova and Russia* (2004) 40 EHRR 1030; *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745; *Gentilhomme, Schaff-Benhardji and Zerouki v France* (Applications Nos 48205/99, 48207/99 and 48209/99) (unreported) given 14 May 2002 and the majority decision in *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1.

The majority decision in the *Smith* case should now be revised in the light of the Grand Chamber's observations in *Al-Skeini v United Kingdom* 53 EHRR 589 which, demonstrating the correctness of the minority's view in the *Smith* case, sets out, at paras 133–142, the primary exception to the territorial principle, namely, state agent authority.

The Supreme Court recognises the superior institutional competence of the European Court of Human Rights as the proper forum for determining issues of jurisdiction: see the *Smith* case [2011] 1 AC 1, paras 2, 60, 93, 147 and *Rabone v Pennine Care NHS Trust (INQUEST intervening)* [2012] 2 AC 72, para 114. The concept of jurisdiction does not vary with the social and cultural traditions of member states, unlike decisions in the context of the application of qualified rights where the domestic courts have relative institutional competence so that it may sometimes be appropriate for the supra-national court to defer to the national court.

In the present context exclusive jurisdiction vests under international law in the United Kingdom over members of its armed forces: contrast *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1577, 1586. No other state contends for jurisdiction over those serving in Iraq. If they do not fall within the United Kingdom's jurisdiction, they are without any effective protection for their fundamental human rights. They affirm or swear allegiance to the British Crown, the relationship between the state and its armed forces is based on a reciprocal bond and compact that military service will be rewarded by the support and protection of the state. For all other domestic purposes members of the British armed forces are within the jurisdiction of the United Kingdom courts wherever they are in physical terms. Members of the armed forces have relinquished near total control over their lives to the state. They remain subject to United Kingdom military law, without territorial limit; to the law of tort (see *Bici v Ministry of Defence* [2004] EWHC 786 (QB) at [84]–[102]); to internal disciplinary law and employment law: (see *Lawson v Serco Ltd* [2006] ICR 250) and to various aspects of administrative law and they retain all the rights and duties of ordinary citizens: see *Burdett v Abbot* (1812) 4 Taunt 401, 449. *R (Gentle) v Prime Minister* [2008] AC 1356 is distinguished on its facts.

A The *Bankovic* case did not reject the personal control test which does not depend on a person's location but on the reciprocal rights and obligations of nationals and their state wherever they may be. In the present case that provides the jurisdictional link: the soldiers were those who owed a direct and particular allegiance to the state: see *Cyprus v Turkey* (1975) 4 EHRR 482; *W v Ireland* (1983) 32 DR 211; *Martin v United Kingdom* (2006) 44 EHRR 652 and *Vearncombe v United Kingdom* (1989) 59 DR 186.

B British troops who are subject to the obligation of complying with the Convention when posted outside United Kingdom territory as state agents should therefore continue to enjoy the Convention benefits. Their position is secured in the statutory structure of domestic law. Public authorities, such as members of the military, are within the legislative grasp or intendment of the Human Rights Act 1998: see section 6. It would be contrary to logic and principle, and discriminatory for the purposes of article 14 of the Convention, if the alleged human rights breaches arising from the extraterritorial activities of British soldiers were considered capable of conferring jurisdiction on non-nationals by virtue of the soldiers' link with the United Kingdom, but the soldiers themselves were not considered within the jurisdiction for breaches of rights arising from the same operations at the same time for the purposes of section 7 of the 1998 Act: see *Al-Skeini v United Kingdom* 53 EHRR 589; *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2008] AC 153, paras 46, 65 and *Exp Blain; In re Sawers* (1879) 12 Ch D 522.

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The wider rationale for recognising article 1 jurisdiction adopted by the minority in the *Smith* case accords more closely with the underpinning principles of jurisdiction in international law and the national and European Court of Human Rights case law than the narrower reasoning of the majority. There would have to be compelling reasons of principle to accept the proposition that article 1 jurisdiction only arises in respect of a British soldier abroad while he remains on an United Kingdom base but dissipates when he steps outside it. There would also have to be compelling reasons of principle to hold that there was a jurisdictional link between the United Kingdom and the relatives of the Iraqi victims in the *Al-Skeini* case, but no such link between the United Kingdom and the relatives of the personnel killed at the same time and in the same place. No compelling reasons of public policy require that result. Public policy and the harmonisation of international human rights protection compel the opposite conclusion.

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*Alex Bailin QC, Iain Steele and Edward Craven* (instructed by *Herbert Smith Freehills LLP*) for the first intervener.

G

Jurisdiction under article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is to be analysed by reference to the principles enunciated by the Grand Chamber in *Al-Skeini v United Kingdom* (2011) 53 EHRR 589, paras 134–142 and the minority in *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2011] 1 AC 1, paras 174–183. While primarily territorial, extraterritorial jurisdiction will arise whenever a state exerts its authority and control over individuals abroad and whenever state agents exercise de facto control and authority over individuals outside the state's authority. The unanimous decision in the *Al-Skeini* case, in clear and unqualified language, dispels any lingering doubt that state agent authority

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and control is a general, freestanding basis for establishing jurisdiction under article 1. Three broad examples are identified, as manifestations of the principle: (a) diplomatic and consular agents abroad, and on board craft and vessels flying the state's flag, (b) where through the consent, invitation or acquiescence of the government of the territory concerned the state exercises some or all the public powers normally exercised by the government of that territory: see *Drozdz and Janousek v France and Spain* (1992) 14 EHRR 745; *Gentilhomme, Schaff-Benhardji and Zerouki v France* (Applications Nos 48205/99, 48207/99 and 48209/99) (unreported) given 14 May 2002, and (c) in certain circumstances, the use of force by state agents operating outside its territory may bring an individual into the state's article 1 jurisdiction. The starting point for establishing state agent authority is de facto control; but consent or acquiescence of the host state cannot be a precondition of establishing jurisdiction: the European Court of Human Rights jurisprudence expressly countenances a state taking control of a territory lawfully, or unlawfully: see *Issa v Turkey* (2004) 41 EHRR 567; *Solomou v Turkey* (Application No 36832/97) (unreported) given 24 June 2008; *Isaak v Turkey* (Application No 44587/98) (unreported) given 28 September 2006 (Admissibility); *Pad v Turkey* (Application No 60167/00) (unreported) given 28 June 2007; *Medvedyev v France* (2010) 51 EHRR 899 and the *Smith* case [2011] 1 AC 1, paras 329–330.

Soldiers are subject to United Kingdom military law wherever they serve and are entitled to bring claims under United Kingdom law against the state in respect of conduct occurring outside the United Kingdom; in international law the United Kingdom has almost absolute responsibility and control over its armed forces, such jurisdiction being essentially personal not territorial: see the *Smith* case at paras 191, 192, 194. The state's ability to bring individuals within its jurisdiction through the agency of its soldiers presupposes a high degree of authority and control over the soldiers themselves. The assimilation of the soldiers' acts with acts of the state for the purposes of article 1 reflects the relationship of overriding subordination and obedience on the one hand and command and authority on the other: see *Attorney General v The Queen* [2003] EMLR 499, para 41 and *Bankovic v Belgium* (2001) 11 BHRC 435, para 36.

Accordingly, in exchange for complete allegiance and, reflecting their near-complete subjection to the United Kingdom, there can be no principled reason to deny British soldiers protection under the Human Rights Act 1998 and they are in consequence entitled to the protection of United Kingdom law at all times, including the protection of their fundamental human rights under the Human Rights Act 1998: see the *Smith* case, at paras 192, 199 and *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74. [Reference was made to *Hermi v Italy* (2006) 46 EHRR 1115 and *DH v Czech Republic* (2007) 47 EHRR 59.]

However the position of soldiers can also be analysed in terms of the second category of state agent authority identified in the *Al-Skeini* case, at para 135. Establishing and maintaining a sufficient military presence in an overseas territory is quintessentially a public function which involves the exercise of sovereign authority over armed forces owing allegiance to the state and represents a classic state activity. Whenever the state establishes such a military presence on foreign territory, it necessarily exercises some of the public powers normally exercised by the government of that state. All

A persons potentially affected by those powers are brought within the state's jurisdiction by the exercise of military powers. That must logically include the individual soldiers through whose agency that public function is performed.

B Because of the exceptional nature of extraterritorial jurisdiction, where jurisdiction is founded on personal control and authority over an individual, the state's duty to secure Convention rights may be tailored to the particular circumstances. That resolves any perceived pragmatic concerns over the state's ability to secure the full range of Convention rights outside the territory which it controls: see the *Al-Skeini* case, at para 137, and the *Smith* case, at paras 193–194. The position is different where jurisdiction is based on effective control of an area: see the *Al-Skeini* case, at para 138. The consequence is that, when on a United Kingdom base, the soldier enjoys the full range of Convention rights, whereas off base his rights are tailored according to the circumstances. Other individuals affected by soldiers are treated comparably: they enjoy the full range of rights when held on base, but their rights are similarly tailored when off base.

C The principles in the *Al-Skeini* case are clear. They are impossible to reconcile with the majority reasoning in the *Smith* case. The Court of Appeal in the present case, although having the benefit of the *Al-Skeini* decision, misinterpreted and failed properly to apply the principles identified at paras 136–137 of that decision: see ante, pp 73–74, paras 26, 28–30. The result reached by the Court of Appeal is impossible to reconcile with the European Court of Human Rights jurisprudence: see *Cyprus v Turkey* (1975) 4 EHRR 482; *W v Ireland* (1983) 32 DR 211; *Loizidou v Turkey* (1995) 20 EHRR 99 (Admissibility); *Loizidou v Turkey* (1996) 23 EHRR 513 (Merits); *Catan v Moldova and Russia* (2012) 57 EHRR 99 and *Ilasçu v Moldova and Russia* (2004) 40 EHRR 1030. That jurisprudence contains many examples of the European Court of Human Rights' application of the Convention to claims arising from military operations: see the *Al-Skeini* case 53 EHRR 589; *Al-Jedda v United Kingdom* (2011) 53 EHRR 789; the *Ilasçu* case; *Issa v Turkey* 41 EHRR 567; *Cyprus v Turkey* (2001) 35 EHRR 731 and *Pad v Turkey* (Application No 60167/00) (unreported) given 28 June 2007.

F The position of the soldiers in international law and the application of the doctrine of state agent authority and control in other international human rights bodies support those submissions: see UN Human Rights Committee, General Comment 31 (29 March 2004), para 10; *López v Uruguay* (1981) 68 ILR 29; *Celiberti de Casariego v Uruguay* (1981) 68 ILR 41; *Alejandro v Cuba* (1999) (Report No 86/99) 29 September 1999, IACHR and *Coard v United States* (1999) 9 BHRC 150. The focus of international law is clear: it is the relationship of control and power over an individual by the state that determines the question of jurisdiction regardless of the circumstances in which such control is obtained. A ruling that British soldiers are outside the United Kingdom's jurisdiction for the purposes of article 1 would therefore be contrary to the clear and consistent approach of international jurisprudence.

H The Supreme Court is required to give effect to the decision of the Grand Chamber in the *Al-Skeini* case, despite prior conflicting decisions of the domestic court, and whatever latitude section 2(1) of the Human Rights Act 1998 appears to give: see Supreme Court Practice Direction 3.1.3; *Practice*

*Statement (Judicial Precedent)* [1966] 1 WLR 1234; *Kay v Lambeth London Borough Council* [2006] 2 AC 465; *R (Purdy) v Director of Public Prosecutions (Society for the Protection of Unborn Children intervening)* [2010] 1 AC 345; *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2011] 2 AC 104; *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269; *Cadder v HM Advocate (HM Advocate General for Scotland intervening)* [2010] 1 WLR 2601; *R (GC) v Comr of Police of the Metropolis (Liberty intervening)* [2011] 1 WLR 1230; *A v HM Treasury (JUSTICE intervening)* [2010] 2 AC 534 and *Rabone v Pennine Care NHS Trust (INQUEST intervening)* [2012] 2 AC 72, para 112.

*James Eadie QC, Sarah Moore, Karen Steyn and David Pevsky* (instructed by *Treasury Solicitor*) for the defendant.

Article 1 sets a limit to the reach of the Convention for the Protection of Human Rights and Fundamental Freedoms. The engagement undertaken by a contracting state is confined to securing the listed rights and freedoms to individuals within its own jurisdiction; article 1 is primarily or essentially territorial and any other basis for identifying such jurisdiction is exceptional: see *Bankovic v Belgium* (2001) 11 BHRC 435, paras 57, 59, 61, 63; *Medvedyev v France* (2010) 51 EHRR 899, paras 63–64 and *Hirsi Jamaa v Italy* (2012) 55 EHRR 627, paras 71, 72. That construction, which is consistent with public international law and state practice, reflects the ordinary meaning of the article and is confirmed by the travaux préparatoires: see articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969) (Cmd 4140). The concept of jurisdiction which is determinative of the scope of the positive obligations undertaken by contracting states, and therefore of the reach of the entire Convention system of human rights, is not subject to the living instrument doctrine. Article 1 jurisprudence is unique; it does not evolve in the same way as the law in respect of substantive rights and freedoms. Nothing in the court's jurisprudence since the *Bankovic* case departs from that principle and the question remains what would the framers have intended: see *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2011] 1 AC 1, para 303. The concept of jurisdiction under article 1 cannot therefore be expanded incrementally from case to case.

Any new category must be within or so closely analogous to an existing recognised category that it would have been regarded by the framers of the Convention as being within its jurisdiction. A determination that exceptional circumstances exist, such as would justify a finding that a state was exercising jurisdiction extraterritorially, requires special justification: see the *Bankovic* case, at para 59; *Al-Skeini v United Kingdom* (2011) 53 EHRR 589, para 132 and the *Hirsi Jamaa* case, at para 73. Only two categories are identified. The first, state agent authority and control, exemplified by (1) diplomatic and consular agents (see the *Al-Skeini* case, at para 134; the *Bankovic* case, at para 71; *Medvedyev v France*, at para 65 and *Hirsi Jamaa v Italy*, at para 75; and (2) state agents exercising exclusive physical power and control over individuals: see *Öcalan v Turkey* (2005) 41 EHRR 985; *Issa v Turkey* (2004) 41 EHRR 567 and *Al-Saadoon and Mufdhi v United Kingdom* (2009) 49 EHRR SE95. Each example illustrates

A the type of control and authority in question, each involves bringing into the state's jurisdiction, not the state agent, but those subject to the necessary degree of authority and control exercised by the agent: see *Loizidou v Turkey* (1995) 20 EHRR 99, para 62 and *Drozdz and Janousek v France and Spain* (1992) 14 EHRR 745, para 91. The reasoning which brings an individual over whom state agents have exercised authority and control within the state's article 1 jurisdiction would not apply to the agents by virtue of that status.

B The concept of authority and control is not so broad as to encompass all service personnel, wherever they are in the world, just because that is their status. The present case does not fall within any recognised exception: the claim that jurisdiction is established on a personal basis for members of the armed services wherever they are in the world is entirely novel and would constitute a highly significant expansion of article 1. All other decided cases are very different from the present case. The state agent must exercise the type of authority and control over others to a sufficient degree to provide the requisite special justification. The proposition that members of a state's armed forces are within its article 1 jurisdiction when serving abroad is almost entirely unsupported by European Court of Human Rights jurisprudence and is not consistent with public international law; further, a volunteer soldier is not in a comparable position to a detainee in the custody of the state by reason of his obligation to obey orders: see *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2011] 1 AC 1, paras 49, 104 and *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647. [Reference was made to *Cyprus v Turkey* (1975) 4 EHRR 482.]

D There are good reasons of principle and policy, judged in principle, by reference to the intentions of the framers of the Convention, not to extend jurisdiction in that way. The majority of the Supreme Court in the *Smith* case [2011] 1 AC 1, paras 91, 308, was right to find that there were no policy reasons for such an extension, and compelling policy reasons against it. The facts of the *Al-Skeini* case 53 EHRR 589 distinguish that decision from the present cases. In any event such an expansion is unnecessary: armed conflicts are regulated by legal standards, in particular by international humanitarian law and the Geneva Conventions and Additional Protocols. As a matter of principle, the European Court of Human Rights could have overruled the decision in the *Bankovic* case, or its reasoning. It did not do so but reaffirmed its basic approach. The majority of the Supreme Court in the *Smith* case applied that approach and the *Al-Skeini* decision has not undermined or rendered it incorrect.

E There is no clear and constant jurisprudence of the European Court of Human Rights to the effect that service personnel are within the jurisdiction in the present cases. The precise reach and reasoning of the *Al-Skeini* decision is controversial: see *Ambrose v Harris* [2011] 1 WLR 2435. Domestic courts have to be clear that the European Court of Human Rights would extend jurisdiction in the way proposed, before doing so themselves. Compelling constitutional principles underlie that position: the domestic court should not leap ahead of an international court in relation to the meaning of substantive obligations contained in an international agreement: see *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20; *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2008] AC

153; the *Smith* case [2011] 1 AC 1; the *Ambrose* case, at paras 19–20, 86, 100–105, and *Brown v Stott* [2003] 1 AC 681, para 59. [Reference was made to *Dyer v Watson* [2004] 1 AC 379.] Where the scope of a Convention right is in issue, as opposed to a matter falling within the state’s margin of appreciation, a cautious approach is required. That approach applies even more strongly where the issue is jurisdictional because the state is being asked to cede a jurisdiction to a foreign court which would not have been clear when the Convention was framed.

The High Court and the Court of Appeal were correct to reject the contention that the principle in *Soering v United Kingdom* (1989) 11 EHRR 439 applies to the deployment of soldiers abroad. There is no indication that the principle in the *Soering* case should be treated as one of general application beyond the context of forcible removal: see *D v United Kingdom* (1997) 24 EHRR 423.

Although the claimants seek to cast their claims away from the battlefield, they cannot mask the reality. Their challenge is to the political and military decision-making surrounding the deaths and injuries of soldiers in the course of an armed conflict in a foreign country. If permitted, the obligations contended for would take the law of negligence, and an even wider alleged implied operational obligation under article 2 of the Convention, into every sphere of military operations, requiring courts to rule on matters of military, economic and political judgment: see *Hatton v United Kingdom* (2003) 37 EHRR 611; *James v United Kingdom* (1986) 8 EHRR 123 and *R v Cambridge Health Authority, Ex p B* [1995] 1 WLR 898. To impose such extended duties on the state, whether under the Convention or at common law, would be unprincipled, problematic and contrary to the public interest.

Article 2 has been interpreted by the European Court of Human Rights as imposing on the state negative, and in more limited circumstances, positive obligations. The latter are implied and the courts are careful when examining their existence and scope to ensure that they do not, by the process of implication, read in obligations which the contracting states did not clearly intend to assume: see *Brown v Stott* [2003] 1 AC 681, 703; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United National High Comr for Refugees intervening)* [2005] 2 AC 1 and *R (Gentle) v Prime Minister* [2008] AC 1356.

The European Court of Human Rights case law distinguishes between two categories of potential implied positive obligations under article 2, primarily a legal framework, and exceptionally, an operational obligation. Under the primary obligation the state is required to put in place a legislative and administrative framework designed to provide effective deterrence, through appropriate procedural and legal systems, against threats to the right to life. Such obligations are normally discharged by providing systems to establish the cause of death and accountability, where appropriate, on the part of state agents. Contracting states have a wide margin of appreciation as to how they choose to set out such a framework and where it is in place casual errors of judgment or acts of negligence by state servants or agents will not amount to a breach of the substantive article 2 obligation: see *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182; *Savage v South Essex Partnership NHS Foundation Trust (MIND intervening)* [2009] AC

- A 681; *Emms, Petitioner* (2007) 99 BMLR 116; *Hristozov v Bulgaria* (Applications Nos 47039/11 and 358/12) (unreported) given 13 November 2012; *Erikson v Italy* (1999) 29 EHRR CD152; *Powell v United Kingdom* (2000) 30 EHRR CD362; *Siemínska v Poland* (Application No 37602/97) (unreported) given 29 March 2001; *Calvelli v Ciglio v Italy* Reports of Judgments and Decisions 2002-I, p 25; *Vo v France* (2004) 40 EHRR 259; *R (Takoushis) v Inner North London Coroner* [2006] 1 WLR 461 and
- B *Byrzykowski v Poland* (2006) 46 EHRR 675.

- The operational obligation requires the state to take active steps to protect the life of a particular individual, but only in certain, well-defined circumstances, where an individual is known to be at risk from criminal acts of third parties, or is in a vulnerable position and where the state has assumed responsibility for his or her welfare. But the threshold for
- C establishing a breach is very high and especially compelling circumstances have to be shown. In considering whether such a duty should be implied the court will take into account the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices to be made in terms of priorities and resources: see *Osman v United Kingdom* (1998) 29 EHRR 245; *Öneryildiz v Turkey* (2004) 41 EHRR 325; *Kontrová v Slovakia* [2007] Inquest LR 286; *In re Officer L* [2007] 1 WLR 2135; *Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening)* [2009] AC 225; *Mitchell v Glasgow City Council* [2009] AC 874; *Angelova and Iliev v Bulgaria* (2007) 47 EHRR 236; *Keenan v United Kingdom* (2001) 33 EHRR 913; *Uçar v Turkey* (Application No 52392/99) (unreported) given 11 April 2006; *Slimani v France* (2004) 43 EHRR 1068; *Ataman v Turkey* (Application
- D No 46252/99) (unreported) given 27 April 2006; *Chember v Russia* (Application No 7188/03) (unreported) given 3 July 2008; *Kilinç v Turkey* (Application No 40415/98) (unreported) given 7 June 2005 and *Rabone v Pennine Care NHS Trust (INQUEST intervening)* [2012] 2 AC 72.
- E

- The European Court of Human Rights consistently recognises that article 2 does not impose operational or framework duties on contracting states in respect of matters that raise essentially political rather than legal
- F issues: see *Taylor v United Kingdom* (1994) 18 EHRR CD215; *Banks v United Kingdom* (2007) 45 EHRR SE15; *Scholes v Secretary of State for the Home Department* [2006] HRLR 1391; *R (Gentle) v Prime Minister* [2007] QB 689, paras 82–83; [2008] AC 1356; *A v Secretary of State for the Home Department* [2006] 2 AC 68 and the *Smith* case [2011] 1 AC 1, paras 125, 127, 146. Where, as here, the subject matter of the dispute is inapt for
- G judicial resolution, both the domestic courts and the European Court of Human Rights recognise that it falls beyond the scope of article 2 and outwith the purview of the courts.

- The European Court of Human Rights distinguishes between the risks inherent in ordinary, albeit dangerous, military duties and specifically life-threatening situations posed by the violent, unlawful acts of third parties or man-made or natural hazards which call for the operational duties: see
- H *Öneryildiz v Turkey* 41 EHRR 325. The former category will require the state, through its framework duties, to ensure that the relevant risk is reduced to a reasonable minimum and, so long as appropriate systems and rules are in place, a breach will not occur if damage arises: see *Stoyanovi v Bulgaria* (Application No 42980/04) (unreported) given 9 November 2010.

Although article 2 may extend into the examination of military operations and planning where civilian deaths have occurred, there is no authority in the European Court of Human Rights case law, apart from that of *Stoyanovi*, which concerns the duties arising under article 2 in respect of servicemen: see *McCann v United Kingdom* (1995) 21 EHRR 97; *Özgül Gündem v Turkey* (2000) 31 EHRR 1082 and *Finogenov v Russia* (2011) 32 BHRC 324.

The United Kingdom has complied with its framework duties with regard to its armed forces. No implied operational duty currently exists in respect of the preparation for, equipping and conduct of military operations. Were it to do so, it would represent a significant extension to the Convention jurisprudence and the consequences would be profound and damaging. There are in principle compelling reasons, in particular, of institutional competence and democratic accountability, why no such extension should be made.

There is no common law liability for negligence in respect of acts or omissions which occur during combat operations against the enemy and there is no duty to establish a safe system of work during such operations, whether those issues are analysed from the perspective of combat immunity or under the fair, just and reasonable test. The principle of combat immunity exists because the court cannot realistically or reasonably be required to resolve whether injuries suffered by soldiers could have been avoided by different tactics and if so how to apportion blame: see *Mulcahy v Ministry of Defence* [1996] QB 732 and *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344. Therefore no common law duty arises or is enforceable in such situations. No proper distinction can be drawn between active operations and those made earlier; procurement decisions cannot sensibly be divorced from battle planning and tactics. Combat immunity will therefore apply to preclude a tort claim which alleges failure by the state to take reasonable care to avoid the injury or death of a member of the armed forces during active operations: see *Shaw Savill & Albion Co Ltd v Commonwealth* 66 CLR 344, 361–362, 355–356; *Groves v Commonwealth of Australia* (1982) 150 CLR 113, para 3; *In re Civilian Casualty Court Martial* (2011) 259 FLR 208; *Mulcahy v Ministry of Defence* [1996] QB 732, 748–751; *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 and *Hughes v National Union of Mineworkers* [1991] ICR 669. Contrast *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 (QB).

Common law duties are not generally imposed where they would clash with other overriding duties: see *D v East Berkshire Community Health NHS Trust* [2005] 2 AC 373, paras 85, 110 and *Jain v Trent Strategic Health Authority* [2009] AC 853, para 25. That principle relates, not to factual reasonableness, but to the existence of the duty itself. A duty to protect soldiers on the battlefield would cut across the state's other duties. To claim that the act complained of, here the procurement decisions, took place away from the battlefield is superficial and wrong. The nature of the duty contended for is to take steps to ensure that particular things do or do not happen on the battlefield. The location of the act complained of cannot be determinative.

The mere availability, in principle, of a suit against the Crown as a result of section 2 of the Crown Proceedings (Armed Forces) Act 1987 does not

A mean that combat immunity cannot apply to the common law claims. The statutory position does not shed any light on the position at common law. Parliament is assumed to have understood that position and correctly considered that no further legislation was necessary.

B Even if it were permissible for the court to consider whether a duty of care exists and has been breached, at the procurement stage, it would be necessary, on common law principles, to consider whether any such breach caused the relevant loss. Causation is a complex and value-driven exercise of attributing liability: see *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22; *Stapley v Gypsum Mines Ltd* [1953] AC 663; *Rahman v Arearose Ltd* [2001] QB 351 and *Wright v Lodge* [1993] 4 All ER 299. Such an exercise would involve entering into territory which the courts consistently recognise as  
C inappropriate for judicial determination.

Three different and compelling rationales lead to the conclusion that all the claimants' allegations fail, whether under the doctrine of combat immunity or on the basis that it would not be fair, just and reasonable to impose such a duty: (1) as a matter of institutional competence, there are certain issues which the court should not or cannot resolve: see *R (Gentle) v Prime Minister* [2008] AC 1356, para 58 and *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 738; (2) as a matter of policy, the armed forces need freedom to conduct war effectively and attention and resources should not be diverted from that primary function: see *Brooks v Comr of Police of the Metropolis* [2005] 1 WLR 1495, para 30; *Elguzouli-Daf v Comr of Police of the Metropolis* [1995] QB 335; *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 63 and *Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening)* [2009] AC 225, para 133; and (3) as a matter of accountability, the controversial creation of the tortious remedy contended for should not take place in the absence of parliamentary consideration.

There is no proper analogy to be drawn with respect to the defendant's obligations under the Health and Safety at Work etc Act 1974 to provide  
F suitable protective clothing and work equipment or suitable health and safety risk assessments or in the fact that a common law duty of care has previously been recognised in cases brought against the defendant: see *Chalk v Ministry of Defence* [2002] EWHC 422 (QB); *Fawdry v Ministry of Defence* [2003] EWHC 322 (QB); *Hanks v Ministry of Defence* [2005] EWHC 3509 (QB) and *Hopps v Mott MacDonald Ltd* [2009] EWHC 1881 (QB). Those cases are to be distinguished on their facts and are not in point.

G *Weir QC* and *Eadie QC* replied.

The court took time for consideration.

19 June 2013. The following judgments were handed down.

H LORD HOPE OF CRAIGHEAD DPSC (with whom LORD WALKER OF GESTINGTHORPE, BARONESS HALE OF RICHMOND and LORD KERR OF TONAGHMORE JJSC agreed)

1 These proceedings arise out of the deaths of three young men who lost their lives while serving in the British Army in Iraq and the suffering by two other young servicemen of serious injuries. The units in which they were

serving were sent to Iraq as part of Operation TELIC. This operation, which lasted from January 2003 to July 2009, had two distinct phases of military activity. The first began on 19 March 2003 when Iraq was invaded by coalition forces including those from the United Kingdom. The second phase began on 1 May 2003 when major combat operations ceased and were replaced by a period of military occupation. During much of that time there was a constant threat of enemy action by insurgents opposed to the interim Iraqi government.

2 On 25 March 2003 Corporal Stephen Allbutt, who was the husband of the claimant Ms Deborah Allbutt, Lance Corporal Daniel Twiddy and Trooper Andrew Julien were serving with the Queen's Royal Lancers as part of the Royal Regiment of Fusiliers battle group during the fourth day of the offensive by British troops to take Basra. They were in one of a number of Challenger II tanks which had been placed at a dam in hull down positions to minimise their visibility to the enemy. Just after midnight a Challenger II tank of the Second Royal Tank Regiment which had been assigned to the 1st Battalion Black Watch battle group and was commanded by Lt Pinkstone crossed over onto the enemy side of a canal to take up a guarding position some distance to the south east of the dam. At about 0050 hrs Lt Pinkstone identified two hot spots through his thermal imaging sights which he thought might be personnel moving in and out of a bunker. He described the location to Sgt Donlon who was unable to identify the hot spots for himself because the description he was given was incorrect. After Lt Pinkstone had identified a further four hot spots in the same area he was given permission to fire by Sgt Donlon.

3 Lt Pinkstone's tank fired a first round of high explosive shell at about 0120 hrs and a second round shortly afterwards. The hot spots that he had observed were in fact men on top of Cpl Allbutt's Challenger II tank at the dam. The first shell landed short of the tank, but the explosion blew off the men who were on top of it including Lance Corporal Twiddy. The second shell entered the tank and killed Cpl Allbutt, injured Trooper Julien and caused further injury to Lance Corporal Twiddy. It also killed Trooper David Clarke: see *R (Gentle) v Prime Minister* [2008] AC 1356, para 1. Lt Pinkstone did not know of the presence at the dam of the Royal Regiment of Fusiliers battle group. He did not realise that he was firing back across the canal, as he was disorientated and believed that he was firing in a different direction.

4 In 2005 Private Phillip Hewett, who was the son of the claimant Susan Smith, was serving with 1st Battalion the Staffordshire Regiment. On 10 May 2005 he was deployed to Camp Abu Naji, near the town of Al Amarah in the Maysan Province of Iraq. He was assigned to a battle group working alongside soldiers from other battalions. In mid-July 2005 there was a substantial threat against Camp Abu Naji from rocket attacks and an operation was launched to counter this threat by restricting the movement of insurgent anti-Iraqi forces.

5 On 15 July 2005 Pte Hewett was assigned to a mobile unit which was sent that evening to patrol around Al Amarah. The unit consisted of three Snatch Land Rovers. Snatch Land Rovers are lightly armoured. Their armour is designed to provide limited protection against ballistic threats, such as those from small arms fire. It provided no protection, or no significant protection, against improvised explosive devices ("IEDs"). It was

A escorted into, but not around, the town by a Warrior fighting vehicle. Warriors are heavily armoured and tracked, and are capable of carrying seven or eight personnel as well as the crew. Pte Hewett was in the lead Snatch Land Rover as its driver with 2nd Lt Richard Shearer. It had no electronic counter measures (“ECMs”) to protect it against the threat of IEDs.

B 6 At about 0115 hrs on 16 July 2005 an explosion was heard in the vicinity of the stadium in Al Amarah. 2nd Lt Shearer decided to investigate the explosion. As the Snatch Land Rovers were driving down the single road to the stadium an IED detonated level with the lead vehicle. Pte Hewett, 2nd Lt Shearer and another soldier who was acting as top cover died in the explosion, and two other occupants of the vehicle were seriously injured.

C 7 In 2006 Private Lee Ellis, who was the father of the claimant Courtney Ellis and the brother of the claimant Karla Ellis, was serving with the 2nd Battalion the Parachute Regiment. His unit was attached to the Royal Scots Dragoon Guards and was based at Camp Abu Naji. On 28 February 2006 Pte Ellis was the driver of a Snatch Land Rover in a patrol of three Warriors and two Snatch Land Rovers which made a journey from the Camp to the Iraqi police headquarters in Al Amarah. Captain Richard Holmes and another soldier were in the same vehicle.

D 8 On the return journey from the police headquarters an IED was detonated level with the lead Snatch Land Rover driven by Pte Ellis. He and Captain Holmes were killed by the explosion and another soldier in the vehicle was injured. The vehicle had been fitted with an ECM, but a new part of that equipment known as element A was not fitted to it at that time. Element A was fitted to the other Snatch Land Rovers used in the Camp within a few days of the incident.

### *The claims*

F 9 The claims by Ms Deborah Allbutt, Lance Corporal Daniel Twiddy and Trooper Andrew Julien (“the Challenger claims”) are brought in negligence at common law only. They make two principal claims. First, they allege a failure to ensure that the claimants’ tank and the tanks of the battle group that fired on it were properly equipped with the technology and equipment that would have prevented the incident. That equipment falls into two categories: target identity devices that provide automatic confirmation as to whether a vehicle is a friend or foe; and situational awareness equipment that permits tank crews to locate their position and direction of sight accurately. Secondly, they allege that the Ministry of Defence (“the MOD”) was negligent in failing to provide soldiers with adequate recognition training pre-deployment and also in theatre.

G 10 The claims by Susan Smith and Courtney and Karla Ellis (“the Snatch Land Rover claims”) fall into two parts. The first, which is common to all three claimants, is that the MOD breached article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms by failing to take measures within the scope of its powers which, judged reasonably, it might have been expected to take in the light of the real and immediate risk to life of soldiers who were required to patrol in Snatch Land Rovers. The second, which is brought by Courtney Ellis only, is based on negligence at common law.

11 The particulars of the Smith claim under article 2 of the Convention are that the MOD (i) failed to provide better/medium armoured vehicles for use by Pte Hewett's commander which, if provided, would have been used for Pte Hewett's patrol, (ii) failed to ensure that any patrol inside Al Amarah was led by a Warrior, (iii) caused or permitted a patrol of three Snatch Land Rovers to proceed inside Al Amarah, especially when there was no ECM on the lead Snatch Land Rover and it knew or ought to have known that ECMs were ineffective against the triggers that were in use by the insurgents and no suitable counter measures had been provided, (iv) permitted the patrol of Snatch Land Rovers to investigate the bomb blast, especially when there was only one road to the decoy bomb site, (v) failed to provide other vehicles for route clearing and route planning ahead of the Snatch Land Rovers, (vi) failed to provide suitable counter measures to IEDs in the light of the death of Lance Corporal Brackenbury, who was killed by an IED while in a Snatch Land Rover on 29 May 2005 and (vii) failed to use means other than patrols to combat the threat posed by the insurgents.

12 The particulars of the Ellis claim under article 2 and in negligence are that the MOD failed (i) to limit his patrol to better, medium or heavily armoured vehicles, (ii) to provide any or any sufficient better or armoured vehicle for use by Pte Ellis's commander which, had they been provided, would or should have been used for his patrol and (iii) to ensure that Element A had been fitted to the ECM on Pte Ellis's Snatch Land Rover, without which it should not have been permitted to leave the Camp.

13 The MOD's primary case in reply to the Challenger claims and the Ellis claim in negligence is that they should all be struck out on the principle of combat immunity. It also pleads that it would not be fair, just or reasonable to impose a duty of care on the MOD in the circumstances of those cases. Its case for a strike out in reply to the Snatch Land Rover claims under article 2 of the Convention falls into two parts. First, it submits that at the time of their deaths Pte Hewett and Pte Ellis were not within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention. Secondly, it submits that on the facts as pleaded the MOD did not owe a duty to them at the time of their deaths under article 2.

14 The strike-out applications were heard by Owen J, who handed down his judgment [2011] HRLR 795 on 30 June 2011. He struck out the Snatch Land Rover claims under article 2 on the ground that Pte Hewett and Pte Ellis were not within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention when they died: para 48. He based this decision on *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2011] 1 AC 1. He went on nevertheless, in a carefully reasoned judgment, to address the question whether, if the deceased were within the Convention jurisdiction, the MOD was under a substantive article 2 duty of the kind that the Snatch Land Rover claimants were contending for. He said that he would not have struck out their claims relating to the supply of equipment: para 80. But in his judgment there was no sound basis for extending the scope of the implied positive duty under article 2 to decisions made in the course of military operations by commanders: para 81. Holding that the doctrine of combat immunity should be narrowly construed, he refused to strike out the Challenger claims and the second and third of the three Ellis claims in negligence because he was not persuaded that their equipment and

A pre-deployment training claims were bound to fail: paras 110, 111. But he struck out the first of the Ellis claims because he was of the opinion that this claim fell squarely within the scope of combat immunity: para 114.

15 On 19 October 2012, the Court of Appeal (Lord Neuberger MR, Moses and Rimer LJJ), ante, p 68, dismissed appeals by the Snatch Land Rover claimants on the question whether the deceased were within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention. It found it unnecessary to deal with the extent of the substantive obligations implicit within that article. It also dismissed the MOD's appeal against the judge's refusal to strike out the Challenger claims and the second and third of the Ellis claims in negligence on the ground of combat immunity. But it allowed a cross-appeal by the Ellis claimants against the striking out of the first Ellis claim. This was because, although the allegation was of failures of the MOD away from the theatre of war, there might be factual questions as to the circumstances in which the decisions were made which would enable the MOD to raise the defence of combat immunity at the trial: para 63. All these issues are now the subject of appeals by the claimants and a cross-appeal by the MOD to this court.

16 It will be convenient to take first the question whether at the time of their deaths Pte Hewett and Pte Ellis were within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention. If they were, I propose to consider next the question whether article 2 imposes positive obligations on the states party to the Convention with a view to preventing the deaths of their own soldiers in active operations against the enemy. Finally, there are the claims made at common law where the question is whether the allegations of negligence by the Challenger and Ellis claimants should be struck out because they fall within the scope of combat immunity or because it would not be fair, just or reasonable to impose a duty to take care to protect against such death or injury.

### *I. Jurisdiction: article 1 ECHR*

#### *(a) The domestic authorities*

17 Article 1 of the Convention provides: "The high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention." In *Soering v United Kingdom* (1989) 11 EHRR 439, para 86 the European Court of Human Rights said that article 1 sets a limit, notably territorial, on the reach of the Convention and that the engagement undertaken by a contracting state is confined to securing the listed rights and freedoms to persons within its own jurisdiction. It does not govern the actions of states not parties to it, nor does it purport to be a means of requiring the contracting state to impose Convention standards on other states. The essentially territorial notion of jurisdiction was also emphasised by the Grand Chamber in *Bankovic v Belgium* (2001) 11 BHRC 435, para 67, where it said that it is only in exceptional cases that acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of article 1 of the Convention. In *Andrejeva v Latvia* (2009) 51 EHRR 650, para 56, the Grand Chamber reiterated that the concept of jurisdiction for the purposes of article 1 reflects that term's meaning in

public international law and that it is closely linked to the international responsibility of the state concerned. A

18 The question that the Snatch Land Rover claims raise is whether the jurisdiction of the United Kingdom extends to securing the protection of article 2 of the Convention to members of the armed forces when they are serving outside its territory. For that to be so it would have to be recognised that service abroad by members of the armed forces is an exceptional circumstance which requires and justifies the exercise by the state of its jurisdiction over them extraterritorially. B

19 In *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153 (“*Al-Skeini (HL)*”) the House of Lords was asked to consider the case of the deaths of six Iraqi civilians which were the result of actions by a member or members of the British armed forces in Basra. One of them, Mr Baha Mousa, had died as a result of severe maltreatment in a prison occupied and run by British military personnel. It was argued for the civilians that, because of the special circumstances in which British troops were operating in Basra, the conduct complained of, although taking place outside the borders of the United Kingdom and any other contracting state, fell within the exceptions recognised by the Strasbourg jurisprudence. C

20 The House held that, although one such exception was recognised where a state through effective control of another territory exercised powers normally exercised by the government of that territory, the obligation to secure the Convention rights would arise only where a contracting state had such effective control over an area as to enable it to provide the full package of rights and freedoms guaranteed by article 1 of the Convention to everyone within that area: Lord Rodger of Earlsferry at para 79; Lord Brown of Eaton-under-Heywood at para 129. The United Kingdom’s presence in Iraq fell far short of such control. As Lord Rodger put it in para 78, the idea that the United Kingdom was obliged to secure the observance of all the rights and freedoms as interpreted by the European court in the utterly different society of southern Iraq was manifestly absurd. The Secretary of State accepted that, as the events occurred in a British detention unit, Mr Mousa met his death within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention: Lord Rodger at para 61. So far as the other appellants were concerned, the United Kingdom did not have the kind of control of Basra and the surrounding area that would have allowed it to have discharged its obligations, including its positive obligations, as a contracting state under article 2. D E F

21 Three aspects of the discussion of the issue in that case should be noted at this stage. First, the appellants were all citizens of Iraq. They were not state agents of the United Kingdom or otherwise subject to its control or authority. British servicemen, on the other hand, are under the complete control of the UK authorities and are subject exclusively to UK law. Secondly, the House was plainly much influenced by the ruling on jurisdiction by the Grand Chamber in *Bankovic* which emphasised the centrality of territorial jurisdiction, the regional nature of the Convention and the indivisibility of the package of rights in the Convention: Lord Rodger at para 69. As Lord Brown noted in para 109, *Bankovic* stood, among other things, for the proposition that the rights and freedoms defined in the Convention could not be divided and tailored. In para 73 of G H

A *Bankovic* the proposition which attracted these observations was in these terms:

“The court is of the view that the wording of article 1 does not provide any support for the applicants’ suggestion that the positive obligation in article 1 to secure ‘the rights and freedoms defined in section 1 of this Convention’ can be divided and tailored in accordance with the particular circumstances of the extraterritorial act in question.”

In para 65 of its judgment in that case the Grand Chamber said that the scope of article 1 was determinative of the very scope of the contracting parties’ positive obligations and, as such, of the scope and reach of the entire Convention system of human rights protection.

22 Thirdly, it was recognised that it was for the Strasbourg court to define the exceptions and evaluate the grounds for departing from the general rule: Lord Bingham of Cornhill at para 29. As Lord Brown put it at para 105, the ultimate decision on the question must necessarily be for that court. Lord Rodger referred at para 67 to the problem which the House had to face, which was that the judgments and decisions of the European court did not speak with one voice. On the one hand there was *Issa v Turkey* (2004) 41 EHRR 567, where the court said at para 71 that accountability for violation of the Convention rights and freedoms of persons in another state stems from the fact that article 1 of the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of the other state which it could not perpetrate on its own territory. This appeared to focus on the activity of the contracting state, whereas the emphasis in *Bankovic* was on the requirement that the victim should be within the jurisdiction. In these circumstances the House was of the view that it would not be proper to proceed beyond the jurisprudence of the European court on jurisdiction as analysed and declared by the Grand Chamber in *Bankovic*.

23 The appellants then sought just satisfaction in Strasbourg. In the meantime the jurisdiction question was considered by the domestic court in two further cases: *R (Gentle) v Prime Minister* [2008] AC 1356 and *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2011] 1 AC 1 (“*Catherine Smith*”). The question in *Gentle* was whether article 2 of the Convention imposed a substantive duty on the state to take timely steps to obtain reliable legal advice before committing its troops to armed conflict: see para 3. The claimants were the mothers of two soldiers who were killed while serving in Iraq, one of whom was killed by the same shell as killed Cpl Allbutt and injured Trooper Julien and Lance Corporal Twiddy: see para 3, above. The issue which the claimants wished to explore was the lawfulness of the military action on which the United Kingdom had been engaged in Iraq before it was legitimised by United Nations Security Council Resolution 1546 of 8 June 2004. Lord Bingham of Cornhill said at para 8(3) that, although the soldiers were subject to the authority of the United Kingdom, they were clearly not within its jurisdiction as that expression in the Convention had been interpreted in *Al-Skeini (HL)*, paras 79, 129. But the case was decided on the basis that the claimants were unable to establish the duty which they asserted: see Lord Bingham at para 6. In para 39 Lord Rodger said article 2 of the Convention did not impose an obligation on the

government not to take part in an invasion that was unlawful in international law: see also Baroness Hale of Richmond, para 57. In para 19 I said that the guarantee in the first sentence of that article was not violated simply by deploying servicemen and women on active service overseas as part of an organised military force which was properly equipped and capable of defending itself, even though the risk of their being killed was inherent in what they were being asked to do.

24 The issue in *Catherine Smith* was whether a British soldier in Iraq when outside his base was within the scope of the Convention. The appellant was the mother of Private Jason Smith who had been mobilised for service in Iraq as a member of the Territorial Army and was stationed at Camp Abu Naji. He collapsed while working off base. He was rushed by ambulance to the Camp's medical centre but died there almost immediately of heat stroke. The issue in the case concentrated on the question whether the inquest into his death had to satisfy the procedural requirements of article 2. The Secretary of State conceded that, as Private Smith was on the base when he died, Mrs Smith was entitled to the relief which she sought. This meant that the issue had become largely academic, as Lord Phillips of Worth Matravers PSC recognised in para 2. But on this occasion the court decided to examine the question and express its opinion on it.

25 The court was divided on the issue by six to three. The majority held that the contracting states, in concluding the provisions of the Convention, would not have intended it to apply to their armed forces when operating outside their territories. Lord Collins of Mapesbury JSC, who delivered the leading judgment on behalf of the majority, said in para 307 that the case came within none of the exceptions recognised by the Strasbourg court, and that there was no basis in its case law, or in principle, for the proposition that the jurisdiction which states undoubtedly have over their armed forces abroad both in national law and international law means that they are within their jurisdiction for the purposes of article 1. Repeating a point that had been made by Lord Rodger in *Al-Skeini (HL)*, he said that, to the extent that *Issa v Turkey* stated a principle of jurisdiction based solely on authority and control by state agents, it was inconsistent with *Bankovic*. In para 308 he said that there were no policy grounds for extending the scope of the Convention to armed forces abroad, as this would ultimately involve the courts in issues relating to the conduct of armed hostilities which was essentially non-justiciable.

26 The leading judgment for the minority was delivered by Lord Mance JSC, with whom Baroness Hale of Richmond and Lord Kerr of Tonaghmore JJSC agreed. It is not possible to do justice to it in a brief summary. But some points that are of particular importance should be noted. In para 188 he said that, to the extent that jurisdiction under the Convention exists over occupied territory, it does so only because of the occupying state's pre-existing authority and control over its own armed forces. An occupying state cannot have any jurisdiction over local inhabitants without already having jurisdiction over its own armed forces, in both cases in the sense of article 1 of the Convention. In para 194 he said that the United Kingdom's jurisdiction over its armed forces was essentially personal. It could not be expected to take steps to provide in Iraq the full social and protective framework and facilities which it would be expected to provide domestically. But the United Kingdom could be expected to take

- A steps to provide proper facilities and proper protection against risks falling within its responsibility or its ability to control or influence when despatching and deploying armed forces overseas. In paras 195–197 he examined the question whether there would be consequences beyond or outside any that the framers of the Convention could have contemplated and concluded that none of the matters that might give cause for concern
- B justified giving to the concept of jurisdiction a different or more limited meaning to that which in his opinion followed from the guidance that the Strasbourg court had already given in *Bankovic*. It is however worth noting that he did not attach the same importance as the majority did to the proposition in *Bankovic* that the rights and freedoms defined in the Convention could not be divided and tailored, and that he was inclined to give more weight than they were to a principle of jurisdiction based on the
- C authority and control which the contracting state had over its armed forces.

(b) *Al-Skeini in Strasbourg*

- 27 The structure of the relevant part of the Grand Chamber’s judgment (*Al-Skeini v United Kingdom* (2011) 53 EHRR 589) falls into two parts. First, there is a comprehensive statement of general principles relevant to the
- D issue of jurisdiction under article 1 of the Convention. Secondly, those principles are applied to the facts of the case. Although the facts of that case are different from those which are before this court in these appeals, both parts of the judgment provide important guidance as to how we should resolve the issue with which we have to deal.

- 28 The statement of general principles begins in para 130 with the observation that the exercise of jurisdiction, which is a threshold condition,
- E is a necessary condition for a contracting state to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention. The significance of this observation in the context of these appeals is that it is not disputed that the United Kingdom has authority and control over its armed forces when serving abroad. It has just as much
- F authority and control over them anywhere as it has when they are serving within the territory of the United Kingdom. They are subject to UK military law without any territorial limit: Armed Forces Act 2006, section 367(1). The extent of the day to day control will, of course, vary from time to time when the forces are deployed in active service overseas, especially when troops are in face to face combat with the enemy. But the legal and administrative structure of the control is, necessarily, non-territorial in
- G character.

29 In paras 131–132 the general principles relevant to the territorial principle are set out:

- “131. A state’s jurisdictional competence under article 1 is primarily territorial. Jurisdiction is presumed to be exercised normally throughout the state’s territory. Conversely, acts of the contracting states performed,
- H or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of article 1 only in exceptional cases.

“132. To date, the court in its case law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a contracting state outside its own territorial boundaries.

In each case, the question whether exceptional circumstances exist which require and justify a finding by the court that the state was exercising jurisdiction extraterritorially must be determined with reference to the particular facts.”

30 One can take from these paragraphs two important points. First, the word “exceptional” is there not to set an especially high threshold for circumstances to cross before they can justify a finding that the state was exercising jurisdiction extraterritorially. It is there to make it clear that, for this purpose, the normal presumption that applies throughout the state’s territory does not apply. Secondly, the words “to date” in para 132 indicate that the list of circumstances which may require and justify a finding that the state was exercising jurisdiction extraterritorially is not closed. In *Catherine Smith*, para 303 Lord Collins JSC said that *Bankovic* made it clear in paras 64 and 65 that article 1 was not to be interpreted as a “living instrument” in accordance with changing conditions. That can no longer be regarded as an entirely accurate statement. The general principles are derived from the application to particular facts of the requirement of jurisdictional competence. The particular facts to which those principles must now be applied may be the product of circumstances that were not foreseen by the framers of the Convention. But that is no reason to disregard them if they can be shown to fall within the general principles relevant to jurisdiction under article 1.

31 The Grand Chamber in *Al-Skeini* then set out to divide the general principles relevant to jurisdiction into three distinct categories: state agent authority and control; effective control over an area; and the Convention legal space. We are not concerned in the case of the Snatch Land Rover claims with a situation where, as a consequence of military action, the United Kingdom was in effective control of an area outside its territory. Its presence in Iraq in 2005 and 2006 was to provide security and help with the reconstruction effort in that country pursuant to a request by the Iraqi government. The local administration was in the hands of the Iraqi government. Nor are we concerned with the risk of a vacuum in the Convention legal space. The category relevant to this case is that of state agent authority and control, which is described in paras 133–137.

32 This category is introduced by para 133, which is in these terms:

“The court has recognised in its case law that, as an exception to the principle of territoriality, a contracting state’s jurisdiction under article 1 may extend to acts of its authorities which produce effects outside its own territory: see *Drozd and Janousek v France and Spain* (1992) EHRR 745, para 91; *Loizidou v Turkey* (1995) 20 EHRR 99 (preliminary objections), para 62; *Loizidou v Turkey* (1997) 23 EHRR 513 (merits), para 52; *Bankovic v Belgium* (2004) 44 EHRR SE75, para 69. The statement of principle, as it appears in *Drozd* and the other cases just cited, is very broad: the court states merely that the contracting party’s responsibility ‘can be involved’ in these circumstances. It is necessary to examine the court’s case law to identify the defining principles.”

There then follow three paragraphs in which the principles are defined by reference to the court’s case law.

A 33 The first principle is set out in para 134. It refers to the acts of  
 diplomatic and consular agents, who are present on foreign territory in  
 accordance with provisions of international law. This may amount to an  
 exercise of jurisdiction when these agents exert authority and control over  
 others. The cases cited are *X v Federal Republic of Germany* (1965) 8 YB  
 158; *X v United Kingdom* (1977) 12 DR 73; *M v Denmark* (1992) 73 DR  
 B 193; and *Bankovic*, para 71, where the court noted

“that other recognised instances of the extraterritorial exercise of  
 jurisdiction by a state include cases involving the activities of its  
 diplomatic or consular agents abroad and on board craft and vessels  
 registered in, or flying the flag of, that state. In these specific situations,  
 customary international law and Treaty provisions have recognised the  
 C extraterritorial exercise of jurisdiction by the relevant state.”

34 The second principle is set out in para 135. It refers to the fact that  
 the court has recognised the exercise of extraterritorial 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: *Bankovic*, para 69. So, where  
 D 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 that result from their exercise, so long as the acts in question are  
 attributable to it rather than to the state in whose territory the acts take  
 place. The cases cited are *Drozd and Janousek v France and Spain* (1992)  
 E 14 EHRH 745; *Gentilhomme, Schaff-Benhardji and Zerouki v France*  
 (Applications Nos 48205/99, 48207/99 and 48209/99) (unreported) given  
 14 May 2002; and *X and Y v Switzerland* (1977) 9 DR 57.

35 The third principle is set out in para 136. It refers to the fact that the  
 court’s case law demonstrates that in certain circumstances the use of force  
 by a state’s agents operating outside its territory may bring the individual  
 thereby brought under control of the state’s authorities into the state’s  
 F article 1 jurisdiction. Four examples are given of the application of this  
 principle to cases where an individual was taken into the custody of state  
 agents abroad: *Öcalan v Turkey* (2005) 41 EHRH 985, where an individual  
 was handed over to Turkish officials outside the territory of Turkey by  
 officials from Kenya; *Issa v Turkey* (2004) 41 EHRH 567, where the court  
 indicated in paras 74–77 that if it had been established that Turkish soldiers  
 G had taken the shepherds into custody in a nearby cave in Northern Iraq and  
 executed them, the deceased would have been within Turkish jurisdiction by  
 virtue of the soldiers’ authority and control over them; *Al-Saadoon and  
 Mufdhi v United Kingdom* (2009) 49 EHRH SE95 where the court held that  
 two Iraqi nationals detained in a British-controlled prison in Iraq fell within  
 the jurisdiction of the United Kingdom as the United Kingdom exercised  
 total control over the prison and the individuals detained in them; and  
 H *Medvedyev v France* (2010) 51 EHRH 899, where crew members of a  
 Cambodian registered merchant ship suspected of drug smuggling were  
 taken into custody and detained on a French frigate while it was taken to  
 France. A more recent example of the application of the same principle is to  
 be found in *Hirsi Jamaa v Italy* (2012) 55 EHRH 627, where the applicant

asylum seekers were detained on an Italian ship after their vessels had been intercepted by the Italian Revenue Police and Coastguard. A

36 The following words are set out at the end of para 136 which sum up the essence of the general principle:

“The court does not consider that jurisdiction in the above cases arose solely from the control exercised by the contracting state over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.” B

37 The description of the category of state agent authority and control concludes with an important statement in para 137. It is in these terms:

“It is clear that, whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation under article 1 to secure to that individual the rights and freedoms under section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be ‘divided and tailored’.” C

I do not read the first sentence of this para as adding a further example to those already listed in paras 134–136. No further cases are cited in support of it, which the court would have been careful to do if that were the case. D

38 The point that the Grand Chamber was making in para 137, as is made clear by the last sentence, is that the package of rights in the Convention is not indivisible, as *Bankovic*, para 75, which is cited here, appeared to indicate. The Grand Chamber had stated in that paragraph of its judgment in *Bankovic* that it was of the view that the wording of article 1 did not E

“provide any support for the applicants’ suggestion that the positive obligation in article 1 to secure ‘the rights and freedoms defined in section 1 of this Convention’ can be divided and tailored in accordance with the particular circumstances of the extraterritorial act in question.”

The effect of para 137 of the *Al-Skeini* judgment is that this proposition, which informed much of the thinking of the House of Lords in *Al-Skeini (HL)* and of the majority in *Catherine Smith*, that the rights in section 1 of the Convention are indivisible, is no longer to be regarded as good law. The extraterritorial obligation of the contracting state is to ensure the observance of the rights and freedoms that are relevant to the individual who is under its agents’ authority and control, and it does not need to be more than that. The dividing and tailoring concept relative to the situation of the individual was applied in the *Jamaa* case to resolve the issue whether the asylum seekers were subject to the jurisdiction of Italy while they were detained on the ship flying the Italian flag: 55 EHRR 627, para 74. F

39 The second part of the judgment of the Grand Chamber applies the principles described in the first part to the facts of the case. The state of affairs in Iraq during the period when the applicants’ deaths at the hands of British forces occurred is reviewed in paras 143–148. They were killed on various dates between May and September 2003. This was during a period when the United States and the United Kingdom were exercising the powers of government for the provisional administration of Iraq through a Coalition G

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A Provisional Authority, which had been created for the purpose in May 2003. They included the maintenance of civil law and order. That remained the position until 28 June 2004, when full authority for governing Iraq passed from the Coalition Provisional Authority to the Interim Iraqi Government.

B 40 In the light of these facts the court held in para 149 that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations. This established a jurisdictional link between the deceased and the United Kingdom for the purposes of article 1 of the Convention. The court does not say which of the general principles led it to this conclusion, but it is reasonably clear that the facts come closest to those referred to in para 135. The United Kingdom was not exercising public powers through the consent, invitation or acquiescence of the government of Iraq as during the relevant period no such government was in existence. But it was exercising powers normally to be exercised by that government had it existed. The case thus fell within the general principle of state authority and control.

C 41 It should be noted, however, that the situation in Iraq had changed by the time the incidents that have given rise to the Snatch Land Rover claims occurred. These incidents took place on 16 July 2005 and D 28 February 2006. By that stage the occupation of Iraq had come to an end and the Coalition Provisional Authority had ceased to exist. Full authority for governing the country had passed to the Interim Iraqi Government. The United Kingdom was no longer exercising the public powers normally to be exercised by that country's government.

E (c) Discussion

42 The question whether at the time of their deaths Pte Hewett and Pte Ellis were within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention does not receive a direct answer from the Grand Chamber in its *Al-Skeini* judgment. This is not surprising, as that was not the question it had to decide. As it made clear in para 132, the question F whether the state was exercising jurisdiction extraterritorially in any given case must be determined with reference to the particular facts of that case. But the insertion of the words "to date" at the beginning of that paragraph indicate that one should not be too troubled by the fact that no case has yet come before the Strasbourg court which required it to consider whether the jurisdiction which states undoubtedly have over their armed forces abroad in both national and international law means that they are within their G jurisdiction for the purposes of article 1 of the Convention.

43 Care must, of course, be exercised by a national court in its interpretation of an instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court: *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20, per Lord Bingham of Cornhill. He had already acknowledged in *Brown v Stott* [2003] 1 AC 681 that, as an important constitutional instrument, the Convention was to be seen as a H "living tree capable of growth and expansion within its natural limits": *Edwards v Attorney General for Canada* [1930] AC 124, 136, per Lord Sankey LC. But he said that those limits will often call for very careful consideration. As he put it at the end of para 20 in *Ullah*, the duty of national courts is to keep pace with the Strasbourg jurisprudence as it

evolves over time. Lord Bingham’s point was that Parliament never intended by enacting the Human Rights Act 1998 to give the courts of this country the power to give a more generous scope to the Convention rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the Treaty obligation, into free-standing rights of the court’s own creation. In *Al-Skeini (HL)*, paras 105–106, Lord Brown saw a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly.

44 The question before us here, however, is not one as to the scope that should be given to the Convention rights, as to which our jurisprudence is still evolving. It is a question about the state’s jurisdictional competence under article 1. In this context, as the question of jurisdiction is so fundamental to the extent of the obligations that must be assumed to have been undertaken by the contracting states, the need for care is all the greater. In *Catherine Smith*, para 93, I endorsed the view expressed by Lord Brown in *Al-Skeini (HL)*, para 107 that article 1 should not be construed as reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach. I would take that as being for us, as a national court, the guiding principle.

45 It seems to me that three elements can be extracted from the Grand Chamber’s *Al-Skeini* judgment which point clearly to the conclusion that the view that was taken by the majority in *Catherine Smith* that the state’s armed forces abroad are not within its jurisdiction for the purposes of article 1 can no longer be maintained.

46 The first is to be found in its formulation of the general principle of jurisdiction with respect to state agent authority and control. The whole structure of the judgment is designed to identify general principles with reference to which the national courts may exercise their own judgment as to whether or not, in a case whose facts are not identical to those which have already been held by Strasbourg to justify such a finding, the state was exercising jurisdiction within the meaning of article 1 extraterritorially. While the first sentence of para 137 does not add a further example of the application of the principle to those already listed in paras 134–136, it does indicate the extent to which the principle relating to state agent authority and control is to be regarded as one of general application. The words “whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction,” can be taken to be a summary of the exceptional circumstances in which, under this category, the state can be held to be exercising its jurisdiction extraterritorially. As I said in para 30, above, the word “exceptional” does not set an especially high threshold for circumstances to cross before they can justify such a finding. It is there simply to make it clear that, for this purpose, the normal presumption that applies throughout the state’s territory does not apply. Lord Collins JSC’s comment in *Catherine Smith*, para 305, that other bases of jurisdiction are exceptional and require special justification should be understood in that sense.

47 The second is to be found in the way, albeit with a degree of reticence, that this formulation resolves the inconsistency between *Issa v Turkey* and *Bankovic* on the question whether the test to be applied in these exceptional cases can be satisfied by looking only at authority and control or

A is still essentially territorial. The problem that was created by this inconsistency was articulated most clearly by Lord Rodger in *Al-Skeini (HL)*, paras 71–75. How can one reconcile the decision in *Bankovic*, which showed that an act which would engage the Convention if committed on the territory of a contracting state does not ipso facto engage the Convention if carried out by that contracting state on the territory of another state outside the Council of Europe, with the test that was described in *Issa* that required the court to ascertain whether the deceased were under the authority and control of the respondent state? We now know that *Issa* cannot be dismissed as an aberration because, as Lord Collins JSC said in *Catherine Smith*, para 307, it is inconsistent with *Bankovic*. It is *Bankovic* which can no longer be regarded as authoritative on this point. The fact that *Issa* is included in para 136 as one of the examples of cases that fall within the general principle of state agent authority and control is particularly noteworthy. It anchors that case firmly in the mainstream of the Strasbourg court’s jurisprudence on this topic.

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48 The third is to be found in the way that the Grand Chamber has departed from the indication in *Bankovic* that the package of rights in the Convention is indivisible and cannot be divided and tailored to the particular circumstances of the extraterritorial act in question. It was always going to be difficult to see how, if that was to be the guiding principle, it could be possible to accept that a state’s armed forces abroad in whatever circumstances were within their jurisdiction for the purposes of article 1 as its ability to guarantee the entire range of the Convention rights would in many cases be severely limited. The problem was solved in the case of the actions of Turkish soldiers in northern Cyprus because the Convention rights were also engaged by the acts of the local administration which survived by virtue of Turkish military and other support: *Cyprus v Turkey* (2001) 35 EHRR 731, para 77. Other cases were likely to be more difficult, and Lord Collins JSC recognised in *Catherine Smith*, para 302 that cases such as *Markovic v Italy* (2006) 44 EHRR 1045 suggested that some qualification would have to be made to the principle of indivisibility of Convention rights.

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49 The Grand Chamber has now taken matters a step further. The concept of dividing and tailoring goes hand in hand with the principle that extraterritorial jurisdiction can exist whenever a state through its agents exercises authority and control over an individual. The court need not now concern itself with the question whether the state is in a position to guarantee Convention rights to that individual other than those it is said to have breached: see *Jamaa v Italy* 55 EHRR 627.

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50 There is one other point arising from the Grand Chamber’s *Al-Skeini* judgment that should not pass unnoticed. The Equality and Human Rights Commission points out in para 49 of its written case that the anterior question that presents itself in state agent cases is whether the state agent himself is within his state’s jurisdiction within the meaning of article 1. As Lord Mance JSC observed in *Catherine Smith*, para 188, to the extent that a state’s extraterritorial jurisdiction over local inhabitants exists because of the authority and control that is exercised over them, this is because of the authority and control that the state has over its own armed forces. It would seem to follow therefore that an occupying state cannot have any jurisdiction over local inhabitants without already having jurisdiction over

its own armed forces, in each case in the sense of article 1 of the Convention. That this is so has never been questioned by the Strasbourg court, and it may be said that it is the premise from which extraterritorial jurisdiction based on state agent authority and control has been developed.

51 In *Cyprus v Turkey* (1975) 4 EHRR 482, which appears to have been the first case in which the concept of state agent authority and control was mentioned (see *Al-Skeini*, para 121), the European Commission of Human Rights observed, at p 136, para 8, that

“authorised agents of a state, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring other persons or property ‘within the jurisdiction’ of that state, to the extent that they exercise authority over such person or property. In so far as, by their acts or omissions, they affect such persons or property, the responsibility of the state is engaged.”

The same formulation is to be found in the commission’s decisions in *W v Ireland* (1983) 32 DR 211, 215 and *Vearncombe v Germany and United Kingdom* (1989) 59 DR 186, 194. It no longer appears in references by the Strasbourg court to the acts of diplomatic and consular agents present on foreign territory in accordance with provisions of international law: see *X and Y v Switzerland* 9 DR 57, para 2; *Bankovic*, para 73; *Al-Skeini*, para 134. But it has never been disapproved. It was quoted without comment or criticism in *Chrysostomos v Turkey* (1991) 34 YB 35, para 32. The Grand Chamber in *Al-Skeini* was referred by the applicants to the same passage in the *Cyprus* judgment: see para 121. The quotation from it in that paragraph includes the proposition that authorised agents of a state remain under its jurisdiction when abroad. The Grand Chamber had the opportunity to say that there was something wrong with it, but it did not do so.

52 The *Cyprus* case was referred to by Lord Phillips PSC in *Catherine Smith*, paras 49–50. He did not attach any significance to it, as it seemed to him that the reasoning of the commission was far wider than that of the court when it dealt with Turkey’s jurisdiction in Northern Cyprus in *Loizidou v Turkey* (1995) 20 EHRR 99. It receives a passing mention also by Lord Collins JSC in para 249 in the course of a brief review of the cases on acts of diplomatic and consular officials abroad. As matters now stand, given the guidance that has now been given in *Al-Skeini*, it deserves more attention. The logic which lies behind it, as explained by Lord Mance JSC in *Catherine Smith*, para 188, is compelling. It is plain, especially when one thinks of the way the armed forces operate, that authority and control is exercised by the state throughout the chain of command from the very top all the way down to men and women operating in the front line. Servicemen and women relinquish almost total control over their lives to the state. It does not seem possible to separate them, in their capacity as state agents, from those whom they affect when they are exercising authority and control on the state’s behalf. They are all brought within the state’s article 1 jurisdiction by the application of the same general principle.

53 In *Demir v Turkey* (2008) 48 EHRR 1272, para 74, the Grand Chamber said that in a number of judgments it had used, for the purposes of interpreting the Convention, intrinsically non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of

A the Committee of Ministers and the Parliamentary Assembly. These resolutions and recommendations constitute agreements within the meaning of article 31(3)(a) of the Vienna Convention on the Law of Treaties (1969) (Cmnd 4140), account of which may be taken in the interpretation of a Treaty or the application of its provisions. It is therefore worth noting  
 B recommendation 1742 (2006) of the Parliamentary Assembly on the human rights of members of the armed forces of 11 April 2006, which was made in the light of a debate on a report on this issue of its Committee on Legal Affairs and Human Rights (doc 10861).

54 In para 2 of recommendation 1742 the point was made that members of the armed forces are citizens in uniform who must enjoy the same fundamental freedoms and the same protection of their rights and dignity as any other citizen, within the limits imposed by the specific  
 C exigencies of military duties. In para 3 it was emphasised that members of the armed forces cannot be expected to respect humanitarian law and human rights in their operations unless respect for human rights is guaranteed within the army ranks. The Parliamentary Assembly recommended that the Committee of Ministers should prepare and adopt guidelines in the form of a new recommendation to member states designed to guarantee respect for human rights by and within the armed forces.  
 D A draft recommendation prepared by a steering committee was adopted by the Committee of Ministers on 24 February 2010 with an explanatory memorandum (CM/Rec (2010) 4) in which it was stated that member states should, so far as possible, apply the principles set out in the recommendation to their armed forces in all circumstances, including in time of armed conflict. The conclusion which I would draw from the jurisprudence of the  
 E Strasbourg court derives further support from these non-binding recommendations.

55 For these reasons I would hold that the decision in *Catherine Smith* should be departed from as it is inconsistent with the guidance that the Grand Chamber has now given in its *Al-Skeini* judgment. I would also hold that the jurisdiction of the United Kingdom under article 1 of the Convention extends to securing the protection of article 2 to members of the  
 F armed forces when they are serving outside its territory and that at the time of their deaths Pte Hewett and Pte Ellis were within the jurisdiction of the United Kingdom for the purposes of that article. To do so would not be inconsistent with the general principles of international law, as no other state is claiming jurisdiction over them. The extent of that protection, and in particular whether the MOD was under a substantive duty of the kind for  
 G which the Snatch Land Rover claimants contend, is the question which must now be considered.

## II. The article 2 ECHR claims

56 Article 2.1 of the Convention provides as follows:

H “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

The relevant guarantee for the purposes of this case is set out in the first sentence. It has two aspects: one substantive, the other procedural.

57 We are not concerned here with the procedural obligation which is implied into the article in order to make sure that the substantive right is effective in practice: see *R (Gentle) v Prime Minister* [2008] AC 1356, para 5, per Lord Bingham. The Snatch Land Rover claims, details of which are set out in paras 11 and 12, above, are all directed to the substantive obligation, which requires the state not to take life without justification and also, by implication, to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life: *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, para 2. As Owen J pointed out [2011] HRLR 795, para 51, these claims involve issues of procurement as well as allegations relating to operational decisions made by commanders.

(a) *Preliminary observations*

58 Lord Collins JSC said in *Catherine Smith*, para 308 that to extend the scope of the Convention to armed forces abroad would ultimately involve the courts in issues relating to the conduct of armed hostilities which are essentially non-justiciable. That some issues relating to the conduct of armed hostilities are non-justiciable is not really in doubt. But in my opinion a finding that in all circumstances deaths or injuries in combat that result from the conduct of operations by the armed forces are outside the scope of article 2 would not be sustainable. It would amount, in effect, to a derogation from the state's substantive obligations under that article. Such a fundamental departure from the broad reach of the Convention should not be undertaken without clear guidance from Strasbourg as to whether, and in what circumstances, this would be appropriate.

59 It may be noted in this context that the intervener JUSTICE drew attention to article 15 of the Convention in reply to concerns about the practical consequences of finding that soldiers are within the jurisdiction of the United Kingdom under article 1. It provides that in time of war or other public emergency threatening the life of the nation any high contracting party may take measures derogating from its obligations under the Convention to the extent required by the exigencies of the situation. But the phrase "threatening the life of the nation" suggests that the power to derogate under this article is available only in an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed: *Lawless v Ireland (No 3)* (1961) 1 EHRR 15, para 28.

60 It will be recalled that in *A v Secretary of State for the Home Department* [2005] 2 AC 68 it was held that the Human Rights Act 1998 (Designed Derogation) Order 2001 (SI 2001/3644), which had been made to derogate from the right to personal liberty under article 5(1) to enable the appellants to be detained indefinitely without trial, should be quashed. And in *R (Al-Jedda) v Secretary of State for Defence (JUSTICE intervening)* [2008] AC 332, para 38, Lord Bingham of Cornhill said that it was hard to think that the conditions of article 15 could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw. He also noted that it had not been the practice of states to derogate in situations such as those in Iraq in 2004 and that as subsequent practice in the application of a Treaty may, under article 31(3)(b) of the Vienna Convention, be taken into account in

A interpreting the Treaty it seemed proper to regard the power in article 15 as inapplicable. I do not think therefore that it would be right to assume that concern about the practical consequences in situations such as those with which we are dealing in this case can be answered by exercising the power to derogate. The circumstances in which that power can properly be exercised are far removed from those where operations are undertaken overseas with a view to eliminating or controlling threats to the nation's security. The jurisprudence of the Strasbourg court shows that there are other ways in which such concerns may be met.

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D 61 The Strasbourg court has repeatedly emphasised that, when it comes to an assessment of the positive obligations that are to be inferred from the application in any given case of the Convention rights, a fair balance must be struck between the competing interests of the individual and of the community as a whole. It has also recognised that there will usually be a wide margin of appreciation if the state is required to strike a balance between private and public interests and Convention rights: *Hristozov v Bulgaria* (Applications Nos 47039/11 and 358/12) (unreported) given 13 November 2012, paras 118, 124. That was a case about a refusal to authorise an experimental medicinal product which the applicants had wished to be administered to them. But the competition between the interests of the state and those of the individual is no less acute where issues arise about the risk to life of soldiers in the context of military operations conducted on the state's behalf. The challenge this court faces when dealing with the Snatch Land Rover claims is to determine where the boundary lies between the two extremes in the circumstances that the armed forces were facing in Iraq in 2005 and 2006.

E 62 In *Gentle*, para 19, I said that the proper functioning of an army in a modern democracy includes requiring those who serve in it to undertake the operations for which they have been recruited, trained and equipped, some of which are inherently dangerous, and that the jurisprudence developed from the decision in *Soering v United Kingdom* 11 EHRR 439 about decisions taken in this country to send people abroad to places where they face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment does not apply. The guarantee in the first sentence of article 2.1 is not violated simply by deploying servicemen and women on active service overseas as part of an organised military force which is properly equipped and capable of defending itself, even though the risk of their being killed is inherent in what they are being asked to do.

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H 63 The other side of the coin, as Lord Mance JSC explained in *Catherine Smith*, para 195, is that there is nothing that makes the Convention impossible or inappropriate of application to the relationship between the state and its armed forces as it exists in relation to overseas operations in matters such as, for example, the adequacy of equipment, planning or training. Lord Rodger of Earlsferry JSC recognised in the same case at para 126 that, while a coroner will usually have no basis for considering at the outset that there has been a violation of article 2 where a serviceman or woman has been killed by opposing forces in the course of military operations, new information might be uncovered as the investigation proceeds which does point to a possible violation of the article. He referred to the death of a soldier as a result of friendly fire from other British forces as an extreme example. And, as I said in *Catherine Smith*,

para 105, one must not overlook the fact that there have been many cases where the death of service personnel indicates a systemic or operational failure on the part of the state, ranging from a failure to provide them with the equipment that was needed to protect life on the one hand to mistakes in the way they are deployed due to bad planning or inadequate appreciation of the risks that had to be faced on the other. So failures of that kind ought not to be immune from scrutiny in pursuance of the procedural obligation under article 2 of the Convention.

64 The extent to which the application of the substantive obligation under article 2 to military operations may be held to be impossible or inappropriate will, however, vary according to the context. Military operations conducted in the face of the enemy are inherently unpredictable. There is a fundamental difference between manoeuvres conducted under controlled conditions in the training area which can be accurately planned for, and what happens when troops are deployed on active service in situations over which they do not have complete control. As Lord Rodger JSC observed in *Catherine Smith*, para 122, the job of members of the armed forces involves their being deployed in situations where, as they well know, opposing forces will be making a determined effort, and using all their resources, to kill and injure them. The best laid plan rarely survives initial contact with the enemy. The best intelligence cannot predict with complete accuracy how the enemy will behave, or what equipment will be needed to meet the tactics and devices that he may use to achieve his own ends. Speed may be essential if the momentum of an attack is to be maintained or to strengthen a line of defence. But lines of communication may become stretched. Situations may develop where it is simply not possible to provide troops in time with all they need to conduct operations with the minimum of casualties. Things tend to look and feel very different on the battlefield from the way they look on such charts and images as those behind the lines may have available to them. A court should be very slow indeed to question operational decisions made on the ground by commanders, whatever their rank or level of seniority.

65 Then there is the issue of procurement. In *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 29, Lord Bingham of Cornhill said that the more purely political (in a broad or narrow sense) the question is, the more appropriate it would be for political resolution, and the less likely it is to be an appropriate matter for judicial decision. The allocation of resources to the armed services and as between the different branches of the services, is also a question which is more appropriate for political resolution than it is by a court. Much of the equipment in use by the armed forces today is the product of advanced technology, is extremely sophisticated and comes at a very high price. Procurement depends ultimately on the allocation of resources. This may in turn be influenced as much by political judgment as by the judgment of senior commanders in Whitehall as to what they need for the operations they are asked to carry out. It does not follow from the fact that decisions about procurement are taken remote from the battlefield that they will always be appropriate for review by the courts.

66 This, then, is a field of human activity which the law should enter into with great caution. Various international measures, such as those contained in the 3rd Geneva Convention of 1929 to protect prisoners of war, have been entered into to avoid unnecessary hardship to non-combatants.

A But subjecting the operations of the military while on active service to the close scrutiny that may be practicable and appropriate in the interests of safety in the barrack block or in the training area is an entirely different matter. It risks undermining the ability of a state to defend itself, or its interests, at home or abroad. The world is a dangerous place, and states cannot disable themselves from meeting its challenges. Ultimately democracy itself may be at risk.

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(b) *The Strasbourg authorities*

67 Fundamentally, article 2 requires a state to have in place a structure of laws which will help to protect life: *Savage v South Essex NHS Trust* [2009] AC 681, para 19, per Lord Rodger of Earlsferry. As he explained, with reference to the European court's discussion of this issue in *Osman v United Kingdom* (1998) 29 EHRR 245, para 115, the primary duty is to secure the right to life by putting in place effective criminal law offences backed up by law-enforcement machinery. But the state's duty goes further than that. It may also imply, in certain well defined circumstances, a positive obligation on the authorities to take preventive operational measures to protect the lives of those within their jurisdiction.

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D 68 In para 88 of its judgment in *Keenan v United Kingdom* (2001) 33 EHRR 913, the court began by reciting the high level of duty of the state to put in place effective criminal law sanctions to deter the commission of offences against prisoners. But that was just part of what Lord Rodger described in para 30 of *Savage* as the tralatian jurisprudence of the court on positive obligations under article 2. The positive duties on the state operate at various levels, as one idea is handed down to another. There is a lower-level, but still general, duty on a state to take appropriate measures to secure the health and well-being of prisoners or people who are in some form of detention. This in its turn gives rise, at a still lower level, to two general obligations: *Savage*, para 36; *Rabone v Pennine Care NHS Trust (INQUEST intervening)* [2012] 2 AC 72, para 12, per Lord Dyson JSC; *Öneryildiz v Turkey* (2004) 41 EHRR 325, para 89. The first is a systemic duty, to put in place a legislative and administrative framework which will make for the effective prevention of the risk to their health and well-being or, as it was put in *Öneryildiz*, para 89, effective deterrence against threats to the right to life. Depending on the facts, this duty could extend to issues about training and the procurement of equipment before the forces are deployed on operations that will bring them into contact with the enemy. The second, which is also directly in point in this case, is to ensure that, where there is a real and immediate risk to life, preventative operational measures of whatever kind are adopted to safeguard the lives of those involved so far as this is practicable.

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69 The Strasbourg court has not had occasion to examine the extent to which article 2.1 offers protection at any level to a state's armed forces when engaged in operations such as those that were being conducted in Iraq in 2005 and 2006. But there are some straws in the wind which may offer some guidance.

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70 In *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, para 54, in a well known passage, the court said that, when interpreting and applying the rules of the Convention, the court must bear in mind the particular characteristics of military life and its effect on the situation of individual

members of the armed forces. That was a case about the preservation of military discipline, as were *Şen v Turkey* (Application No 45824/99) (unreported) given 8 July 2003 and *Grigoriades v Greece* (1997) 27 EHRR 464, where it was observed at p 8 that the extent of the protection given to members of the armed forces must take account of the characteristics of military life, the nature of the activities they are required to perform and of the risk that they give rise to.

71 These comments, however brief, do seem to make it clear that it would not be compatible with the characteristics of military life to expect the same standard of protection as would be afforded by article 2.1 to civilians who had not undertaken the obligations and risks associated with life in the military. That is plainly so in the context of the exercise of military discipline over members of the armed forces when they are on active service. It is hard to see why servicemen and women should not, as a general rule, be given the same protection against the risk of death or injury by the provision of appropriate training and equipment as members of the police, fire and other emergency services. But it is different when the serviceman or woman moves from recruitment and training to operations on active service, whether at home or overseas. It is here that the national interest requires that the law should accord the widest measure of appreciation to commanders on the ground who have the responsibility of planning for and conducting operations there.

72 This approach receives some support from *Stoyanovi v Bulgaria* (Application No 42980/04) (unreported) given 9 November 2010, where an application was made under article 2.1 by the family of a soldier who had died during a parachute exercise. In paras 59–61 the court examined the difference between the primary positive obligation under that article to establish a framework of laws and procedures to protect life and the obligation to take preventative operational measures to protect the life of an individual which may be imposed by implication, as it was put in *Osman v United Kingdom* 29 EHRR 245, para 115, only in certain and well-defined circumstances. In para 59, recalling what was said in para 116 of *Osman* where the allegation was of a failure to take preventive measures where there was a known risk of a real, direct and immediate threat to the life of an individual posed by another individual, the court said:

“Subject to considerations as to the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities and which also conforms with the other rights guaranteed by the Convention.”

In para 61 it observed that positive obligations will vary in their application depending on the context. Having noted that the case concerned an accident during a military training exercise and that parachute training was inherently dangerous but an ordinary part of military duties, it said:

“Whenever a state undertakes or organises dangerous activities, or authorises them, it must ensure through a system of rules and through sufficient control that the risk is reduced to a reasonable minimum. If

A nevertheless damage arises, it will only amount to a breach of the state's positive obligations if it was due to insufficient regulations or insufficient control, but not if the damage was caused through the negligent conduct of an individual or the concatenation of unfortunate events."

73 That was a case where the state was in control of the situation, as the accident occurred during a training exercise. It was not claimed that any specific risk to the life of the deceased should have been foreseen in advance, nor was it argued that the legislative and administrative framework was defective in any general or systemic sense: paras 62–63. The whole focus of the court's supervision was on the authorities' response to the accident. It was not suggested that there could not have been a breach of the general or systemic duties in such a case. There is, however, a sharp contrast between that situation and operations undertaken in a situation where it was known or could reasonably have been anticipated that troops were at risk of attacks from insurgents by unconventional means such as by the planting of IEDs. Regulation and control of the kind contemplated in *Stoyanovi* is likely to be very difficult, if not impossible, to achieve on the ground in situations of that kind. Even where those directing operations are remote in place and time from the area in which the troops are operating, great care is needed to avoid imposing a burden on them which is impossible or disproportionate.

74 Another example of the Strasbourg court's concern not to impose a disproportionate and unrealistic obligation on the state is provided by *Giuliani and Gaggio v Italy* (2011) 54 EHRR 278. The applicants in that case complained of the death of their son and brother during demonstrations surrounding the G8 summit in Genoa which had degenerated into violence. The court held that the Italian authorities did not fail in their obligation to do what could reasonably be expected of them to provide the level of safeguards required during operations potentially involving the use of lethal force. It drew a contrast between dealing with a precise and identifiable target and the maintenance of order in the face of possible disturbances spread over the entire city as regards the extent to which the officers involved could be expected to be highly specialised in dealing with the tasks assigned to them.

75 So too, in the case of the armed forces, a contrast can be drawn between their situation in the training area that can be planned for precisely and that which they are likely to encounter during operations when in contact with the enemy. The same approach is indicated by *Finogenov v Russia* (2011) 32 BHRC 324, para 213, where the court was prepared to give a margin of appreciation to the domestic authorities, in so far as the military and technical aspects of the situation were concerned, in connection with the storming of a theatre in which many people were held hostage by terrorists, even if with hindsight some of the decisions they took might appear open to doubt.

76 The guidance which I would draw from the court's jurisprudence in this area is that the court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate. But it must give effect to those obligations where it would be reasonable to expect the individual to be afforded the protection of the article. It will be easy to find that allegations are beyond the reach of article 2 if the decisions

that were or ought to have been taken about training, procurement or the conduct of operations were at a high level of command and closely linked to the exercise of political judgment and issues of policy. So too if they relate to things done or not done when those who might be thought to be responsible for avoiding the risk of death or injury to others were actively engaged in direct contact with the enemy. But finding whether there is room for claims to be brought in the middle ground, so that the wide margin of appreciation which must be given to the authorities or to those actively engaged in armed conflict is fully recognised without depriving the article of content, is much more difficult. No hard and fast rules can be laid down. It will require the exercise of judgment. This can only be done in the light of the facts of each case.

(c) *Should the claims be struck out?*

77 The circumstances of the Snatch Land Rover cases are not precisely analogous to those of any previous case in which the implied positive obligation under article 2 has been imposed, and the allegations made in each of the claimants' particulars of claim (see paras 11 and 12, above) are not identical. This is because the explosion in which Pte Hewett was killed occurred more than six months before that which killed Pte Ellis. The claim in Pte Ellis's case concentrates on the provision of what is said, in the light of experience, to have been inadequate equipment and a failure to limit his patrol to vehicles which offered better protection or had been fitted with element A. The claims in Pte Hewett's case are less precise and range more widely. But they too extend to criticism of operational decisions taken by those in charge of the patrols as well as to alleged failures in the provision of appropriate vehicles and equipment in the light of the death of L Cpl Brackenbury in similar circumstances seven weeks previously.

78 I am conscious, however, of the fact that these particulars are no more than the briefest outline of the case that the claimants seek to make. Account should also be taken of the fact that the claims were issued in January 2008, in the case of Pte Hewett, and in February 2009, in the case of Pte Ellis. In both cases this was before the judgment was delivered in *Stoyanovi v Bulgaria*. The European court has now provided greater clarity as to the approach that should be taken to claims of this kind, as has the discussion about the distinct elements that are to be found in the positive duty to protect life that is to be found in *Savage* and *Rabone*. Some of the failures which the claimants allege appear to be of the systemic kind: see para 68, above. Others are of the operational kind that was described in the *Osman* case, where there was an implied positive obligation to take preventative operational measures to protect those who were at risk of a real, direct and immediate threat to life. Measures of that kind could extend to procurement decisions taken on the ground about the provision of vehicles and equipment, as well as to decisions about their deployment. How precisely the allegations fit into the structure of the duties implied by the article cannot be determined without knowing more about the facts, bearing in mind that it must be interpreted in a way which does not impose an unrealistic or disproportionate burden on the authorities.

A 79 The overall aim of the court's procedure must be to achieve fairness, and I think that it would be unfair to the relatives of the deceased to apply too exacting a standard at this stage to the way the claims have been pleaded. The circumstances in which the various decisions were made need to be inquired into before it can be determined with complete confidence whether or not there was a breach of the implied positive obligation. The details  
B which are needed to place those circumstances into their proper context will only emerge if evidence is permitted to be led in support of them. This seems to me to be a classic case where the decision on liability should be deferred until after trial.

80 I agree with Owen J that the procurement issues may give rise to questions that are essentially political in nature but that it is not possible to decide whether this is the case without hearing evidence. He said that there  
C was no sound basis for the allegations that relate to operational decisions made by commanders, and for this reason took a different view as to whether they were within the reach of article 2. But it seems to me that these allegations cannot easily be divorced from the allegations about procurement, and that here too the question as to which side of the line they lie is more appropriate for determination after hearing evidence. Much will  
D depend on where, when and by whom the operational decisions were taken and the choices that were open to them, given the rules and other instructions as to the use of equipment under which at each level of command they were required to operate.

81 I would therefore dismiss the MOD's appeal against Owen J's decision, while the Court of Appeal found it unnecessary to consider, that none of these claims should be struck out. The claimants are, however, on  
E notice that the trial judge will be expected to follow the guidance set out in this judgment as to the very wide measure of discretion which must be accorded to those who were responsible on the ground for the planning and conduct of the operations during which these soldiers lost their lives and also to the way issues as to procurement too should be approached. It is far from clear that they will be able to show that the implied positive obligation under  
F article 2.1 of the Convention to take preventative operational measures was breached in either case.

### III. *Combat immunity*

#### (a) *Background*

82 The Challenger claims proceed on the basis that there is no common  
G law liability for negligence in respect of acts or omissions on the part of those who are actually engaged in armed combat. So it has not been suggested that Lt Pinkstone or anyone else in the Black Watch battle group was negligent. Nor, as his decision to fire was taken during combat, would it have been appropriate to do so. The Challenger claimants concentrate instead on an alleged failure to ensure that the claimants' tank and the tanks of the battle  
H group that fired on it were properly equipped with technology and equipment that would have prevented the incident, and an alleged failure to ensure that soldiers were provided with adequate recognition training before they were deployed and also in theatre. Their case is founded entirely on failings in training and procurement. The Ellis claim at common law also raises issues about procurement.

83 The MOD invokes in reply the doctrine of combat immunity, which it says should be given a sufficiently broad scope to cover all acts or omissions that are alleged to have caused death or injury in the course of combat operations. It is plain that the effect of the doctrine, if it applies, would be to remove the issue of liability for negligence from the jurisdiction of the court altogether. But the MOD also submits that, if the court does have jurisdiction, it would not be fair, just or reasonable to impose a duty of care on it to protect the soldiers in such circumstances against death or injury. The justification for these arguments is the same, whichever of the two formulations is adopted. It is that the interests of the state must prevail over the interests of the individual. As Mr Eadie QC for the MOD put it, the fair, just and reasonable test chimes with the doctrine of combat immunity. His appeal against the Court of Appeal's decision that the negligence claims should not be struck out was directed primarily to that doctrine. This may be considered to be an application to given facts of the test as to what is fair, just and reasonable. But the structure of the law is important and combat immunity is best thought of as a rule, because once a case falls within it no further thought is needed to determine the question whether a duty of care was owed to the claimant. The scope of this rule deserves attention as a separate issue in its own right.

(b) *The authorities*

84 Combat immunity made its first appearance in *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344. A collision had occurred between HMAS *Adelaide* and a civilian vessel, the MV *Coptic*. It took place on 3 December 1940 while the civilian vessel was on a voyage from Brisbane to Sydney. The owners of the civilian vessel claimed that the collision had been caused by negligence on the part of the naval authorities and sought damages. The High Court was adjudicating on the plaintiff's demurrer to the defence and a strike out summons by the Commonwealth. The defence was that, while in the course of actual operations against the enemy, the forces of the Crown are under no duty of care to avoid loss or damage to private individuals. Both applications were dismissed and the case proceeded to trial. The Commonwealth was ultimately found liable on the ground of the captain's fault in his navigation of the *Adelaide*: see *Attorney General for New South Wales v Perpetual Trustee Co Ltd* (1952) 85 CLR 237, 252, per Dixon CJ.

85 Dixon J, with whom Rich ACJ and McTiernan J agreed, said in the demurrer proceedings at p 361 that it could hardly be maintained that during an actual engagement with the enemy the navigating officer of a ship of war was under a common law duty to avoid harm to such non-combatant ships as might appear in the theatre of operations:

“To concede that any civil liability can rest on a member of the armed forces for supposedly negligent acts or omissions in the course of an actual engagement with the enemy is opposed alike to reason and to policy. But the principle cannot be limited to the presence of the enemy or to occasions when contact with the enemy has been established. Warfare perhaps never did admit of such a distinction, but now it would be quite absurd. The development of the speed of ships and the range of guns were enough to show it to be an impracticable refinement, but it has been put

A out of question by the bomber, the submarine and the floating mine. The principle must extend to all active operations against the enemy.”

86 At p 362 he acknowledged that it might not be easy under conditions of modern warfare to say in a given case on which side of the line an act or omission falls. But the uniform tendency of the law had been to concede to the armed forces complete legal freedom in the field, that is to say in the course of active operations against the enemy, so that the application of private law by the ordinary courts may end where the active use of arms begins. Starke J said, at pp 355–356, that acts done in the course of operations of war are not justiciable and that this had been decided by *Marais v General Officer Commanding the Lines of Communication; Ex p Marais* [1902] AC 109, where the Judicial Committee of the Privy Council applied the test of whether actual war was raging at the time of the incident.

C 87 In *Groves v The Commonwealth of Australia* (1982) 150 CLR 113, 117 Gibbs CJ said that he had no difficulty in accepting the correctness of what was said by Dixon J:

D “To hold that there is no civil liability for injury caused by the negligence of persons in the course of an actual engagement with the enemy seems to me to accord with common sense and sound policy.”

In *Mulcahy v Ministry of Defence* [1996] QB 732, 746 Neill LJ said that it seemed to have been recognised in the Australian cases that warlike activities fell into a special category. He concluded, at p 748, that an English court should approach a claim of negligence by a soldier who was injured while a gun of whose team he was a member was fired into Iraq during the first Iraq war in the same way as in the High Court of Australia did in the *Shaw Savill* case. At pp 749–750 he examined what the position would have been, in the absence of the Australian cases, as to whether it would have been fair, just or reasonable to impose a duty of care on one soldier in his conduct to another when engaging the enemy during hostilities. Echoing the words of Gibbs CJ in *Groves*, he reached the same conclusion, as there was no duty on the defendants in battle conditions to maintain a safe system of work. Sir Iain Glidewell said, at p 751, that at common law one soldier does not owe a duty of care to another member of the armed forces when engaging the enemy in the course of hostilities.

G 88 In his judgment in this case, at para 93, Owen J referred to his judgment in *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 (QB) in which he drew from the cases the proposition that the immunity is not limited to the presence of the enemy or the occasions when contact with the enemy has been established. It extends to all active operations against the enemy in which service personnel are exposed to attack or the threat of attack, including the planning and preparation for the operations in which the armed forces may come under attack or meet armed resistance. He qualified the latter part of this proposition by saying that the extension of the immunity to the planning of and preparation for military operations applied to the planning of and preparation for the operations in which injury was sustained, and not to the planning and preparation in general for possible unidentified further operations.

*(c) Discussion: Combat immunity*

89 There is not much by way of close reasoning in *Shaw Savill and Groves*, apart from assertions that where combat immunity applies the doctrine is justified by reason and policy. But the doctrine itself, as explained in *Mulcahy*, is not in doubt. The question is as to the extent of the immunity. With great respect, I doubt the soundness of the extension of it that in the *Multiple Claimants* case Owen J drew from the very few cases on this topic. They included *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, where the House held that the destruction of oil installations to avoid their falling into the hands of the enemy did not fall into the category of damage done during the course of battle. That was a very unusual case, which does not really bear on the issue we have to decide. It seems to me that the extension of the immunity to the planning of and preparation for the operations in which injury was sustained that the judge seems to have favoured is too loosely expressed. It could include steps taken far away in place and time from those operations themselves, to which the application of the doctrine as a particular application of what is just, fair and reasonable would be at the very least questionable.

90 Such an extension would also go beyond the situations to which the immunity has so far been applied. In *Bici v Ministry of Defence* [2004] EWHC 786 (QB) at [90], Elias J noted that combat immunity was exceptionally a defence to the government, and to individuals too, who take action in the course of actual or imminent armed conflict and cause damage to property or death or injury to fellow soldiers or civilians. It was an exception to the principle that was established in *Entick v Carrington* (1765) 19 State Tr 1029 that the executive cannot simply rely on the interests of the state as a justification for the commission of wrongs. In his opinion the scope of the immunity should be construed narrowly. That approach seems to me to be amply justified by the authorities.

91 The Challenger claims are about alleged failures in training, including pre-deployment and in-theatre training, and the provision of technology and equipment. They are directed to things that the claimants say should have been done long before the soldiers crossed the start line at the commencement of hostilities. The equipment referred to consists of target identity devices to provide automatic confirmation as to whether a vehicle is a friend or a foe, and situation awareness equipment that would permit tank crews to locate their position and direction of sight accurately. The claim is that, if the Challenger II tanks that were involved in this incident had been provided with this equipment before they went into action, the claimants' tank would not have been fired on. The training referred to is described as recognition training. It is said that this should have been provided pre-deployment and in theatre. Here too the essence of the claim is that these steps should have been taken before the commencement of hostilities. The claimants are careful to avoid any criticism of the actions of the men who were actually engaged in armed combat at the time of the incident.

92 The question which these claims raise is whether the doctrine of combat immunity should be extended from actual or imminent armed conflict to failures at that earlier stage. I would answer it by adopting Elias J's point, with which Owen J agreed in para 99 of his judgment in this case, that the doctrine should be narrowly construed. To apply the doctrine of

A combat immunity to these claims would involve an extension of that doctrine beyond the cases to which it has previously been applied. That in itself suggests that it should not be permitted. I can find nothing in these cases to suggest that the doctrine extends that far.

93 In the *Shaw Savill* case the argument for the Commonwealth at the demurrer stage was that at the time of the collision the warship was engaged in active naval operations against the enemy, that those operations were urgently required and necessary for the safety of the realm and that the national emergency called for the taking of the measures that the warship adopted. Both vessels were said to have been proceeding without any navigation or other lights, in pursuance of instructions from the Australian naval authorities which had been authorised to give them as part of the Crown's function of waging war by sea and protecting vessels from enemy action. It was not said where the enemy were, or what exactly the warship was doing when the collision occurred. But the phrase "active naval operations against the enemy" makes the point that it was assumed that it occurred during, and not before, the vessel's engagement in those operations. The fact that the Commonwealth was ultimately found liable at trial suggests that the judge found that at the material time the warship was not, after all, engaged in actual operations against the enemy. The accident in *Mulcahy's* case occurred while the gun was being fired into Iraq during, and not before, the actual engagement with the enemy.

94 Then there is the point that, as was noted in *Jones v Kaney* [2011] 2 AC 398, paras 108, 161, any extension of an immunity needs to be justified. It has to be shown to be necessary. Starke J observed in the *Shaw Savill* case, at p 354, that not every warlike operation done in time of war is an operation or an act of war. It is to operations or acts of war only that the doctrine extends, on the ground that the armed forces must be free to conduct such operations without the control or interference of the courts of law. As Dixon J said in the same case, at p 361, no one can imagine a court undertaking the trial of an issue as to whether a soldier on the field of battle or a sailor fighting on his ship might reasonably be more careful to avoid causing civil loss or damage. The principle, as he described it, is not limited to acts or omissions in the course of an actual engagement with the enemy. It extends to all active operations against the enemy. While in the course of actually operating against the enemy, the armed forces are under no duty of care to avoid causing loss or damage to those who may be affected by what they do. But, as Dixon J also said at p 362, there is a real distinction between actual operations against the enemy and other activities of the combatant services in time of war. He referred by way of example to a warship proceeding to her anchorage or manoeuvring among other ships in a harbour. At that stage no reason was apparent for treating her officers as under no civil duty of care, remembering always that the standard of care is that which is reasonable in the circumstances.

95 The same point can be made about the time when the failures are alleged to have taken place in the Challenger claimants' case. At the stage when men are being trained, whether pre-deployment or in theatre, or decisions are being made about the fitting of equipment to tanks or other fighting vehicles, there is time to think things through, to plan and to exercise judgment. These activities are sufficiently far removed from the pressures and risks of active operations against the enemy for it to not to be

unreasonable to expect a duty of care to be exercised, so long as the standard of care that is imposed has regard to the nature of these activities and to their circumstances. For this reason I would hold that the Challenger claims are not within the scope of the doctrine, that they should not be struck out on this ground and that the MOD should not be permitted, in the case of these claims, to maintain this argument. A

96 The Ellis common law claim relates to a different phase of the United Kingdom's engagement in Iraq, but it was a phase during which there was a constant threat of enemy action by insurgents which was liable to cause death or injury. These claims are less obviously directed to things done away from the theatre in which Pte Ellis was engaged at the time of his death: see para 12, above. Their wording suggests that at least some of the failures alleged may have been due to decisions taken by local commanders during active operations on the ground. If that was the situation, it may be open to argument that these claims are within the doctrine. As Moses LJ recognised in the Court of Appeal, para 63, factual issues of that kind must be left for determination at the trial. The information that would be needed for a decision either way is lacking at this stage. As in the case of their claims under article 2 of the Convention, the details that are needed to place the claims in context will only emerge if evidence is permitted to be led in support of them. So I would hold that it would be premature for these claims to be struck out on the ground of combat immunity. I would leave this issue open to further argument in the light of the evidence. B  
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*(d) Discussion: fair, just and reasonable*

97 Mr Eadie also renewed the argument that was advanced below that the common law claims should be struck out on the ground that it would not be fair, just and reasonable to impose a duty of care at common law to protect against such death or injury as occurred in these cases. He referred, for example, to *Van Colle v Chief Constable of Hertfordshire Police (Secretary of State for the Home Department intervening)* [2009] AC 225, *Brooks v Comr of Police of the Metropolis* [2005] 1 WLR 1495 and *Stovin v Wise* [1996] AC 923 in support of this part of his argument. In *Brooks*, para 30 Lord Steyn affirmed what he described as the core principle in *Hill v Chief Constable of West Yorkshire* [1989] AC 53, where it was held on grounds of public policy that the police did not owe legal duties to victims or witnesses in the performance of their function in keeping the Queen's peace: see also *Elguzouli-Daf v Comr of Police of the Metropolis* [1995] QB 335, where Lord Steyn held, also on grounds of public policy, that the Crown Prosecution Service did not owe a duty of care to those whom it was prosecuting; and *Hughes v National Union of Mineworkers* [1991] ICR 669, where May J held that it would be detrimental to the public interest if police officers charged with deploying of other officers in times of serious public disorder were to have to concern themselves with possible negligence claims from their subordinates. These can all be seen as cases where, for reasons of public policy, it was not fair, just or reasonable for the defendant to be under a duty of care to avoid injury. E  
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98 The closest of the cases have come to applying that reasoning to cases involving members of the armed forces is *Mulcahy v Ministry of Defence* [1996] QB 732, where Neill LJ said, at p 750, that there was no duty on the defendants in battle conditions to maintain a safe system of work and Sir

A Iain Glidewell said, at p 751, that one soldier does not owe to another a duty of care when engaged in battle conditions. As in the other cases, the question whether a duty should be held not to exist depends on the circumstances—on who the potential claimants are and when, where and how they are affected by the defendant’s acts. The circumstances in which active operations are undertaken by our armed services today vary greatly from theatre to theatre and from operation to operation. They cannot all be grouped under a single umbrella as if they were all open to the same risk, which must of course be avoided, of judicialising warfare. For these reasons, I think that the question whether the claims in this case fall within the exclusion that was recognised in *Mulcahy* or any extension of it that can be justified on grounds of public policy cannot properly be determined without hearing evidence. In *Van Colle*, para 58, Lord Bingham of Cornhill said that one would ordinarily be surprised if conduct which violated a fundamental right or freedom of the individual under the Convention did not find a reflection in a body of law as sensitive to human needs as the common law. So Lord Rodger JSC’s observation in *Catherine Smith*, para 126 that there would be reason to believe that the military authorities may have failed in their article 2 duty if a soldier dies as a result of friendly fire from other British forces is capable of being read across as indicating that the question in the case of the Challenger claims is not whether a duty was owed but whether, on the facts, it was breached. Whether the situation in Iraq at the time of the incidents that gave rise to the Ellis claims was comparable to battle conditions when a nation is at war is a matter that also needs to be investigated.

99 It needs to be emphasised, however, that the considerations mentioned in paras 64–66 and 76–81, above in the context of the claims made under article 2 of the Convention are just as relevant in the context of the common law claims. Close attention must be paid to the time when the alleged failures are said to have taken place, and to the circumstances in which and the persons by whom the decisions that gave rise to them were taken. It will be easier to find that the duty of care has been breached where the failure can be attributed to decisions about training or equipment that were taken before deployment, when there was time to assess the risks to life that had to be planned for, than it will be where they are attributable to what was taking place in theatre. The more constrained he is by decisions that have already been taken for reasons of policy at a high level of command beforehand or by the effects of contact with the enemy, the more difficult it will be to find that the decision-taker in theatre was at fault. Great care needs to be taken not to subject those responsible for decisions at any level that affect what takes place on the battlefield, or in operations of the kind that were being conducted in Iraq after the end of hostilities, to duties that are unrealistic or excessively burdensome.

100 The sad fact is that, while members of the armed forces on active service can be given some measure of protection against death and injury, the nature of the job they do means that this can never be complete. They deserve our respect because they are willing to face these risks in the national interest, and the law will always attach importance to the protection of life and physical safety. But it is of paramount importance that the work that the armed services do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the

threat of litigation if things should go wrong. The court must be especially careful, in their case, to have regard to the public interest, to the unpredictable nature of armed conflict and to the inevitable risks that it gives rise to when it is striking the balance as to what is fair, just and reasonable.

### Conclusion

101 For these reasons I would allow the Snatch Land Rover claimants' appeal against the decision of the Court of Appeal that the soldiers in these cases were not within the United Kingdom's jurisdiction for the purposes of article 2 of the Convention at the time of their deaths. I would, however, dismiss the MOD's application that the Snatch Land Rover claims should be struck out on the ground that the claims are not within the scope of that article. I would dismiss the MOD's application that the Challenger claims should be struck out on the ground of combat immunity and on the ground that it would not be fair, just or reasonable to extend the duty of care to those cases. I would also dismiss the MOD's cross appeal against the decision of the Court of Appeal to dismiss its application to strike out the Ellis claim based on negligence.

LORD MANCE JSC (with whom LORD WILSON JSC agreed)

### Introduction

102 This first issue is whether soldiers in the British army are within the jurisdiction of the United Kingdom when serving both on and off base in Iraq for the purposes of article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. On this issue, I am in complete agreement with Lord Hope of Craighead DPSC. I have nothing to add to what he says in his paras 17–55.

103 On this basis, this case raises once again for consideration the “difficult line” or inter-relationship between national law and substantive Convention rights, to which I referred in *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72, para 121. It is in general terms clear from Strasbourg jurisprudence that article 2 of the Human Rights Convention includes substantive duties on the part of the state, namely (a) a systems or framework duty, viz to establish a framework which is appropriately protective of life and (b) an operational duty, viz “in appropriate circumstances, a positive obligation . . . to take preventive operational measures to protect an individual whose life is at risk”: *Watts v United Kingdom* (2010) 51 EHRR SE 66, para 82.

104 Although the operational duty was said in *Osman v United Kingdom* 29 EHRR 245 to apply “in certain well-defined circumstances”, the subsequent recognition of its application in new sets of circumstances (including by this court in *Rabone*) leaves its scope uncertain. As Baroness Hale of Richmond notes in *Rabone*, para 97–99, it is conceivable that the Strasbourg jurisprudence accepts or is moving towards a broad principle that engages article 2 and requires the state to react reasonably in any situation where the state knows or ought to know of a real and immediate threat to human life. It is also unclear how far the two substantive duties are separated, with middle ground between them, or form part of a continuum covering almost every aspect of state activity.

A 105 In *Öneryildiz v Turkey* 41 EHRR 325, paras 89–90 the Strasbourg court treated the framework duty as “indisputably apply[ing] in the particular context of dangerous activities”, where “special emphasis must be placed on regulations geared to the special features of the activity in question”, adding that

B “They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.”

106 On the other hand, there are some circumstances in which death occurs as a result of the activities of state agents, but article 2 is not engaged. They include “casual errors of judgment or acts of negligence” (which C I described in *R (Smith) v Oxfordshire Assistant Deputy Coroner (“Catherine Smith”)* [2011] 1 AC 1, para 201, as “operational as opposed to systematic failures”), a principle established in the context of medical negligence.

107 The present appeal concerns the operation and application of the principles of common law negligence and of article 2 in a factual context which is very largely uncharted by previous authority. The right approach is D I believe to take first the common law position. A primary aspect of the framework duty on states is to have a “legislative and administrative framework” appropriately protective of life: *Öneryildiz*, para 89, quoted in *Rabone*, para 12. So article 2 naturally directs attention first to the question whether domestic law provides such a framework, including the recourse to compensation for non-pecuniary damages which the Strasbourg court has E indicated should “in principle” be available as part of the range of redress where a state is held responsible for a death: *Z v United Kingdom* (2001) 34 EHRR 97, para 109.

### *The claims*

108 I gratefully adopt Lord Hope DPSC’s summary of the various F claims in paras 9–12 of his judgment. Some preliminary observations may be made. First, although the Challenger claims are based only on allegations of lack of technology, equipment and/or training, the particulars of claim alone show that the factual circumstances of these sad deaths would require examination and that failings on the ground of those with command over the firing tank are in fact held directly responsible for such deaths. In particular, it is alleged that Major McDuff under whose command the firing G tank fell was told of the presence of the tanks subsequently fired on and had such tanks visually identified to him, that he was shown, but refused to accept, the boundaries of responsibility marked on a map which had been given to such tanks and that he failed to communicate any of this information to anyone, with the result that, some 12 hours later, the firing tank wrongly identified the tanks fired on as enemy.

H 109 Second, the particulars relied on in Mrs Smith’s claim under article 2 include both decisions or omissions on the ground and equipment and tactical decisions at a higher level. Third, the particulars relied on in Ellis’ claims in negligence and/or under article 2 relate mainly at least to equipment and tactical decisions at a higher level (although they also embrace allegations as to what equipment should have been used if

available). As pleaded, the complaint regarding the decision to deploy Snatch Land Rovers on the patrol might be read as a complaint about a decision made on the ground. But their case (para 188) explains that it relates to a decision made “well away from the heat of battle at a time when the decision-maker was neither under attack nor threat of attack. It did not form part of the planning of this particular patrol”.

### *Common law*

110 The questions arising are (i) the existence and scope of any common law responsibility on the part of the state towards its soldiers, in particular in respect of deaths in active service and (ii) the nature and scope of any common law doctrine of combat immunity. The claimants’ starting point is that the state owes to its soldiers a general duty to take appropriate measures to secure their safety, like that owed by any other employer, and that it must also answer vicariously for any breach of duty by one soldier killing or injuring another. It is only therefore by virtue of some exceptional immunity that the state can escape liability for breach of any such duty, and the only principle giving any such immunity is a limited principle of combat immunity.

111 That the Crown is in tort generally in the same position as any employer follows from section 2 of the Crown Proceedings Act 1947, providing

#### *“Liability of the Crown in tort*

“(1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:— (a) in respect of torts committed by its servants or agents; (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property: Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate.”

112 However, there is authority that “where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals”: *Ex p Marais* [1902] AC 109, 114. That was a case of alleged wrongful detention where the Privy Council declared that the principle applied where martial law had been declared, even though the military commander had allowed ordinary courts, before which the claimant might have been brought, to continue in operation. In *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, Lord Reid recognised (at p 110) an exception (to the Crown’s liability to pay compensation for property seized or destroyed) in relation to “battle damage” consisting of accidental or deliberate damage done in the course of fighting operations.

113 In *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344, *Ex p Marais* was cited by Starke and Williams JJ, but all the members of the High Court also assimilated the question of “justiciability” with the question whether the state owed a legal duty to take care in the particular

A circumstances. Starke J stated that it is for the court to determine whether a state of war exists and whether “the matters complained of were done or omitted in the conduct of an operation or act of war”, He added (consistently with *Ex p Marais*) that

B “the immunity arising from conduct of war cannot be confined to the theatre of operations where combatants are actively engaged: it must extend, in modern times, to all theatres in which action on the part of the King’s enemies is imminent”: p 356.

C 114 In terms of the modern law of tort, the right analysis is, I consider, that combat immunity is not so much an entirely separate principle as the result of a general conclusion that it is not fair, just or reasonable to regard the Crown or its officers, soldiers or agents as under a duty of care to avoid injury or death in their acts or omissions in the conduct of an active military operation or act of war. That is how the matter was seen in *Mulcahy v Ministry of Defence* [1996] QB 732. The Court of Appeal there, rightly in my view, followed the approach in *Shaw Savill* in holding that a gun commander firing live rounds into Iraq during the first Gulf War in 1991 owed the claimant, a serving soldier in the same team, no duty of care for breach of which the ministry could be held vicariously liable. It held equally D that the ministry itself owed the claimant no duty to maintain a safe system of work.

E 115 Among the points considered in *Mulcahy* was whether the repeal of the immunity in tort formerly provided by section 10 of the Crown Proceedings Act 1947, subject to the right (never yet utilised) to revive section 10 for all or limited purposes under section 2 of the Crown Proceedings (Armed Forces) Act 1987 bore on the existence or scope of any doctrine of combat immunity. Neill LJ held it did not, because it was still necessary to consider the common law position. I agree.

F 116 In *Bici v Ministry of Defence* [2004] EWHC 786 (QB), concerning the killing of two civilians by British soldiers during the course of peace-keeping operations in Kosovo, Elias J treated separately the doctrine of combat immunity and the question whether there existed a duty of care, viewing the former as an exclusion of justiciability and so as a doctrine to be strictly confined on constitutional grounds. But on that basis it was still necessary to consider whether any duty of care existed. Elias J held it did, because the case involved the single question whether the soldiers were justified in firing on the civilians, and there was no basis for concluding that they did not owe a duty of care in doing so: “Troops” he said, at para 104

G “frequently have to carry out difficult and sensitive peace keeping functions, such as in Northern Ireland, whilst still being subject to common law such duties of care. The difficulties of their task are reflected in the standard of the duty rather than by denying its applicability.”

H 117 As Lord Hope DPSC has noted, the cases on combat immunity are focused on acts or omissions occurring and causing injury or death in the course of hostilities. In the present case the Challenger claimants are careful to put their case in a way which relies solely on allegedly negligent conduct occurring prior to and distant from the actual hostilities, and involving failures, in Whitehall or elsewhere, properly to equip and train the soldiers sent to fight in Iraq. The same applies, at least for the most part, to the Ellis

claims. The question is whether the state, or indeed those of its officers responsible for procurement and training decisions, owe any duty of care in respect of injury or death in the course of combat operations allegedly attributable to their negligence in the performance of such responsibility.

118 This is a question of public policy about the answer to which Lord Rodger of Earlsferry JSC (at para 127), with whom Lord Walker of Gestingthorpe JSC expressly agreed (at para 131), can, I think, have had no doubt in *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1. Although they were addressing explicitly the position under article 2, they cannot have thought that their remarks were or could be made irrelevant simply by reformulating a claim in negligence. It is not difficult to identify situations in which the common law has concluded on policy grounds that no duty of care should exist. I agree with all that Lord Carnwath JSC has said in this connection in paras 161–175 of his judgment.

119 In *Hill v Chief Constable of West Yorkshire* [1989] AC 53, the House held that the police had owed no enforceable duty of care with respect to the last victim of the Yorkshire Ripper, properly to investigate the crimes committed by the Yorkshire Ripper before the murder of, and so to save the life of, the last victim. Lord Keith of Kinkel said, at p 63:

“From time to time they [the police] make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward type of failure—for example that a police officer negligently tripped and fell while pursuing a burglar—others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted.”

120 In *Brooks v Comr of Police of the Metropolis* [2005] 1 WLR 1495, the House applied similar reasoning when holding that the police have no

A duty of care not to cause by positive acts or omissions harm to victims of serious crime, or witnesses to serious crime, with whom they have contact. Lord Steyn said, at para 30:

B “It is, of course, desirable that police officers should treat victims and witnesses properly and with respect: compare the Police (Conduct) Regulations 2004 (SI 2004/645). But to convert that ethical value into  
C general legal duties of care on the police towards victims and witnesses would be going too far. The prime function of the police is the preservation of the Queen’s peace. The police must concentrate on preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence: . . . A retreat from the principle in *Hill’s* case would have detrimental effects for law  
D enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police’s ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in *Hill’s* case, be bound to lead to an unduly defensive approach in combating crime.”

E 121 *Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening)* [2009] AC 225 is a further case in which there was in Lord Hope’s words “a highly regrettable failure to react to a prolonged campaign by Jeffrey threatening the use of extreme criminal violence” against Mr Smith, which in the event did culminate in Jeffrey attacking Mr Smith and very severely injuring him. The House again applied the approach in *Hill* and *Brooks* in concluding that there was no actionable duty of care.

F 122 In all these cases the existence of a duty of care was negated, although it could not be said that the police action or inaction occurred in the heat of the moment and the failings occurred over considerable periods when the police had the opportunity to think about and investigate the position and take protective measures. In *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 (QB), it was claimed that the ministry was in breach of a duty of care to provide service personnel with a safe system of  
G work. Owen J considered (para 2.C.16) that

H “In aggressive operations the objective will be defeat of the enemy; in defensive operations the successful repulse of the enemy. In the planning of and preparation for such operations the interests of service personnel must be subordinate to the attainment of the military objective. In my judgment the military cannot be constrained by the imposition of civil liability in the planning of and preparation for such operations any more than in their execution. The planning of and preparation for military operations will include decisions as to the deployment of resources.”

123 On that basis, he dismissed a claim that the ministry had failed to make proper arrangements for psychiatric support in combat on the basis

that “Decisions as to the deployment of medical resources in operations in which service personnel may engage in hostilities fall within the combat immunity . . .”: para 10.12. However, he disagreed with the ministry’s more extended submission that “no cause of action can arise in relation to injury sustained in combat irrespective of whether the acts or omissions to which such injury is attributable fall within the combat immunity”: para 2.C.18. He reiterated his view on this point in his judgment at first instance in the present cases concerning the Challenger and Ellis claims. Mr Eadie QC takes issue with Owen J on the point. However, it was explained by Owen J with an example which suggests that he had in mind a relatively narrow situation not presently relevant. The explanation was in these terms:

“If the restriction to the duty of care does not arise on the facts, and a claimant is able to demonstrate breach of duty resulting in injury and consequential loss and damage, it is immaterial that the injury was sustained in the course of combat. The question with regard to the injury is then simply one of causation; is it attributable to the breach of duty? The point can be illustrated by reference to the claimants’ contention that the MoD was under a duty to devise and implement a system for screening recruits so as, and I paraphrase, to eliminate those vulnerable to stress, and that as a result of breach of that duty recruits who should have been rejected were enlisted, and subsequently sustained psychiatric injury when exposed to the trauma of battle. If that contention is well founded, it will obviously not be open to the MoD to argue that the combat immunity applies to the relevant acts or omissions. The injury will have been sustained in combat; but the exposure to stress in combat is simply the mechanism by which the breach causes injury.”

124 In considering the Challenger claims and the Ellis claim for negligence, Owen J referred to his previous decision in *Multiple Claimants* as well as to Elias J’s decision in *Bici*. He accepted the latter as standing for the proposition that any exception on grounds of combat immunity should be narrowly construed. He confined the extension of the doctrine of combat immunity, recognised in *Multiple Claimants*, to the planning and preparation of the particular operations in which injury was sustained, as opposed to planning and preparation “made . . . in general for possible unidentified further military operations”: para 94. He was not persuaded that the fact that the equipment claims were likely to give rise to issues of procurement and allocation of resources demonstrated conclusively that it would not be fair, just and reasonable to impose the duties of care for which the claimants contend: para 107. He was not persuaded that either the equipment or the claims based on lack of pre-deployment training had no real prospect of success. He thought that different considerations might apply to the claims so far as based on lack of in-theatre training, but that this issue would be better determined by the trial judge. He struck out the Ellis claim for negligence in para 26.1 (failure to limit patrols to other vehicles) as falling squarely within combat immunity. The Court of Appeal upheld Owen J’s conclusion that the equipment and training claims arguably fall outwith the scope of combat immunity, and also allowed the appeal in respect of para 26.1.

125 Three points arise. First, in my opinion, the decisions below underestimate the inevitable inter-linking of issues relating to the supply of

A technology and equipment and to training for active service with decisions taken on the ground during active service. As noted in para 110 above, it is not possible to consider the Challenger claims without considering the conduct of those on the ground. If it were suggested, as might be possible, that the real cause of the incident was the failings of a local commander, the court would, on the claimants' case, find itself having to adjudicate on this suggestion in order to establish whether there was any relevant causative failure regarding the prior supply of equipment or training. As Lord Hope DPSC notes (para 91), the claimants have, quite naturally, been careful not to make any criticism of those actually engaged on the ground. But that indicates, rather than resolves, the problem. The proper attribution of responsibility cannot depend on how a claimant frames his case. The Ministry of Defence could itself advance a case that the real cause was not the fault of someone responsible for procurement, but of someone on the ground. In any event, as the present pleadings show, all the facts would be laid before the court, which would have to decide on causation looking at them as a whole. Allegations about procurement cannot in the case of the Challenger claims be divorced from consideration of the conduct of those using the equipment on the ground. Lord Hope DPSC recognises this in para 80, but draws the opposite conclusion to that which I would draw. He considers that all such circumstances must be evaluated with a view to striking a balance between competing considerations: paras 61, 78–80, 98–99. I would conclude the opposite—that all such circumstances are inter-related and essentially non-justiciable.

E 126 Second, Mr Hermer QC for the Challenger claimants accepts that tactical decisions, wherever taken, are not actionable. Mr Hermer must on any view be correct, I consider, on this point. But, if so, it opens the question in relation to the Snatch Land Rover claim by Ms and Mrs Ellis whether a complaint of failure to supply a better armoured or equipped vehicle is not really a complaint about tactics. (In contrast to Mr Hermer, Mr Weir QC for the Smith and Ellis claimants would confine combat immunity so narrowly that it could not embrace in the case of the Ellis claimants either a question why allegedly available equipment (Element A) was not fitted to Private Ellis's Snatch Land Rover on the day of the casualty or a question why the movement to the Iraqi police station was not delayed a day or two to enable it to be fitted.)

F 127 Third, both in that connection and more widely, I consider that Owen J was clearly right to conclude in *Multiple Claimants*, at para 2.C.16, that

G “the military cannot be constrained by the imposition of civil liability in the planning of and preparation for such operations any more than in their execution. The planning of and preparation for military operations will include decisions as to the deployment of resources.”

I would also refer to cautionary words of Lord Keith of Kinkel in *Rowling v Takaro Properties Ltd* [1988] AC 473, 502D–F:

“The third [matter] is the danger of overkill. It is to be hoped that, as a general rule, imposition of liability in negligence will lead to a higher standard of care in the performance of the relevant type of act; but sometimes not only may this not be so, but the imposition of liability may

even lead to harmful consequences. In other words, the cure may be worse than the disease”.

128 The claims that the ministry failed to ensure that the army was better equipped and trained involve policy considerations of the same character as those which were decisive in *Hill*, *Brooks* and *Van Colle*. They raise issues of huge potential width, which would involve courts in examining procurement and training policy and priorities over years, with senior officers, civil servants and ministers having to be called and to explain their decisions long after they were made. Policy decisions concerning military procurement and training involve predictions as to uncertain future needs, the assessment and balancing of multiple risks and the setting of difficult priorities for the often enormous expenditure required, to be made out of limited resources. They are only often highly controversial and not infrequently political in their nature. These may well also be influenced by considerations of national security which cannot openly be disclosed or discussed.

129 Lord Rodger JSC summarised the position in relation to responsibility, accountability and investigation in *Catherine Smith* (para 127) in terms with which, as I have said, Lord Walker JSC agreed, as I also do:

“Once it is established, say, that a soldier died because the blast from a roadside bomb penetrated the armour-plating on his vehicle, it may well be inferred that he would not have died if the plating had been stronger. And that simple fact may be worth pointing out as a possible guide for the future. But questions, say, as to whether it would have been feasible to fit stronger protection, or as to why the particular vehicles were used in the operation or campaign, or as to why those vehicles, as opposed to vehicles with stronger protection, were originally purchased by the Ministry of Defence, or as to whether it would have been better to have more helicopters available etc, all raise issues which are essentially political rather than legal. That being so, a curious aspect of counsel’s submissions before this court was the complete absence of any reference to Parliament as the forum in which such matters should be raised and debated and in which ministers should be held responsible. Of course, in consequence of pressure brought to bear by Parliament, the government might set up an independent inquiry with wide terms of reference to look into all aspects of a situation, including the political aspects.”

130 Also in *Catherine Smith* Lord Brown of Eaton-under Heywood JSC asked rhetorically, at para 146:

“Is it really to be suggested that even outside the area of the Council of Europe Strasbourg will scrutinise a contracting state’s planning, control and execution of military operations to decide whether the state’s own forces have been subjected to excessive risk (risk, that is, which is disproportionate to the objective sought)? May Strasbourg say that a different strategy or tactic should have been adopted—perhaps the use of airpower or longer-range weaponry to minimise the risk to ground troops notwithstanding that this might lead to higher civilian casualties?”

A The question was asked in the context of jurisdiction, but, jurisdiction having been established under article 1, both the question and Lord Brown JSC's evident scepticism remain relevant.

B 131 The claimants' case is that during or after any war any injured soldier or the relatives or dependants of any soldier killed in combat could sue the state for alleged failures in the preparation or equipping of the armed forces for combat. Logically, if that is so, then a soldier might, even during the war, complain that his or her equipment or training was inadequate and that it would be a breach of the state's common law duty of care and/or duties under the Human Rights Convention even to order him or her to go into combat with it. If domestic legislation compelled this, then the soldier could seek relief in the Strasbourg court—maybe even interim relief prohibiting the further use or giving of orders to use the allegedly defective equipment. One may also recall the facts of *R v Jones (Margaret)* [2007] 1 AC 136, where protestors sought to disrupt Fairford Airbase in order to prevent intervention in Iraq, and pleaded in defence that they were preventing the international crime of aggression. Pointing to defective equipment and seeking to ban its use could have a considerable disruptive effect. Not only would there be a huge potential diversion of time and effort in litigation of such issues in an area of essential national interest (whether before, during or after hostilities). There must be risks that the threat of exhaustive civil litigation following any active military operation would affect decision-making and lead to a defensive approach, both at the general procurement and strategic stages and at the tactical and combat stages when equipment was being deployed.

E 132 The duties of care owed by soldiers to civilians during peace-keeping operations or by the state to its soldiers in peace are not in issue and raise different considerations. I examined some of the cases which the Strasbourg court has decided in this area in para 196 of my judgment in *Catherine Smith*. When considering whether a duty of care exists, it is always relevant to ask in what context and to avoid what consequences. (Compare in another branch of the law *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 and *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627.) Equipment should at least be safe and training adequate for peacetime training and activities, and its adequacy in the face of enemy action will not be tested in the same way. But procurement and training decisions and priorities are geared primarily to the needs and risks inherent in active military operations, when enemy activity will be aimed at killing British soldiers in as many unexpected ways as possible. It is after a death or injury occurring in such operations that, as the present cases show, questions can be raised as to whether different technology, equipment or training or different decisions regarding deployment and use of equipment like vehicles might not have made all the difference to the incidence of the death or injury.

H 133 The relevant question for present purposes is therefore whether the state owed a duty of care to avoid the death or injury during the course of active service which actually occurred. It will often not be difficult with hindsight to point to different decisions that might have been made or preparations made. Would the disaster of Isandlwana have been avoided had the army command equipped Lord Chelmsford's forces with the heliograph? Or was the cause the failure to form a laager? Or the

deployment of troops over too wide a perimeter? Or the lack of screwdrivers to open the ammunition boxes quickly enough? And would many disastrous casualties of the First World War have been avoided if the War Office had recognised the significance of the proposal for a tank put to it in 1912, 1914 and 1916 by the Australian engineer Lancelot de Mole—of whom a post-war Commission on Awards to Inventors said in 1919:

“We consider that he is entitled to the greatest credit for having made and reduced to practical shape as far back as the year 1912 a very brilliant invention which anticipated and in some respects surpassed that actually put into use in the year 1916. It was this claimant’s misfortune and not his fault that his invention was in advance of his time, and failed to be appreciated and was put aside because the occasion for its use had not then arisen.”

Was the fall of Singapore to numerically inferior forces, with the ensuing slaughter and torture, due to culpable failures to fortify the Malay peninsular or landward side of Singapore or to provide armoured vehicles or aircraft to protect both? Or was it due to failures of military commanders on the ground? Or was it inevitable in the context of what Churchill described as “our bitter needs elsewhere”?

134 To offer as a panacea in relation to these points the injunction that courts should be very cautious about accepting such claims is to acknowledge the problem, but to offer no real solution. Had it been, the same panacea would have been adopted as the solution by the House in *Hill, Brooks and Van Colle*.

135 My conclusions do not mean that every death or injury occurring in the course of military conflict falls necessarily outside the scope of any duty of care. There will be deaths and injuries occurring during active service which are unconnected with the risks of active combat or which arise, as Owen J recognised was possible (para 123 above), from breaches of duty independent of active combat. An accident arising from a defect in equipment which could just as well have occurred on Salisbury Plain and owed nothing significant to any risk of war would be an example. Private Smith’s sad death in *Catherine Smith* likewise.

136 I consider that that the Challenger claims, which are only in common law negligence, should be struck out in their entirety on the basis that the state owes no such duty of care as alleged with regard to the provision of technology, equipment or training to avoid death or injury in the course of an active military operation. Similarly, with regard to the Ellis claim for negligence, I would hold that there was no such duty of care as alleged regarding the provision of different or differently equipped vehicles or, a fortiori, regarding the deployment on patrol on 28 February 2006 of the Snatch Land Rovers which were deployed.

137 Moses LJ suggested in the Court of Appeal (para 60) that it was necessary to consider the evidence in order to decide when “active operations” start and when they finish and that Owen J had recognised that the present cases may not fall within the scope of combat immunity. But, so far as this suggests that Owen J doubted whether active operations were afoot at the dates relevant to either the Smith claim (16 July 2005) or the Ellis claim (28 February 2006), it is wrong. No such argument even appears to have been raised before Owen J or before the Court of Appeal, in relation

A to either claim. Further, in paras 113–114 of his judgment Owen J expressly struck out the Ellis claim, so far as it relied on the failure to limit the patrol, on the basis that combat immunity did apply as at 28 February 2006. Before the Supreme Court, the nearest there is to any suggestion is the elliptical statement made in para 186 of the Ellis case in the context of combat immunity that Private Ellis

B “was not engaged in a major combat operation that had ended in May  
2003. He was part of an armed force providing security and stability to a  
region of Iraq; at the time of his death he was on a patrol returning  
returning from a trip to the Iraqi police headquarters in Al Amarah. It is  
the Ellis claimants’ case that this activity should be treated as akin to a  
peace-keeping, police or anti-terrorist activity so that the ambit of combat  
C immunity should be very tightly constrained around the actual patrol in  
question.”

Even that statement does not challenge the existence of a combat operation involving the patrol, and in any event there is no basis for allowing an entirely new point, contrary to the basis on which the matter was put before the judge, to be raised at this stage. I would therefore also hold that the Ellis claim should be struck out in so far as it is made for common law negligence.

#### Article 2

138 As stated in para 103 above, article 2 is said to involve two substantive obligations: framework and operational. In *Stoyanovi v Bulgaria* (Application No 42980/04) (unreported) given 9 November 2010, the Strasbourg court was concerned with an accidental death in a military training exercise—a practice parachute jump during which the deceased’s head hit the aircraft’s wheel rendering him unconscious and so unable to open his parachute. The court referred to the operational duty arising, on the authority of *Osman v United Kingdom* and *Öneryildiz v Turkey*, where authorities know or ought to know of a real and immediate risk to life, or of a situation inherently dangerous to life, and to the framework duty in the public-health sphere to make regulations compelling hospitals to adopt appropriate measures to protect patients’ lives and to have an effective independent judicial system to determine the cause of death of patients in hospital and make those responsible accountable. It then went on, at para 61:

G “Positive obligations will vary therefore in their application depending  
on their context . . . In the present case, which concerns an accident  
during a military training exercise, the court notes that while it may  
indeed be considered that the armed forces’ activities pose a risk to life,  
this is a situation which differs from those ‘dangerous’ situations of  
specific threat to life which arise exceptionally from risks posed by  
violent, unlawful acts of others or man-made or natural hazards. The  
armed forces, just as doctors in the medical world, routinely engage in  
activities that potentially could cause harm; it is, in a manner of speaking,  
H part of their essential functioning. Thus, in the present case, parachute  
training was inherently dangerous but an ordinary part of military duties.  
Whenever a state undertakes or organises dangerous activities, or  
authorises them, it must ensure through a system of rules and through

sufficient control that the risk is reduced to a reasonable minimum. If nevertheless damage arises, it will only amount to a breach of the state's positive obligations if it was due to insufficient regulations or insufficient control, but not if the damage was caused through the negligent conduct of an individual or the concatenation of unfortunate events: see, for comparison, *Kalender v Turkey* (Application No 4314/02) (unreported) given 15 December 2009, paras 43–47.”

139 The court's reasoning appears to have been that, in so far as military life is inherently dangerous, there could be no question of any operational duty to prevent that danger. This seems fairly self-evident, and is certainly consistent with the Strasbourg court's recognition in other cases of the need to “bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces” (*Engel v The Netherlands (No 1)* 1 EHRR 647, para 54), meaning, for example, also that

“many acts that would constitute degrading or inhuman treatment in respect of prisoners may not reach the threshold of ill-treatment when they occur in the armed forces, provided that they contribute to the specific mission of the armed forces in that they form part of, for example, training for battlefield conditions”: *Chember v Russia* (Application No 7188/03) (unreported) given 3 July 2008, para 49.

However, as the court stated in *Stoyanovi*, the state must by the same token have a system of rules and sufficient control to reduce the risks to a reasonable minimum. In *Kalender v Turkey* (Application No 4314/02) (unreported) given 15 December 2009, cited by the court, liability under the substantive aspect of article 2, was held to exist in the light of numerous failings in the structure and operation of a railway station, leading to passengers having, without supervision or warning, to disembark and cross a line used by other trains and being killed in the process. Accordingly, it appears that the framework duty may in appropriate circumstances operate at a low level.

140 In domestic contexts where the state is taking armed action affecting or liable to affect third persons, the court has undertaken quite close and in the upshot critical examination of the state's conduct. I cited examples in para 196 of my judgment in *Catherine Smith*:

“Such cases start with *McCann v United Kingdom* (1995) 21 EHRR 97, relating to the shooting by SAS officers of members of the Provisional IRA suspected of planning to attack the Royal Anglian Regiment in Gibraltar, and include *Isayeva, Yusupova and Bazayeva v Russia* (Application Nos 57947/00, 57948/00 and 57949/00), 24 February 2005, and *Isayeva v Russia* (Application No 57950/00), 24 February 2005, relating to the conduct of military operations by the Russian armed forces against Chechen separatist fighters which led to the deaths of civilians. In such cases, it appears that the exigencies of military life go to the standard and performance, rather than the existence of, any Convention duty.”

141 The question is whether the Strasbourg court would take a similar attitude to the responsibility of a state for the death of a member of its own armed forces in circumstances alleged to have involved mistaken decisions in

A the course of an operation or act of war (such as alleged by Mrs Smith in at least paras 26.2–26.5 of her claim), or failings in planning or in the equipping or training of such forces (such as alleged by Mrs Smith in paras 26.1 and it seems paras 26.6 and 26.7 of her claim and by the Ellis claimants in probably all three particulars in their para 26).

B 142 In this connection it is relevant to bear in mind that the Strasbourg court has curtailed the operational duty, so that it does not embrace mere casual acts of negligence, certainly in the field of health care and, as appears logical, in other fields: see my judgment in *Catherine Smith*, para 201 and the cases there cited, to which can now be added *Stoyanovi v Bulgaria*, para 61, where the European Court of Human Rights said that a death occurring during an inherently dangerous training activity (parachute jumping) undertaken by a soldier would not involve any breach of article 2 if  
C “caused through the negligent conduct of an individual”: see para 136 above. Mr Weir regretted this qualification as deeply unsatisfactory, and as a manifestation of the fact that (in his words) “the search for principle has been called off in this area”. An alternative view might be that it would have been better if the Strasbourg court had left the development and application of the law of tort to domestic legal systems, subject to clearly defined criteria, rather than set about creating what amounts in many respects to an  
D independent substantive law of tort, overlapping with domestic tort law, but limited to cases involving death or the risk of death. Be that as it may be, the exception for casual acts of negligence is relevant to show that liability under article 2 can be tailored and limited in what the Strasbourg court regards as appropriate circumstances. In the present circumstances, the question arises whether that the Strasbourg court would regard article 2 in its substantive  
E aspect as making the state liable for the death in combat of one soldier due to alleged negligence of his commander or of another soldier. The prospect of the Strasbourg court reviewing the conduct of combat operations in this way seems to me sufficiently striking, for it to be impossible to give this question a positive answer. If the European court considers that the Convention requires it to undertake the retrospective review of armed conflicts to  
F adjudicate on the relations between a state and its own soldiers, without recognising any principle similar to combat immunity, then it seems to me that a domestic court should await clear guidance from Strasbourg to that effect.

143 That leaves for consideration whether the framework duty involves an obligation on the part of the state to exercise due care in the course of planning armed operations, and in equipping and training its armed forces, so as to reduce or limit the risks to life involved in such operations. In my  
G opinion it is not possible to conclude that the Strasbourg court would hold that such matters are justiciable under the Convention, any more than they are at common law. I am not over-enamoured of the cautionary warning to this court that the road to Strasbourg is a one-way street, which a claimant can tread if this court has not gone far enough, but which the state cannot tread if this court goes too far. If it is clear from prior authority or this court  
H is otherwise confident about what Strasbourg will decide, then we should decide the issue as we believe correct. But in the present very difficult case, two connected considerations lead me to consider that caution is called for. First, having decided that the common law recognises no such duty of care or claims as the claimants advance, we should not lightly conclude, in so

important and sensitive an area of national life, that the Strasbourg court would take a different view. Second, since I have no confidence about the scope or application of any positive duties which the Strasbourg court might recognise under article 2 in the area, I believe it would be wrong for this court to advance way ahead of anything that it has yet decided. It should be for the Strasbourg court to decide whether it will review the procurement and training policy of the British army over recent decades in the context of claims under article 2 for compensation arising from deaths of serving soldiers during active military operations.

144 Support for the view that the Strasbourg court does recognise areas of policy into which the Convention protection does not stretch is afforded by two cases. First, in *Taylor v United Kingdom* (1994) 18 EHRR CD215, the commission held that article 2 did not require the investigation into the killing by Beverley Allitt, a hospital nurse, of child patients to inquire into the responsibility in the NHS for alleged inadequate systems, resource shortages and weak leadership. In holding the application manifestly ill-founded and inadmissible, it stated:

“The commission acknowledges that neither the criminal proceedings nor the Inquiry addressed the wider issues relating to the organisation and funding of the National Health Service as a whole or the pressures which might have led to a ward being run subject to the shortcomings apparent on Ward Four. The procedural element contained in article 2 of the Convention however imposes the minimum requirement that where a state or its agents potentially bear responsibility for loss of life, the events in question should be subject to an effective investigation or scrutiny which enables the facts to become known to the public, and in particular to the relatives of any victims. The commission finds no indication that the facts of this case have not been sufficiently investigated and disclosed, or that there has been any failure to provide a mechanism whereby those with criminal or civil responsibility may be held answerable. The wider questions raised by the case are within the public domain and any doubts which may consequently arise as to policies adopted in the field of public health are, in the commission’s opinion, matters for public and political debate which fall outside the scope of article 2 and the other provisions of the Convention.”

145 The second case concerned article 3 of the Convention. In *Banks v United Kingdom* (2007) 45 EHRR SE2, the ECtHR rejected a claim that article 3 required a public inquiry into allegations of torture and inhuman treatment of prisoners at a UK prison. The court held that the facts had been sufficiently investigated and that:

“The wider questions raised by the case as to the background of assaults and the remedial measures apt to prevent any recurrence in a prison in the future are, in the court’s opinion, matters for public and political debate which fall outside the scope of article 3 of the Convention.”

146 In my opinion therefore this court should proceed on the basis that the policy considerations which guide its domestic law in the present area of national interest will find an echo in Strasbourg, and not invade a field which would involve, in the context of claims for civil compensation, extensive and

A highly sensitive review with the benefit of hindsight the United Kingdom's country's policies, strategy and tactics relating to the deployment and use of its armed forces in combat. The United Kingdom's performance of its investigatory and procedural duties under article 2 is not in doubt, as attested by the sadly numerous inquests (investigating and recording the circumstances of each death) and the still incomplete Chilcot Inquiry (delayed inter alia it is understood by problems relating to the release or use of documents with national security implications). The issue with which this judgment is concerned is whether deaths and (at common law) injuries in combat fall to be investigated in the civil courts, at whatever level in the armed forces, Whitehall or the government responsibility for them is suggested to arise. The answer I would give is, no.

C *The majority approach*

147 I agree with Lord Hope DPSC (para 100) about the

“paramount importance that the work that the armed services do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong”.

D But I do not consider that the majority approach reflects or meets this imperative. In summary, I understand that this approach: (a) recognises at common law a principle of combat immunity, as excluding “liability for negligence in respect of any acts or omissions on the part of those who are actually engaged in active combat” (para 82), since

E “no one can imagine a court undertaking the trial of an issue as to whether a soldier on the field of battle or a sailor fighting on his ship might reasonably be more careful to avoid causing civil loss or damage” (para 94);

(b) recognises allegations as

F “beyond the reach of article 2 . . . if they relate to things done or not done when those who might be thought to be responsible for avoiding the risk of death or injury to others were actively engaged in direct contact with the enemy” (para 76);

extends this to “operational decisions made on the ground by commanders, whatever their rank or level of seniority” (para 64); but also (c) suggests that liability (under the *Osman v United Kingdom* principle, 29 EHRR 245, para 115) for failure to take preventative operational measures in the face of a real, direct and immediate threat to life “could extend to procurement decisions taken on the ground about the provision of vehicles and equipment, as well as to decisions about their deployment” (para 78); (d) recognises that the more “political (in a broad or narrow sense)” a decision, the slower a court should be to impose liability at common law and/or under article 2 (para 65), so that it will easy to find that allegations are beyond the reach of article 2 and do not give rise to liability in common law negligence if they concern

“decisions that were or ought to have been taken about training, procurement or the conduct of operations . . . at a high level of command

and closely linked to the exercise of political judgment and issues of policy”: paras 76, 99. A

148 It is unclear to me whether on this approach liability is said to be “beyond the reach” of article 2 because of its nature or simply because of an injunction that courts should be very slow to find fault in the areas concerned. Whatever the position in that respect, I see real difficulties in the undefined boundaries and the suggested “middle ground” between on the one hand (a) and (b) and on the other (d). The suggestion in para 78 that *Osman* type liability could exist as mentioned in point (c) would also appear liable to extend fault-based liability to all aspects of decision-making during combat operations. What is the logical distinction between deployment of equipment and of troops? The inter-twinning of issues of procurement and training with issues relating to the causation of injury or death on the battlefield seems highly likely to lead to a court undertaking the trial of “unimaginable” issues as to whether a soldier on the field of battle or a sailor on his ship might reasonably have been more careful. B C

149 Further, I see little attraction in a scheme according to which the acts or omissions of the man on the ground and the policy-maker in Whitehall give rise either to no liability at all or only to liability in egregious cases, but the procurement, training and deployment decisions of a “middle-rank” commander (query, in Whitehall or in local headquarters or both) are subject to scrutiny under conventional principles of fault-based liability. All depends, as I understand it, under article 2 on balancing “private and public interests and Convention rights” (para 61); or on balancing (i) the need to avoid “undermining the ability of a state to defend itself, or its interests, at home or abroad” (para 66) and the “paramount importance” of not impeding the armed forces against (ii) the consideration that (at common law) soldiers injured or (at common law and under the Convention) the relatives and dependants of soldiers killed should be able, wherever possible, to benefit by the more substantial civil measure of recovery that fault-based liability brings, over and above the no-fault compensation available in cases of injury or death as described by Lord Carnwath JSC in para 181 of his judgment. D E F

150 Still more fundamentally, the approach taken by the majority will in my view make extensive litigation almost inevitable after, as well as quite possibly during and even before, any active service operations undertaken by the British army. It is likely to lead to the judicialisation of war, in sharp context with *Starke J’s* dictum in the *Shaw Savill* case (1940) 66 CLR 344, 356 that “war cannot be controlled or conducted by judicial tribunals”. No doubt it would be highly desirable if all disputes with international legal implications were to be submitted to international judicial resolution, with those involved abiding by the outcome; and if wars were no more. But, in the present imperfect world, there is no precedent for claims to impose civil liability for damages on states whose armed forces are killed or injured in armed combat as a result of alleged failures of decision-making either in the course of, or in procuring equipment or providing training for, such combat. All the claims made in these appeals fall in my view within one or other of these areas where the common law should not tread. G H

A 151 Similarly, we should not assume that the European Court of Human Rights would regard it as appropriate to enter such areas under article 2, and there is to my mind wholly insufficient guidance to lead to any conclusion that it would. We cannot, at least at present, refer a case to Strasbourg to seek its guidance on the proper interpretation of article 2. But my conclusions as to the common law position and its rationale, the dearth  
B of any authority for any like claim in the Strasbourg jurisprudence and statements in that jurisprudence showing that policy decisions can be non-justiciable all lead me to conclude that we should for the present proceed on the basis that the outcome in Strasbourg would in the present areas be no different from the outcome at common law.

### *Conclusion*

C 152 The upshot is that, in my opinion, although the soldiers involved in these cases were within the United Kingdom’s jurisdiction for the purposes of article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms at the material times, the claims made under article 2 and/or in negligence in respect of their deaths were, in the case of the Smith and Ellis claims, rightly struck out by the courts below and the  
D Ministry of Defence’s appeal seeking to strike out the Challenger claims should be allowed.

## LORD CARNWATH JSC

### *Introduction*

E 153 I agree entirely with Lord Hope of Craighead DPSC’s treatment of the jurisdiction issue. There is also much with which I agree in his discussion of the substantive issues, in particular his comment (para 100) on the “paramount importance” that the preparation for and conduct of active operations should not take place “under the threat of litigation if things should go wrong.”

F 154 However, in agreement with Lord Mance JSC, I do not think it is an adequate response at this level for us simply to send the claims for trial with general injunctions to exercise “great caution” or “special care”. Having heard full argument on all these issues, we should be able to rule whether the claims are in principle viable or not; or at least to give clearer guidance as to what answers to what questions of fact may or may not lead to a favourable result following trial.

G 155 I also agree with Lord Mance JSC that, contrary to the approach adopted by Lord Hope DPSC, we should first concentrate on the common law aspects of the claims. In this respect, the balance of the relevant issues may have been distorted by the sequence of submissions at the hearing. It is understandable, given the importance of the jurisdictional issues arising under the Convention, that much of the oral hearing time was taken up with submissions on that subject, and as a natural extension with arguments  
H about the substantive scope of article 2 itself.

156 On the latter aspect, I have nothing to add to Lord Mance JSC’s reasoning and conclusions, with which I agree. However, like him, I consider that our primary responsibility should be for the coherent and principled development of the common law, which is within our own

control. We cannot determine the limits of article 2. Indeed, the multiplicity of views expressed by the nine members of this court, when this issue was previously considered in *Catherine Smith*, shows how difficult and unproductive it can be, even at this level, to attempt to predict how Strasbourg will ultimately draw the lines. The trial judge will be in no stronger position. With respect to Lord Hope DPSC (para 79), if the problem is a lack of directly relevant guidance from Strasbourg, it is hard to see how, simply by hearing further evidence or finding further facts, he or she will be better able to fill that gap, still less to do so “with complete confidence”.

*Common law—the nature of the issues,*

157 It is important to recognise that we are being asked to authorise an extension of the law of negligence (as indeed of article 2), into a new field. We have not been referred to any authority in the higher courts, in this country or any comparable jurisdiction, in which the state has been held liable for injuries sustained by its own soldiers in the course of active hostilities. Further we are concerned only with duties at common law, rather than under statute. As the Court of Appeal recognised, ante, p 75, para 38, statutory regulations governing the responsibilities of the ministry as employers do not apply outside the United Kingdom.

158 Mr Eadie’s case, on behalf of the ministry, was advanced on a broad front. As formulated in his printed case, this involved a root-and-branch objection to any form of civil liability in this area. It was introduced by a lengthy section headed: “The difficulties courts would face grappling with the issues raised in these claims”: paras 72–92. Not only were the courts “institutionally incompetent” to resolve such issues which are “essentially matters of political and military judgment”; but there are strong reasons both of public policy and democratic accountability for them not seeking to do so.

159 There is some common ground. There is no dispute as to the existence in domestic law of a principle known as “combat immunity”, relating to decisions and actions in the “heat of battle”. Furthermore, at the other end of the spectrum Lord Hope DPSC accepts, as I understand it, that “high level” decisions about procurement or conduct of operations are not open to review in the courts. This dichotomy is most clearly stated in his para 76:

“It will be easy to find that allegations are beyond the reach of article 2 if the decisions that were or ought to have been taken about training, procurement or the conduct of operations were at a high level of command and closely linked to the exercise of political judgment and issues of policy. So too if they relate to things done or not done when those who might be thought to be responsible for avoiding the risk of death or injury to others were actively engaged in direct contact with the enemy . . .”

Although this comes as part of his consideration of article 2, Lord Hope DPSC treats it as equally relevant to the common law claims: para 99. On that view, the difference between us is over the extent (if any) of what he calls “the middle ground”, and whether its boundaries can only be determined after the finding of further facts.

A 160 Here too the balance of the discussion may have been distorted by the course of the submissions at the hearing. The emphasis of the common law debate was directed mainly to the scope of the “combat immunity” defence as such, rather than issues arising under the general law of negligence. No doubt reflecting that emphasis, the wider issues are dealt with relatively shortly at the end of Lord Hope DPSC’s judgment.

B 161 In my view, however, it is within that broader compass that the solution to these difficult questions must be found—if not at this preliminary stage, then following the trial. In truth, the claimants are caught on the horns of a dilemma. The operational phases of the undertaking, which might otherwise under ordinary principles have been expected to give rise to a duty of care (see e.g. *Wade & Forsyth, Administrative Law*, 10th ed (2009), p 653 et seq; *Craig, Administrative Law*, 7th ed (2012), p 908 et seq) are, as the claimants accept, the very phases which are excluded from review by the combat immunity defence. On the other hand the further back in time they seek to direct their challenge so as to include issues of planning, procurement, and training, the more they have to confront the competing principle that discretionary decisions about policy and resources are not justiciable. The issue is whether it is possible to carve out some middle ground of potential liability.

D 162 The answer to that question raises issues of principle, policy and practicality. Mr Weir QC rightly emphasises that the importance of another policy consideration, the principle that “where there is a wrong there should be a remedy”, described by Lord Dyson JSC as “a cornerstone of our system of justice”: *Jones v Kaney* [2011] 2 AC 398, para 113. From that principle he draws the submission that:

E “The default position is one whereby the MoD owes its soldiers an orthodox employer’s duty of care. So it falls for the MoD to establish that public policy must operate to deny the existence of that recognised duty of care.”

F However, that formulation begs a logically prior question. I agree that it is for the ministry to make the case for any policy exception to any “recognised duty of care”. But the scope and content of any such duty of care are themselves matters for determination. In the modern law of negligence, the starting point for determining that issue is the application of the familiar three-fold test laid down in *Caparo Industries plc v Dickman* [1990] 2 AC 605, 618, per Lord Bridge of Harwich.

G 163 In that context, the scope of any so-called “immunity” necessarily overlaps with the question, under the third part of that test, whether it is “fair, just and reasonable” for the law to impose a duty of care at all: see *Clerk & Lindsell on Torts*, 20th ed (2010), para 14-39 et seq “Immunities”. As Lord Browne-Wilkinson has said:

H “a holding that it is not fair, just and reasonable to hold liable a particular class of defendants whether generally or in relation to a particular type of activity is not to give immunity from a liability to which the rest of the world is subject. It is a prerequisite to there being any liability in negligence at all that as a matter of policy it is fair, just and reasonable in those circumstances to impose liability in negligence”: *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 559.

164 For that reason I agree with Lord Mance JSC that the scope of combat immunity should now be discussed, not as a separate principle, but as part of the third element of the *Caparo* analysis. Equally, in my view, we should not see ourselves as necessarily constrained by the limits illustrated by the existing case law on combat immunity, developed in very different circumstances and (until *Mulcahy*) without reference to the modern law of negligence.

*Working by analogy*

165 In determining whether a duty of care should be imposed in a new factual situation, precedent is an important guide. In *Caparo* Lord Bridge proposed, at p 618, that the emphasis should be less on the search for “underlying general principles”, but rather on the development of the law “incrementally and by analogy with established categories”, quoting Brennan J in the High Court of Australia, *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, 43–44.

166 In the present context, apart from the cases on combat immunity as such (discussed by Lord Hope DPSC and Lord Mance JSC) the closest analogies in my view are to be found in two lines of authority: first, the sequence of authorities relating to the “immunity” of the police, culminating in *Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State of the Home Department intervening)* [2009] AC 225; secondly, in respect of the issue of breach, assuming an actionable duty of care is established, the cases relating to the law of negligence as applied to the emergency services, in particular to claims by employees.

*Police “immunity”*

167 On the issue whether a duty of care should be imposed, the most useful parallel in the modern law, in my view, is to be found in the sequence of authorities dealing with the possible liability of the police for alleged negligence in the course of investigating crime. In *Hill v Chief Constable of West Yorkshire* [1989] AC 53 it was held that for reasons of public policy the police owed no actionable duty of care to a victim in such circumstances. They were said to be “immune” from actions of this kind”: p 64, per Lord Keith.

168 Initial concerns that this approach might conflict with article 6 of the Convention by precluding consideration of the merits of the claim (see *Osman v United Kingdom* (1998) 29 EHRR 245) were dispelled by the Strasbourg court in *Z v United Kingdom* (2001) 34 EHRR 97. The Grand Chamber, following the lead of Lord Browne-Wilkinson (*X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 751) accepted the legitimate role of policy in determining the limits of liability:

“the court is not persuaded that the House of Lords’ decision that as a matter of law there was no duty of care in the applicants’ case may be characterised as either an exclusionary rule or an immunity which deprived them of access to court . . . the House of Lords was concerned with the issue whether a novel category of negligence, that is a category of case in which a duty of care had not previously been held to exist, should be developed by the courts in their law-making role under the common law. *The House of Lords, after weighing in the balance the competing considerations of public policy, decided not to extend liability in*

A *negligence into a new area*. In so doing, it circumscribed the range of liability under tort law”: para 96, emphasis added.

Echoing that approach, in *Brooks v Comr of Police of the Metropolis* [2005] 1 WLR 1495, the House confirmed but qualified the “core principle” established in *Hill*. In his leading speech Lord Steyn said, at para 27:

B “since the decision of the European Court of Human Rights in *Z v United Kingdom* (2001) 34 EHRR 97, 138, para 100, it would be best for the principle in *Hill*’s case to be reformulated in terms of the absence of a duty of care rather than a blanket immunity.”

C 169 Finally, in *Van Colle v Chief Constable of the Hertfordshire Police* [2009] AC 225, the House by a majority held that the same principle applied even where the police were aware of a specific threat to an individual witness. That is particularly helpful in the present context because it was concerned with the scope of the state’s liability both at common law and under article 2 of the Convention. I draw the following points from the judgments. (i) The common law claim was to be considered on its own merits (“stand on its own feet”) rather than assimilated with the article 2 claim: para 82, per Lord Hope of Craighead; para 136, Lord Brown of Eaton-under Heywood. (ii) The common law analysis began from the three-fold test laid down in *Caparo*:

E “by which it must be shown that harm to B was a reasonably foreseeable consequence of what A did or failed to do, that the relationship of A and B was one of sufficient proximity, and that in all the circumstances it is fair, just and reasonable to impose a duty of care on A towards B”: para 42, per Lord Bingham.

(iii) The majority were able to support an exception based on “public policy reasons” which were accommodated within the third element of that test, that being accepted as “a price to be paid by individuals denied for public policy reasons (as not being ‘fair, just and reasonable’ within the *Caparo* principle . . .) a civil claim in the interests of the community as a whole”: para 139, per Lord Brown. (iv) There was no suggestion that, because the “core principle” involved an exception to ordinary principles of liability, it should be narrowly construed. On the contrary, as Lord Brown put it, “the wider public interest is best served by maintaining the full width of the *Hill* principle”: para 139. (v) The House was able to determine the limits of this principle on the basis of the pleadings. Again I quote Lord Brown, at para 140:

H “In common, I think, with all your Lordships, I regards this issue as plainly one which the House should decide one way or the other on the pleaded facts. Either a duty of care arises on these facts or it does not. No useful purpose would be served by allowing the action to go to trial for facts to be found and then for further consideration to be given to the applicable law.”

(vi) Finally, the policy considerations justifying immunity in respect of the police’s function of investigating crime were contrasted with “civil operational tasks”, in relation to which liability had been accepted in some

decided cases: Lord Hope, para 79. Those examples were not regarded as undermining the core principle. A

170 This line of cases shows that it remains a proper function of the court, faced with a potential clash between public and private interests, to determine as a matter of policy the limits of any actionable duty of care, and to do so at the preliminary stage: see also Jonathan Morgan, “Negligence into Battle” [2013] CLJ 14, commenting on the Court of Appeal’s reasoning in the present case. Furthermore, so to determine the limits of liability in negligence in a new area, by balancing competing considerations of public policy, is within the margin allowed to the national courts by Convention law. Lord Hope DPSC acknowledges this line of authority, but declines to apply the same approach to the present context: paras 97–98. With respect, I find this difficult to understand. If this was an appropriate exercise in relation to the purely domestic policy concerns arising from police powers of investigation, how much more so in relation to the issues of vital national security raised by the preparation for and conduct of war? B C

#### *Negligence and the emergency services*

171 Assuming a duty of care is not excluded under the principles considered so far, the closest analogies are to be found in cases relating to the duties owed by employees to their staff in the context of the delivery of emergency services. *King v Sussex Ambulance Service NHS Trust* [2002] ICR 1413 contains an authoritative exposition of the relevant principles. The Court of Appeal dismissed a claim related to injuries sustained by an ambulance technician, who was required in the course of an emergency call to help in carrying a patient downstairs. Hale LJ, giving the majority judgment, summarised the relevant law, at para 21: D E

“The starting point is that an ambulance service owes the same duty of care towards its employees as does any other employer. There is no special rule in English law qualifying the obligations of others towards fire fighters, or presumably police officers, ambulance technicians and others whose occupations in the public service are inherently dangerous: see *Ogwu v Taylor* [1988] 1 AC 431. Such public servants accept the risks which are inherent in their work, but not the risks which the exercise of reasonable care on the part of those who owe them a duty of care could avoid. An employer owes his employees a duty to take reasonable care to provide safe equipment and a safe system of work, which includes assessing the tasks to be undertaken, training in how to perform those tasks as safely as possible, and supervision in performing them.” F G

This was subject to two qualifications: first, at para 22, the “further dimension” identified by Denning LJ (*Watt v Hertfordshire County Council* [1954] 1 WLR 835, 838):

“It is well settled that in measuring due care you must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this: you must balance the risk against the end to be achieved. . . .” H

and secondly [2002] ICR 1413, para 23 (citing Colman J in *Walker v Northumberland County Council* [1995] ICR 702, 712): “what is

A reasonable may have to be judged in the light of the service's duties to the public and the resources available to it to perform those duties . . .”

172 In *Hughes v National Union of Mineworkers* [1991] ICR 669 (cited by Lord Hope DPSC, para 97), this approach was taken a stage further so as to deny the existence of a duty of care at all. The claim was by a police officer who had been injured when, in the course of policing a strike at a colliery, he was knocked to the ground by an advancing crowd of pickets. He alleged negligence by the police officers on the day, rather than wider issues relating to police deployment generally or training: pp 671H–672A. The claim was rejected. It was held by May J, applying *Caparo* principles, and following *Hill v Chief Constable of West Yorkshire* that

“public policy requires that senior police officers should not generally be liable to their subordinates who may be injured by rioters or the like for on the spot operational decisions taken in the course of attempts to control serious public disorder. That, in my judgment, should be the general rule in cases of policing serious public disorders”: p 680.

173 In *Multiple Claimants* (at para 2.C.17) Owen J treated *Hughes* as example of the application of the combat immunity defence, noting that it had been cited in that context by the Court of Appeal in *Mulcahy v Ministry of Defence* [1996] QB 732, 747, 751. He was considering the question: “Does the immunity apply to anti-terrorist, policing and peace-keeping operations of the kind in which British forces were engaged in Northern Ireland and in Bosnia?”: para 2.C.17. He gave a qualified yes, concluding that the immunity would apply to “peace-keeping/policing operations in which service personnel are exposed to the attack or threat of attack”: para 2.C.20.

174 This interpretation seems open to question. However violent was the situation facing the police during the mineworkers’ strike, there could be no argument that it had anything to do with the “conduct of war”, nor was the judge’s reasoning linked to that group of cases. While I would not wish to question the actual decision in *Hughes*, it is in my view better seen as an application of *King* principles in an extreme situation.

175 The decisions in both *King* and *Hughes* were concerned with the operations, rather than with prior policy decisions about the nature of the service and the resources to be committed to them, or issues such as procurement and training. To illustrate the possible limits of “operational” liability in relation to the emergency services, a useful analogy can be found in *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242. The police were held liable by Taylor J for damage caused by firing a gas canister into the plaintiff’s premises without having fire-fighting equipment available. On the other hand (relying on *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, and cases following it) the judge rejected a claim based on the failure of the chief constable to equip the force with an alternative CS gas device, known as “Ferret”, which did not carry the same fire risk. In that respect he accepted the submission that the constable was exercising a statutory discretion which could not be impugned if exercised bona fide: pp 1250–1251. That decision, which is cited by *Wade & Forsyth, Administrative Law*, 10th ed, p 656, as an illustration of the “policy-operational decision”, has not as far as I aware been questioned in later authority.

*Statutory intervention*

176 Before drawing some conclusions, and for completeness, although it did not figure prominently in the oral argument, I should address the suggestion that the claim gains at least implicit support from the Crown Proceedings (Armed Forces) Act 1987. In short, it is said, there is no policy reason to extend the scope of immunity beyond acts or omissions occurring in the heat of battle, given that Parliament has now provided a new statutory framework covering both general liability and the means to secure greater protection where exceptionally it is required.

177 It was the Crown Proceedings Act 1947 which opened the way generally to proceedings in tort against the Crown. However, section 10 preserved a specific and precisely defined statutory exception for the armed forces in relation to injury or death on service subject to the conditions outlined in the section, one being a certificate of entitlement to a service pension: see *Clerk & Lindsell on Torts*, 20th ed, para 5-08 et seq. That exclusion was repealed by the 1987 Act, but (by section 2) subject to a power for the Secretary of State to make an order reviving the effect of section 10 in certain circumstances. By section 2(2):

“The Secretary of State shall not make an order reviving the effect of the said section 10 for any purposes unless it appears to him necessary or expedient to do so— (a) by reason of any imminent national danger or of any great emergency that has arisen; or (b) for the purposes of any warlike operations in any part of the world outside the United Kingdom or of any other operations which are or are to be carried out in connection with the warlike activity of any persons in any such part of the world.”

178 Although we were not referred by the parties to any background materials relating to that change, the parliamentary history is of some interest. A written answer by the Secretary of State for Defence explains that it followed a review of the working of section 10: Hansard (HC Debates), 8 December 1986, col 86. He said:

“Section 10 was included in the 1947 Act on the grounds that members of the Armed Forces, by the very nature of their profession, undertake hazardous tasks which ordinary members of the public do not. At that time it was believed that this provision would not result in any overall financial penalty against servicemen, because they received benefits, payable regardless of fault, which were in most cases comparable with those which a civilian might expect from the courts. Our review has, however, shown that damages which courts have awarded in some cases of personal injury have now risen to a level which can considerably exceed the benefits which the serviceman receives. The Government have concluded that repeal of section 10 is the only satisfactory course which will remove this disadvantage . . . We shall need to be able to reactivate the provisions of section 10 in the event of impending or actual hostilities or grave national emergency.”

It was indicated that, while the Government did not have time to promote its own legislation within the current programme, it would be ready to support a suitable Bill brought by a private member.

179 This invitation was taken up by Mr Winston Churchill MP: Hansard (HC Debates), 13 February 1987, written answers, col 602. The

A Parliamentary Under-Secretary of State, welcoming the Bill on the part of the government commented:

B “The Bill seeks to retain the power to reactivate section 10 at a time of great national emergency or in the event of actual or impending hostilities. That is widely accepted by the House. Indeed, I have not heard any hon member advocate in the debate that section 10 should not be reimposed in time of war. It is not possible or desirable to draw hard and fast definitions of the circumstances in which the Government might seek to reimpose section 10, but the wording of clause 2 is satisfactory in this respect, making it clear from that the Secretary of State will need to consider it necessary or expedient to make an order to reactivate section 10 by reason of a great national emergency or imminent national danger or in the event of warlike operations or connected activities outside the United Kingdom. We are talking about a grave situation in Britain or elsewhere, and I draw the attention of the House to the fact that the wording of clause 2 to a large extent mirrors the wording of the provisions of the Reserve Forces Act 1980 dealing with the call-up of reserves. Although there is no intention to create a formal link between, say, mobilisation and the reimposition of section 10, hon members will recognise that that gives an indication of the gravity of the circumstances in which reimposition of section 10 would arise.”

E 180 Those passages raise a number of possible issues, on which we have heard no argument, as to either relevance or substance. One indeed might be the scope of phrase “warlike activities” (cf Reserve Forces Act 1996, section 54) in its possible application to peace-keeping operations such as are in issue in the Snatch claims. We cannot resolve those questions within the scope of the arguments we have heard, and it is unnecessary to do so.

F 181 It should be noted in any event that the provisions for no-fault compensation have changed materially since 1987 when that debate took place. The governing legislation is now the Armed Forces (Pensions and Compensation) Act 2004, with the Armed Forces Compensation Scheme made under it. Awards are based on a detailed tariff, which is kept under review, and there is provision for appeal to a specialised tribunal. The scheme was most recently revised in 2011, following a review by Lord Boyce. However, it was not part of Mr Eadie’s case that the existence of that scheme, or its overlap with the law of negligence, should affect our consideration of the issues before us.

G 182 In my view these two sets of statutory provisions are no more than neutral, and neither assists in establishing the limits of the duty of care in the present context. It is not argued for the claimants that the 1987 Act impinges in any way on the defence of combat immunity as hitherto understood. At most it is said to be relevant in determining what is “fair, just and reasonable” under *Caparo* principles. However, there is nothing in the 1987 Act to suggest that it was intended to inhibit the ordinary, and logically prior, function of the court in determining the limits of potential liability under the law of negligence. It is only in so far as liability is so established that the scope of immunity under the Act becomes relevant.

H 183 Finally, under this section, it is of interest to note how similar issues have been dealt with in the USA, although again we have not heard any submissions on this aspect. Until 1946 claims against the Federal

Government without its consent were barred by the doctrine of sovereign immunity. This position was altered by the Federal Tort Claims Act (“FTCA”), 28 USCA section 1346(b), which can be seen as the equivalent of the Crown Proceedings Act 1947 in the United Kingdom. The FTCA abrogated sovereign immunity in relation to the Federal Government in most circumstances. However, pursuant to 28 USCA section 2680(j), the sovereign immunity of the Federal Government is not abrogated in respect of “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war”.

184 A further exception relating to “injuries incident to service” has been developed judicially, known as the *Feres* doctrine: *Feres v United States* (1950) 340 US 135 (SCt). According to a leading textbook (*Speiser, Krause & Gans, The American Law of Torts* (2010), para 17:5):

“The critical and lasting rationale of the *Feres* doctrine is the third one—the military disciplinary structure. The lawsuit cannot require a civilian court to ‘second guess’ military decisions [see *Stencel Aero Engineering Corp v United States*, (1977) 431 US 666, 673], and the suit cannot conceivably impair essential military discipline [see *Chappell v Wallace* (1983) 462 US 296, 300, 302, 304 (such ‘complex, subtle and professional decisions as the composition, training . . . and control of a military force are essentially professional military judgments’)]. Despite certain confusion in the broad statements of the courts, and notwithstanding critical comments, the *Feres* doctrine of denial of recovery has displayed a charmed life and continuing vitality [*Monaco v United States* (1981) 661 F 2d 129, 132].”

The cases show that in practice the *Feres* doctrine has been applied so as to give immunity in a wide range of situations, not directly linked to armed conflict.

### Conclusions

185 I have discussed these issues at some length, albeit in a minority judgment, because in my view they deserve greater attention than they have been given in the oral argument or the majority judgment. They remain matters which will need to be considered when the case goes to trial. In this respect I do not regard my analysis as conflicting significantly with the majority’s approach. The main difference is that I would have preferred to reach decisions at this stage.

186 In agreement with Lord Mance JSC, and for the same reasons, I would have struck out the Challenger claims. As I have said, in considering the scope of any actionable duty of care relating to the preparation for or conduct of war activities in the modern law of negligence, I do not think we should regard ourselves as constrained by the limits of “combat immunity” as established in the earlier cases. The proper application of *Caparo* principles, as illustrated by the sequence of authorities on police liability, enables us to extend and adapt those limits within the scope of the modern law of negligence, and to hold that there is no “middle ground” of potential liability in relation to the preparation for, or conduct of, war. As I understand Lord Hope DPSC’s judgment, it leaves the trial judge free, albeit after further factual inquiry, to reach the same conclusion.

A 187 In my view, differing from Lord Mance JSC in this respect only, we should apply different considerations to the later Snatch claims. They occurred in July 2005 and February 2006, after the time (May 2003) when (as Lord Hope DPSC explains: para 1) “major combat operations ceased and were replaced by a period of military occupation”. Now that the cases are to go to trial, I would not regard consideration of this issue as necessarily constrained by the shape of the arguments in the lower courts or before us. It is not surprising that Owen J drew no such distinction since, as I have noted, he had already held in *Multiple Claimants* that such operations were in principle within the scope of the combat immunity defence. The Court of Appeal did not address this issue in detail, but as I understand their judgment left it as raising questions of fact to be decided at trial.

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C 188 If as I believe the policy reasons for excluding liability are related to the special features of war or active hostilities, it would be wrong in my view to apply the same approach to peace-keeping operations, however intrinsically dangerous. The ordinary principles of negligence, as illustrated by cases such as *Hughes* and *Rigby*, can when necessary be sufficiently restrictive to ensure that most such claims, whether relating to advance procurement and training, or decisions on the ground, will be doomed to failure. On the other hand, the pleaded claims in the present cases go D further. It is alleged, as I understand, that there was an unjustified failure, following earlier incidents, to take readily available steps to deal with a known and preventable risk. I would not regard such claims as necessarily excluded as a matter of general policy, either at common law or under article 2. Since all the issues will now have to be considered at trial, it is unnecessary and probably undesirable for me to say more.

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*Appeals of claimants in first and third actions allowed.*  
*Defendant's appeals in third and fourth actions dismissed.*

DIANA PROCTER, Barrister

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