

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 16, 2013
CORRESPONDENTS' REPORTS

UNITED KINGDOM¹

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Cases — Scope of Article 2 Investigative Duty

- *R (Ali Zaki Mousa and others) v Secretary of State for Defence* [2013] EWHC 1412 (Admin)

The claimants are Iraqis who allege that they were ill-treated by British soldiers in Iraq and relatives of Iraqis alleged to have been killed by British soldiers in Iraq.

In judicial review proceedings in February 2010, they had claimed that the investigation carried out into the allegations was not independent, nor was it in adequate compliance with the investigative duties under Articles 2 and 3 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* ('ECHR'). In those judicial review proceedings it had been found that the investigation was not sufficiently independent.

The Secretary of State subsequently reformed the investigation procedure by establishing the Iraq Historic Allegations Team ('IHAT') to investigate the allegations. However, the claimants also challenged this process, alleging that the IHAT investigation was still not independent. They also sought to broaden the scope of the inquiry.

The Court held that although IHAT was independent, IHAT's investigation had not fulfilled the obligations under Article 2 of the ECHR. The Court found that cases involving civilian deaths should be investigated in the form of a public 'inquisitorial process' based on the model used for coroners' inquests. This would have many advantages over an overarching public inquiry.

- *R (Ali Zaki Mousa and others) v Secretary of State for Defence* (No 2) [2013] EWHC 2941 (Admin)

¹ Caroline Harvey, Solicitor of the Supreme Court of England and Wales.

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Following on from the decision above, the Court took the unusual step of providing its general view of the form the inquiries should take (and to this extent, it asked the parties for submissions). The main recommendations were as follows:

1. Appointment of a Designated Judge to oversee the matter (Leggatt J);
2. Rapid commencement of inquiries;
3. Establishment of each inquiry to be by a suitable person such as a retired judge or very experienced practitioner, with the Secretary of State to determine the terms of reference and to fully cooperate with the provision of documents;
4. Emphasis of the need for a timetable and for the work of the inquiries to be public, with video link and possibly also a website;
5. Scope would include the possibility of making findings of failure, however without naming individuals, and lessons learned;
6. A highly focused approach to disclosure, with the Inspector deciding whether disclosure is also to the parties;
7. Questions of witnesses should generally be put through the Inspector at his discretion; and
8. Limited legal representation to be provided at the discretion of the Inspector.

Cases — Scope of Jurisdiction for Human Rights Claims and Scope of Article 2 Investigative Duty

☛ *Smith and Others v Ministry of Defence* [2013] UKSC 41

Three claims were brought relating to the deaths of three British soldiers and the serious injuries of two others in Iraq between 2003 and 2006.

The first set of claims is in negligence for alleged failures of the Ministry of Defence to properly equip tanks and provide appropriate recognition training to soldiers. In a friendly fire incident, one serviceman died and two were injured (the 'Challenger claims').

The second set of claims relates to the alleged failure of the Ministry of Defence to protect life in compliance with Article 2 due to an alleged failing to take reasonable measures in light of the real and immediate risk to soldiers with patrolling obligations. Two soldiers were killed in their Snatch Land Rovers due to detonation of improvised explosive devices (the 'Snatch Land Rover claims').

The third set of claims is in negligence and relates to the alleged failure of the Ministry of Defence to provide suitable armoured vehicles for patrolling and to the decision to recommence the use of Snatch Landrovers after they were withdrawn following the incident relating to the first set of claims (the 'Ellis negligence claim').

The Ministry of Defence submitted that the Challenger and Ellis claims should be struck out on the basis of combat immunity and that it would not be fair, just or reasonable to impose a duty of care in the circumstances of those cases. With respect to the Snatch Land Rover claims, the Ministry of Defence submitted that the soldiers were not within the jurisdiction of the United Kingdom for the purposes of Article 1 of the ECHR at the time of their deaths and thus no duty of care existed at the time of their deaths under Article 2.

In the High Court and Court of Appeal proceedings, the Snatch Land Rover Article 2 claims were struck out on the basis that the soldiers were not within the jurisdiction of the

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UK at the time of their deaths. It had been ruled that the Challenger claims and part of the Ellis claims could proceed.

The Supreme Court examined three issues: first, regarding the Snatch Land Rover claims, whether the two soldiers killed during the military operations abroad were, at the time of their deaths, within the jurisdiction of the UK for the purposes of Article 1 of the ECHR; secondly, whether the UK owed a positive duty to the deceased soldiers at the time of their deaths pursuant to Article 2 of the ECHR, with a view to preventing the death of its own soldiers in active operations against the enemy; and thirdly, regarding the Challenger and the Ellis negligence claims, whether the complaints of negligence fell within the scope of combat immunity and whether it would be fair, just and reasonable in the circumstances of the case to impose a duty of care to protect against death or injury on the Ministry of Defence.

On the Snatch Landrover claims, the Supreme Court found unanimously that at the time of their deaths the soldiers were within the jurisdiction of the UK for the purposes of the ECHR and therefore, that those claims could proceed under Article 2. Similarly, the Supreme Court found that the Challenger claims and the Ellis negligence claims were not covered by combat immunity and could likewise proceed.

In discussing Article 1 jurisdiction, the Court distinguished the claims from those in the *Al-Skeini* decision, in which Convention protection was extended to local inhabitants under occupation from UK soldiers. The Court continued that if extra-territorial jurisdiction over local inhabitants exists as a result of the authority and control exercised by reason of another State's control of its armed forces in the territory, extra-territorial jurisdiction must logically also extend to those servicemen and women. According to the Court, given that servicemen and women relinquish control over their lives to the State, their capacity as State agents could not be separated from those whom they affect when they are exercising control on the State's behalf.

In relation to Article 2 obligations, the Court said that these obligations must be realistic and proportionate and that they should be given effect to where it would be reasonable to expect the individual to be given protection. The Court noted that this was a margin of discretion to be examined at trial.

With regard to combat immunity, this was found to apply to actual or imminent armed conflict but not to planning and preparation stages. The Challenger claims were therefore upheld. The Ellis claim occurred at a time of constant threat of enemy action and whether this fell within the scope of combat immunity was to be examined at trial.

Cases — Rendition and State Immunity

• *Belhaj and others v Straw and others* [2013] EWHC 4111 (QB)

In this decision on jurisdiction, the applicants were a Libyan couple who were apprehended in 2004 (when Libya and the UK still maintained friendly relations) in Bangkok whilst attempting to travel to the UK to claim asylum. They claimed that they had been detained at a US 'black site', and then flown to Tripoli and onto Tajoura prison, a detention facility operated by Libyan intelligence services. The first applicant, Mr Belhaj, was held in Libya until 2010 whereas his wife had been released in 2004.

The applicants brought two claims. First, they sought damages and declarations of illegality on the basis that they had been subject to unlawful rendition from Bangkok to Libya by agents of the US (China, Malaysia, Thailand and Libya), which the defendants participated in by providing information and intelligence. The defendants include the former head of MI6 counter-terrorism, the Attorney General, the Secret Intelligence Service, the

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Foreign and Commonwealth Office and the Home Office. The claim was based on conspiracy to injure, trespass to the person and conspiracy to use unlawful means as well as misfeasance in public office. However, the claims were struck out on the basis of the doctrine of State immunity. Simon J found that as English law did not apply to the claims, the court could not be expected to judge the actions of foreign States by the standards of their own domestic laws. In relation to the acts alleged to have been carried out by officials of China, Malaysia, Thailand and Libya in those countries, the act of State doctrine applied and such claims were non-justiciable.

Second, the applicants sought to sue in negligence on the basis of the defendants' alleged duty of care to the applicants not to expose them to a risk of unlawful rendition or torture. The applicants further alleged that the defendants had breached their duty not to disclose information about the first applicant in circumstances where they should have known his health was jeopardised by the inhuman conditions to which he was exposed, and that they had failed to ensure that adequate interrogation protocols were in place. The allegations of negligence, against which the defendants did not argue immunity, were allowed to proceed.

Legislation — Intelligence Oversight, Closed Material Proceedings and Disclosure of Sensitive Information

• *Justice and Security Act 2013*

The Bill passed through the Committee Stage in January 2013 and the Report Stage in March 2013, during which further amendments were made to the draft Bill.²

The main amendments are as follows:

- Previously only the government could apply for closed material proceedings ('CMP') but now the judge will be able to grant an application for a declaration from any party and order one of its own motion;
- The claimant has the possibility to apply to the judge for a CMP in relation to material it does not hold;
- The judge may revoke a declaration to apply for a CMP if the judge does not believe its continuation to be in the interests of the fair and effective administration of justice;
- The judge must conduct a formal review of the decision once disclosure has been conducted, in order to determine whether a CMP declaration is still in the interests of the effective and fair administration of justice in the proceedings and must revoke it if the judge considers that the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings. The review is conducted on all the material put before the court up to that point, not just on the material presented at the original application for a declaration;
- The judge may only grant a declaration to enable an application for a CMP if it is in the interests of the fair and effective administration of justice in the case;
- The judge must be satisfied that the government has considered whether to make a claim for public interest immunity before making an application for a CMP as one of the tests to be met before a CMP could be granted.

The Act also provides for an annual report and a five year review on the operation of CMPs.³

² See Caroline Harvey, 'United Kingdom', 15 *YIHL* (2012) available from <www.asser.nl/YIHL/correspondentsreports>.

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The Act received Royal Assent on 25 April 2013.

Parliamentary Debates — Syria

• United Kingdom, *Parliamentary Debates*, House of Commons, Column 1425, 29 August 2013

On 21 August 2013, Prime Minister David Cameron introduced the following motion in the House of Commons:

That this House:

Deplores the use of chemical weapons in Syria on 21 August 2013 by the Assad regime, which caused hundreds of deaths and thousands of injuries of Syrian civilians;

Recalls the importance of upholding the worldwide prohibition on the use of chemical weapons under international law;

Agrees that a strong humanitarian response is required from the international community and that this may, if necessary, require military action that is legal, proportionate and focused on saving lives by preventing and deterring further use of Syria's chemical weapons;

Notes the failure of the United Nations Security Council over the last two years to take united action in response to the Syrian crisis;

Notes that the use of chemical weapons is a war crime under customary law and a crime against humanity, and that the principle of humanitarian intervention provides a sound legal basis for taking action;

Notes the wide international support for such a response, including the statement from the Arab League on 27 August which calls on the international community, represented in the United Nations Security Council, to 'overcome internal disagreements and take action against those who committed this crime, for which the Syrian regime is responsible';

Believes, in spite of the difficulties at the United Nations, that a United Nations process must be followed as far as possible to ensure the maximum legitimacy for any such action;

Therefore welcomes the work of the United Nations investigating team currently in Damascus, and, whilst noting that the team's mandate is to confirm whether chemical weapons were used and not to apportion blame, agrees that the United Nations Secretary General should ensure a briefing to the United Nations Security Council immediately upon the completion of the team's initial mission;

Believes that the United Nations Security Council must have the opportunity immediately to consider that briefing and that every effort should be made to secure a Security Council Resolution backing military action before any such action is taken, and notes that before any direct British involvement in such action a further vote of the House of Commons will take place; and

³ UK Cabinet Office, *The Justice and Security Act* <<http://consultation.cabinetoffice.gov.uk/justiceandsecurity/the-justice-and-security-bill>>.

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Notes that this Resolution relates solely to efforts to alleviate humanitarian suffering by deterring use of chemical weapons and does not sanction any action in Syria with wider objectives.

The motion was defeated at the vote by 285 to 272.⁴ The main criticism was the failure to specify the nature of the proposed intervention.

Early Day Motions — Congo and the International Criminal Court

- House of Commons, 'Congo and the International Criminal Court' (Early Day Motion 1214) tabled on 19 March 2013
<<http://www.parliament.uk/edm/2012-13/1214>>

The following motion⁵ on Congo and the International Criminal Court received 18 signatures:

That this House notes that the International Criminal Court (ICC)-wanted warlord, Bosco Ntaganda, also known as the Terminator, has turned himself in to the US embassy in Kigali, the capital of Rwanda; welcomes the US decision to facilitate his transfer to the ICC; further notes that war criminals such as Sultani Makenga, Laurent Nkunda and others are still not yet indicted; supports President Obama's call for an end to impunity for M23 commanders and others who have committed serious human rights abuses; further supports Save the Congo's call to the UK Government to call on the UN Security Council to refer allegations of war crimes committed in Congo to the ICC; and therefore urges the Secretary of State for Foreign and Commonwealth Affairs and the Prime Minister to put an end to impunity in Congo at the heart of the 2013 G8 policy on Africa.

Early Day Motions — Syria and the Use of Chemical Weapons

- House of Commons, 'Syria and the Use of Chemical Weapons' (Early Day Motion 453) tabled on 29 August 2013
<<http://www.parliament.uk/edm/2013-14/453>>

The following motion⁶ on Syria and the use of chemical weapons received 18 signatures:

That this House deplores the chemical weapons attacks and appalling loss of life in Syria; notes that the reports of weapons inspectors in Syria are yet to be published and that there is no UN authorisation for military action; calls for refugees from the Syrian conflict to be fully assisted and supported; and believes that the case for military action against Syria has not been established.

Early Day Motions — Syria and Supranational Institutions

- House of Commons, 'Syria and Supranational Institutions' (Early Day Motion 454) tabled on 29 August 2013
<<http://www.parliament.uk/edm/2013-14/454>>

The following motion⁷ on Syria and supranational institutions received 2 signatures:

⁴ United Kingdom, *Parliamentary Debates*, House of Commons, Column 1547, 29 August 2013.

⁵ Primary sponsor was Mike Hancock. The sponsors were Mark Durkan, Margaret Ritchie, Jim Shannon, Jim Dobbin, Hugh Bayley.

⁶ Primary sponsor was John Hemming. Sponsors were Julian Huppert, Paul Burstow, Mark Durkan, Mike Hancock, Jim Dobbin.

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That this House believes that supranational institutions, such as the United Nations and the International Criminal Court, need strengthening in order to deal better with situations such as the use of chemical weapons in Syria; and further believes, therefore, that they need to be tested and given the time and opportunity to fail to deal with such issues before the Government considers circumventing the procedures of such bodies.

Early Day Motions — Bangladesh, International Crimes Tribunal and the Case of Abdul Kader Mullah

- House of Commons, 'Bangladesh International Crimes Tribunal and the Case of Abdul Kader Mullah' (Early Day Motion 569) tabled on 15 October 2013
<<http://www.parliament.uk/edm/2013-14/569>>

The following motion⁸ on the Bangladesh International Crimes Tribunal and the case of Abdul Kader Mullah received 32 signatures:

That this House is very concerned about the failure of the Bangladesh International Crimes Tribunal (ICT), which despite its name is a domestic court, to uphold international fair trial standards; is particularly alarmed about the denial of due process rights in the case of Abdul Kader Mullah, a leader of the Jamaat-e-Islami party convicted of war crimes, who has recently been sentenced to death with no possibility of the sentence being reviewed, in contravention of Bangladesh's international human rights obligations; notes also the criticisms raised in connection with the trial of the Bangladesh National Party MP, Salahuddin Quader Chowdhury, who was recently convicted on charges including murder and genocide and sentenced to death, subject to an appeal; notes that, while holding perpetrators to account for the atrocities committed in the 1971 war of independence is important, the denial of due process in these trials threatens to undermine the very legitimacy of the ICT and result in further political instability and violence; and calls on the Government to raise these concerns as a matter of urgency with the government of Bangladesh and to urge it to end the possibility of the death penalty being handed down in these trials and allow legal experts from the international community to support the work of the ICT.

Government Inquiry — Alleged Improper Treatment of Detainees in the Aftermath of 9/11 ('Detainee Inquiry')

- 'Report of the Detainee Inquiry' (December 2013)
<http://www.detaineeinquiry.org.uk/wp-content/uploads/2013/12/35100_Trafalgar-Text-accessible.pdf>

Also known as the 'Gibson Inquiry' and the 'Torture Inquiry', the Detainee Inquiry was set up to examine whether Britain was implicated in the improper treatment of detainees, held by other countries, in the aftermath of 9/11. It was led by Sir Peter Gibson, Dame Janet Paraskeva and Mr Peter Riddell and was intended to take evidence and hold public hearings.

In January 2013, the work of the Inquiry was halted when, in proceedings brought by Libyan dissidents Abdel Hakim Belhaj and Sami al-Saadi alleging rendition, evidence of MI6 involvement came to light. Now a matter for the police, and with the same agencies and individuals involved, the Inquiry has been abandoned.

⁷ Primary sponsor was John Hemming. The sponsor was Mike Hancock.

⁸ Primary sponsor was Ann Clywd. The sponsors were Mark Durkan, Margaret Ritchie, Bob Russell, Peter Bottomley, Jim Shannon.

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The work of the Inquiry was brought to a conclusion with a report published on 19 December 2013. The Inquiry found inter alia that MI6 officers were under no obligation to report breaches of the *Geneva Conventions* and that they had turned a 'blind eye' to the torture of detainees in foreign jails.

Government Inquiry — Alleged Abuse of Iraqi Detainees by British Armed Forces ('Al-Sweady Inquiry')

As discussed earlier, this Inquiry is examining allegations of human rights abuses by British soldiers in 2004 of Iraqi nationals near Al-Majar after a firefight known as the Battle of Danny Boy. The allegations included unlawful killing (later withdrawn) and mistreatment. Oral hearings commenced on 4 March 2013.

CAROLINE HARVEY