Neutral Citation Number: [2009] EWCA Civ 441

Case No: C1/2008/1049

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION (ADMINISTRATIVE COURT)
The Hon Mr Justice Collins
[2008] EWHC 694 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/05/2009

Before :

SIR ANTHONY CLARKE MR
LORD JUSTICE KEENE
and
LORD JUSTICE DYSON

- -

Between :

SECRETARY OF STATE FOR DEFENCE	**Appellant**
- and -	
THE QUEEN on the application of MRS CATHERINE SMITH	**Respondent**
-and-	
HM ASSISTANT DEPUTY CORONER FOR OXFORDSHIRE	**Interested Party**
-and-	
THE EQUALITY AND HUMAN RIGHTS COMMISSION	**Intervener**

- -

Pushpinder Saini QC and Sarah Moore (instructed by **HM Treasury Solicitor**) for the **Appellant**
Ben Emmerson QC and Jessica Simor (instructed by **Hodge Jones & Allen**) for the **Respondent**
The Interested Party was not represented

The Hon Michael Beloff QC and Raza Husain (instructed by the **Legal Director of the Equality and Human Rights Commission**) for the **Intervener**

Hearing dates: 9 and 10 March 2009

- -

Approved Judgment

Sir Anthony Clarke MR:

This is the judgment of the court.

Introduction

1. This appeal arises out of the inquest into the death of Private Jason Smith which took place before the Assistant Deputy Coroner for Oxfordshire ('the coroner') and led to an inquisition dated 5 January 2007. Private Smith died on 13 August 2003 while serving in Iraq as a private soldier with the Territorial Army ('the TA'). The cause of death was hyperthermia or, in layman's terms, heatstroke. This appeal raises two independent questions. The first ('the jurisdiction question') is to what extent British soldiers serving in Iraq are protected by the European Convention on Human Rights ('the Convention'). The second ('the article 2 question') is whether the inquest should comply with article 2 of the Convention.

The facts

2. For present purposes the facts can be shortly stated and can be taken from the judge's judgment. Private Smith joined the TA on 2 October 1992. In June 2003 he was mobilised for service in Iraq. He arrived in Basra on 18 June 2003 but spent until 26 June 2003 in a tented camp in the desert in Kuwait for the purpose of acclimatisation. He then moved to his base in Iraq, which was an old athletic stadium with a concrete structure comprising terraces, office and accommodation space. It is said that the room which he was assigned was large and airy but without air conditioning. By August 2003 temperatures in the shade reached in excess of 50^{o}C, which was the maximum that available thermometers could measure.

3. On 9 August 2003, he reported sick, complaining that he could not stand the heat. Over the next few days, he carried out various duties off the base. On 13 August at about 7 pm he was found lying face down outside the door of a room in which two of his colleagues were present. He was short of breath and in a confused and erratic state. An ambulance was called and he was taken to the accident and emergency department of the medical facilities, but he sustained a cardiac arrest and was pronounced dead at 8.10 pm.

4. In these circumstances there were a number of matters which naturally called for investigation. They included the question whether Private Smith's death was caused by a defective system operated by the state to afford adequate protection to human life by ensuring, so far as reasonably practicable, that he was an appropriate person, with proper training and equipment, to expose to the extreme heat of Iraq. They also included the question whether there was a real and immediate risk of his dying of heatstroke and, if so, whether all reasonable steps were taken to prevent it.

The decision of Collins J

5. The appeal arises out of a decision of Collins J ('the judge') which was handed down on 11 April 2008. Although the coroner did not appear before the judge, he conceded that the inquisition must be quashed on two grounds. Those grounds arose out of the approach of the Ministry of Defence ('the MOD') to two reports of a Board of Inquiry ('BOI') which the Special Investigations Branch of the Royal Military Police had set

up to inquire into Private Smith's death. The BOI made a report dated 24 May 2004. However, as the judge observed at [4], it was considered that the investigation had not dealt sufficiently with the standards used in judging the fitness of personnel for particular roles, with the result that the BOI reconvened and produced a supplementary report on 23 August 2004. Only the supplementary report was made available to the coroner. Moreover, it was not until the last day of the hearing that the existence of the first report was made known when the president of the BOI gave evidence confirming its existence.

6. When the existence of the first report was disclosed, the coroner decided that it was not necessary to consider it since he was persuaded by the evidence of the president that it would contain nothing which was likely to take matters further. This was most unfortunate from the point of view of the family of Private Smith. So too was the MOD's insistence that there be redaction of a number of documents which, as we understand it, had been supplied to the coroner. The coroner held that he had no power himself to disclose documents when the MOD objected. He further held that rule 37 of the Coroners Rules precluded him from exercising a discretionary power to order their disclosure. Before the judge the coroner conceded that those decisions were wrong in principle and consented to the quashing of the inquisition and verdict and to an order that a fresh inquest be convened before a different coroner. It follows that there will be a fresh inquest.

7. Notwithstanding the fact that there was to be a fresh inquest and even though both the questions identified above were academic, they were argued before the judge and he decided them. He decided both questions in favour of Catherine Smith (the claimant) but gave the Secretary of State for Defence permission to appeal because they raise questions of some general importance and, no doubt for that reason, both parties invite the court to consider them. The Secretary of State has described the judge's ruling on the jurisdiction question as being of great general significance. The importance of the questions is also stressed by the Equality and Human Rights Commission ('the Commission'), which has intervened in this appeal with our permission and has produced both evidence and written submissions which we have found of great assistance. In the circumstances we decided to hear full argument upon both questions and to determine them, especially since, now that the judge has decided them and given permission to appeal, it is desirable that they should be considered by this court. We consider them in turn.

The jurisdiction question

8. The question is whether a British soldier in the TA who, like Private Smith, is on military service in Iraq, is subject to the jurisdiction of the United Kingdom ('the UK') within the meaning of article 1 of the Convention, so as to benefit from the rights guaranteed by the Human Rights Act 1998 ('the HRA') while operating in Iraq or whether he is only subject to the jurisdiction for those purposes when he is on a British military base or in a British hospital. The reason why this question is academic is that Private Smith died in medical facilities on a UK base in Iraq and the Secretary of State has conceded that a soldier who dies on a UK base dies within the jurisdiction of the UK within the meaning of article 1 of the Convention. That concession is based on a concession made in the House of Lords in *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153.

9. The proceedings before the judge in this respect took an unusual turn. He heard full argument and concluded that such a soldier is subject to the UK jurisdiction throughout Iraq and not only when he is on a UK base or in a UK hospital. He prepared a judgment on that basis which is contained in [1] to [47]. However before he delivered his judgment in a final form, on 9 April 2008 the House of Lords handed down its judgments in *R (Gentle) v Prime Minister* [2008] UKHL 20, [2008] 1 AC 1356. At [8] Lord Bingham expressed (or was said to have expressed) an opinion which was different from that which the judge had formed. The judge accordingly entertained further argument on the jurisdiction question. Having done so, he issued an addendum to his judgment, in which he concluded that that opinion of Lord Bingham was not part of the *ratio decidendi* of *Gentle*, that he was not therefore bound by it and that, having heard full argument, which he said that the House of Lords had not, he was not persuaded that the view he had expressed in his judgment was wrong. He therefore adhered to it. The Secretary of State now submits that the judge was bound by the decision of the House of Lords in *Gentle* to reach the conclusion opposite to that which he in fact reached, alternatively that he was wrong as a matter of principle.

10. It is convenient to consider the jurisdiction question first without regard to the decision in *Gentle*, partly because it makes it easier to follow the argument arising out of *Gentle*, and partly because, even if the judge was bound by *Gentle* to reach a different conclusion, the point was not in our view fully reasoned out in *Gentle* and it is desirable that it should be.

11. Article 1 of the Convention provides:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

Section I is entitled "RIGHTS AND FREEDOMS" and in article 2, which is entitled "Right to life", provides:

> "1. 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."

Section 6(1) of the HRA provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. It is common ground that a public authority must be a UK public authority and that the British army is a public authority within the meaning of section 6.

12. Although article 1 of the Convention is not scheduled to the HRA, it is not in dispute that the jurisdictional scope of the HRA is identical to that of the Convention: see *Al-Skeini* per Lord Rodger at [57] to [59], per Baroness Hale at [88] and per Lord Brown at [150]. The question is therefore what is the jurisdictional scope of the Convention, which depends upon the true construction of the phrase "everyone within their jurisdiction", that is within the jurisdiction of the UK. The French text refers to "toute

personne relevant de leur jurisdiction", one translation of which is everyone falling under or within (or subject to) the jurisdiction of the state.

13. The respondent's case is essentially that, although jurisdiction in article 1 includes geographical jurisdiction, it is not limited to it. In some circumstances it includes personal jurisdiction. It does so in the case of a British soldier serving in Iraq because that soldier is within the personal jurisdiction of the army and thus of the UK. The judge essentially accepted that submission.

14. The Secretary of State says that he was wrong to do so. He does not however say that no soldier in Iraq is within the jurisdiction of the UK. It was conceded in *Al-Skeini* that a UK base or hospital in Iraq is within the jurisdiction of the UK. The judge's conclusion was based principally on an analysis of the decision of the European Court of Human Rights ('ECtHR') in *Bankovic v Belgium* (2001) 11 BHRC 435 and of the decision of the majority of the House of Lords in *Al-Skeini*. The Secretary of State's case is that the reference to jurisdiction in article 1 is a reference to geographical jurisdiction and on that basis he accepts that the UK has some geographical jurisdiction in Iraq but says that it is limited to locations over which it has effective control, such as a UK military base or hospital.

15. The key difference between the parties is thus that the Secretary of State says that the jurisdiction under article 1 of the Convention is essentially geographical and that, while a UK base is geographically within the jurisdiction of the UK for these purposes, other parts of Iraq are not, whereas the claimant, supported by the Commission, submits that the jurisdiction may be personal and that a soldier in Iraq is within the personal jurisdiction of the UK.

16. The critical cases for present purposes are thus *Bankovic*, *Al-Skeini* and *Gentle*. We consider them in turn. In *Bankovic* the applicants and their deceased relatives were citizens of the Federal Republic of Yugoslavia ('FRY'), which is not a Contracting State. The deceased were killed when NATO bombed the radio and television station ('RTS') in Belgrade. The respondent states were Belgium and 16 other Contracting States who were members of NATO. The Grand Chamber considered the preliminary question whether the claimants and their deceased relatives came within the jurisdiction of the respondent states within the meaning of article 1 of the Convention.

17. At [19] the ECtHR noted that in the course of the *travaux préparatoires* it was decided to replace 'everyone residing within their territories' with 'everyone within their jurisdiction'. At [36] it identified the respondent states' submission on the meaning of 'jurisdiction' as being that it should be interpreted in accordance with the ordinary and well-established meaning of that term in public international law and added:

> "The exercise of 'jurisdiction' therefore involves the assertion or exercise of legal authority, actual or purported, over persons owing some form of allegiance to that State or who have been brought within that State's control. They [ie the respondent States] also suggest that the term 'jurisdiction' generally entails some form of structured relationship normally existing over a period of time."

18. At [54] the court identified the essential question as being whether the applicants and their deceased relatives were, as a result of the extra-territorial act (viz the bombing which had effect outside the territory of the respondent states), capable of falling within the jurisdiction of the respondent states. It referred, among other cases, to *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745.

19. The critical reasoning in *Bankovic* for present purposes is set out at [59] to [61], which we reproduce without the references:

> "59. As to the 'ordinary meaning' of the relevant term in article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States. …
>
> 60. Accordingly, for example, a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other States' territorial competence … In addition, a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying State in which case it can be found to exercise jurisdiction in that territory, at least in certain respects …
>
> 61. The Court is of the view, therefore, that article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case. …

At [66] the court quoted this extract from *Soering v UK* (1989) 11 EHRR 439 at [86]:

> "Article 1 … sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to 'securing' ('*reconnaître*' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'. Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States."

20. Thus the ECtHR held that the jurisdiction was essentially or, as *Soering* put it, notably, territorial but recognised that there were exceptions. It did not at that stage identify precisely what those exceptions were. It then considered extra-territorial acts as constituting an exercise of jurisdiction and concluded at [67] that it had accepted only in exceptional cases that acts of states performed or producing effects outside their territories can constitute an exercise of jurisdiction within the meaning of article 1. It gave examples at [68] to [70].

21. In *Al-Skeini* Lord Brown summarised at [109] what he described as certain central propositions for which he said that *Bankovic* stands:

> "(1) Article 1 reflects an "essentially territorial notion of jurisdiction" (a phrase repeated several times in the Court's judgment), "other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case" (para 61). The Convention operates, subject to article 56, "in an essentially regional context and notably in the legal space (*espace juridique*) of the contracting states" (para 80) (ie within the area of the Council of Europe countries).
>
> (2) The Court recognises article 1 jurisdiction to avoid a "vacuum in human rights' protection" when the territory "would normally be covered by the Convention" (para 80) (ie in a Council of Europe country) where otherwise (as in Northern Cyprus) the inhabitants "would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed" (para 80).
>
> (3) The rights and freedoms defined in the Convention cannot be "divided and tailored" (para 75).
>
> (4) The circumstances in which the Court has exceptionally recognised the extra-territorial exercise of jurisdiction by a state include:
>
> (i) where the state, at para 71:
>
> "through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by [the government of that territory]" (ie when otherwise there would be a vacuum within a Council of Europe country, the government of that country itself being unable "to fulfil the obligations it had undertaken under the Convention" (para 80) (as in Northern Cyprus).

(ii) At para 73:

> "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 [where] customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction".

(iii) Certain other cases where a state's responsibility "could, in principle, be engaged because of acts … which produced effects or were performed outside their own territory" (para 69). *Drozd v France* (1992) 14 EHRR 745 (at para 91) is the only authority specifically referred to in *Bankovic* as exemplifying this class of exception to the general rule. *Drozd*, however, contemplated no more than that, if a French judge exercised jurisdiction extra-territorially in Andorra in his capacity as a French judge, then anyone complaining of a violation of his Convention rights by that judge would be regarded as being within France's jurisdiction.

(iv) The *Soering v UK* (1989) 11 EHRR 439 line of cases, the Court pointed out, involves action by the state whilst the person concerned is "on its territory, clearly within its jurisdiction" (para 68) and not, therefore, the exercise of the state's jurisdiction abroad. There is, on the face of it, nothing in *Bankovic* which gives the least support to the appellants' arguments."

In this court we are of course bound by that analysis.

22. Ultimately at [82] the ECtHR said that it was not persuaded that there was any jurisdictional link between the victims of the bombing and the respondent states. It therefore held that they were not capable of coming within the jurisdiction of the respondent states on account of "the extra-territorial act in question". The facts of *Bankovic* were, however, far from those here.

23. In *Al-Skeini* the House of Lords by a majority, Lord Bingham dissenting, held that in appropriate circumstances, the HRA extended to the acts of UK public authorities such as the armed forces undertaken abroad as well as in the UK. Establishment of victim status under section 7 of the HRA required the claimant to show that the deceased was within the jurisdiction of the Convention as stated in article 1: see per Lord Rodger at [55] and [56], Baroness Hale at [86], [90] and [91] and Lord Carswell at [96] to [98]. The question is whether the circumstances assumed here are such that the court can properly conclude that a British soldier is within the jurisdiction of the UK when he is in Iraq, not only when he is at a base or hospital but also when he is not.

24. The claimant and the Commission say that there is no logic or sense in such a distinction and that *Al-Skeini* does not support it because the facts there were very different. In *Al-Skeini* the claimants were the relatives of six deceased Iraqis who had been killed by or in the course of action taken by British troops in Iraq. In the first five cases the deceased had been shot in separate armed incidents involving British troops. In the sixth case, that of Daoud Mousa, the deceased had been arrested by British troops and taken into custody at a British military base, where he died allegedly as a result of torture carried out at the base. The claimants sought judicial review of the Secretary of State's failure to conduct independent inquiries into or to accept liability for the deaths or the torture. The distinction between that case and the assumed facts here is that there the soldiers were representatives of the British army who were said to be responsible for the deaths and the victims were Iraqi citizens, whereas here Private Smith is the victim. He was at that time a soldier in the British army and in every sense under its control. His position may thus be contrasted with that of each of the five Iraqis whose claims failed in *Al-Skeini*.

25. In *Al-Skeini* Lord Rodger focused on the importance of the status of the victim and his relationship with the Contracting State, which was of course here the UK. It is, in our judgment, important to focus on the position of the victim because article 1 itself expressly provides that the state "shall secure to everyone within [its] jurisdiction the rights and freedoms" defined in the Convention. The question is thus whether the victim is within the jurisdiction. In this regard Lord Rodger said this at [64]:

> "It is important therefore to recognise that, when considering the question of jurisdiction under the Convention, the focus has shifted to the victim or, more precisely, to the link between the victim and the contracting state. For the purposes of the extra-territorial effects of section 6 of the 1998 Act, the key question was whether a public authority - in this case the Army in Iraq - was within Parliament's legislative grasp when acting outside the UK. By contrast, for the purposes of deciding whether the Convention applies outside the territory of the UK, the key question is whether the deceased were linked to the UK when they were killed. However reprehensible, however contrary to any common understanding of respect for "human rights", the alleged conduct of the British forces might have been, it had no legal consequences under the Convention, unless there was that link and the deceased were within the jurisdiction of the UK at the time. For, only then would the UK have owed them any obligation in international law to secure their rights under article 2 of the Convention and only then would their relatives have had any rights under the 1998 Act."

Lord Rodger had of course already expressed the view that for the purposes of the extra-territorial effects of section 6 of the HRA, the army was within the legislative grasp of Parliament when acting outside the UK. In our judgment, he was not dealing in [64] with the scope of the HRA, but with the question whether a soldier serving in Iraq is within the jurisdiction of the UK under article 1 of the Convention. Lord Rodger identified the relevant question as being whether the person who is alleged to be a victim was "linked to the UK" when he died (or at some other relevant time). As

we read that passage Lord Rodger was saying that if there was a sufficient link then the deceased was within the jurisdiction of the UK within the meaning of article 1 of the Convention. On the facts of *Al-Skeini* it was only Daoud Mousa who had the necessary link. It is, we think, important to note that both Baroness Hale and Lord Carswell agreed with Lord Rodger at [90] and [96] respectively.

26. Lord Rodger said at [62] that he agreed with Lord Brown as to all essentials. Lord Rodger, Baroness Hale and, especially, Lord Brown explained that the reasoning in *Bankovic* was to be preferred to that of the ECtHR (not the Grand Chamber) in *Issa v Turkey* (2004) 41 EHRR 567 and in the cases which have followed it. This was notwithstanding the fact that the decisions in *Issa* and the other cases were after the decision of the Grand Chamber in *Bankovic*. However, since we are bound by *Al-Skeini*, we say nothing about *Issa* and the other cases. It will of course be a matter for the ECtHR in the future how this part of its jurisprudence develops. In the meantime, as has been often stated, our approach in interpreting the Convention is to keep in step with Strasbourg, neither lagging behind nor leaping ahead; no more, as Lord Bingham said in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at [20], but certainly no less; and no less, as Lord Brown said at [106] of *Al-Skeini*, but certainly no more – see per Baroness Hale at [90] of the same case.

27. How then did matters stand in a case of this kind after *Bankovic* and *Al-Skeini*? None of the cases involved the case where, at the time he sought the protection of the Convention, a soldier from a Contracting State (here the UK) was on active service in another state (here Iraq). On the assumed facts here the soldier was not within the geographical jurisdiction of the UK because, at any rate at the time of his death, we are to assume for the purposes of question 2 that, contrary to the true facts, Private Smith was not at a British base or hospital. It is submitted on behalf of the Secretary of State that it follows from *Bankovic*, and applying the principle in *Ullah*, that the correct conclusion is that he was not a victim when he was killed because he was killed outside the jurisdiction of the UK. By contrast, while both the claimant and the Commission accept that the question is whether the victim was within the jurisdiction of the Convention, they submit that on the assumed facts the soldier was within the jurisdiction.

28. In our judgment, if it is permissible to answer the question posed by Lord Rodger, namely whether there was a sufficient link between Private Smith and the UK when he died, on the assumption for this purpose that he died outside the base or a hospital, in a broad and commonsense way, the answer is in our opinion plainly yes. As the judge put it at [9] of his addendum, there is a degree of artificiality in saying that a soldier is protected so long as he remains in the base or military hospital but that he is not protected as soon as he steps outside.

29. As the Commission succinctly puts it in its skeleton argument, there is no question but that members of the British armed forces are subject to UK jurisdiction wherever they are. They remain subject to UK military law without territorial limit and may be tried by court martial whether the offence is committed in England or elsewhere. They are also subject to the general criminal and civil law. Soldiers serve abroad as a result of and pursuant to the exercise of UK jurisdiction over them. Thus the legality of their presence and of their actions depends on their being subject to UK jurisdiction and complying with UK law. As a matter of international law, no infringement of the

sovereignty of the host state is involved in the UK exercising jurisdiction over its soldiers serving abroad.

30. It is not in dispute that the army owes soldiers a duty of care while they are in Iraq, as elsewhere. However, it does not follow from this that a soldier in Iraq is within the jurisdiction of the UK under the Convention. We stress that we are not saying that such a soldier is within the jurisdiction merely because the army may owe soldiers a duty of care. We recognise that that is a different question. However, it is accepted that a British soldier is protected by the HRA and the Convention when he is at a military base. In our judgment, it makes no sense to hold that he is not so protected when in an ambulance or in a truck or in the street or in the desert. There is no sensible reason for not holding that there is a sufficient link between the soldier as victim and the UK whether he is at a base or not. So too, if he is court-martialled for an act committed in Iraq, he should be entitled to the protection of article 6 of the Convention wherever the court martial takes place: see in this regard per Lord Brown in *Al-Skeini* at [140]. In these circumstances we accept the submission made by the Commission that there would have to be compelling reasons of principle for drawing a distinction for the purposes of jurisdiction under article 1 of the Convention between the soldier while at his base and the soldier when he steps outside it, at any rate so long as he is acting as a soldier and not, in the old phrase, on a frolic of his own. In our judgment, no such compelling reasons have been advanced on behalf of the Secretary of State.

31. We add in this regard that we do not see any problem with the point made by Lord Brown at sub-paragraph (3) of [109] in *Al-Skeini* that the rights and freedoms cannot be "divided and tailored". The rights no doubt have to be tailored to the particular circumstances. It has, for example been held that the rights of those in the emergency services or in the armed forces may have to be tempered by the exigencies of the service: see eg *Engel v Netherlands* (1979-80) 1 EHRR 647 at [54] and [59] and *Gentle* per Lord Hope at [18] to [19]. Thus the right to life of a soldier in combat is different from that of a soldier not in combat, but the question here is whether there should be a distinction between the rights of a soldier at a base and when he leaves the base. The answer to that question is not in our view affected by the existence or application of the principle that his rights cannot be "divided or tailored". The Secretary of State has not in our view satisfactorily explained how the UK can secure Convention rights to a soldier when at a base and not when he is outside it.

32. We see no reason why we should not answer the question posed by Lord Rodger in a broad and commonsense way. He concluded that on the facts of *Al-Skeini* the question whether there was a sufficient link between the soldier and the UK was the relevant question to ask in the light of *Bankovic*. It follows that that is the relevant question to ask here, that to ask it is to apply the principles in *Bankovic* and that to do so does not contravene the principle in *Ullah* or *Al-Skeini*. In our opinion, there is nothing in *Bankovic* or *Al-Skeini* to lead to the conclusion that there was no sufficient link between a British soldier and the UK. Neither case was considering the assumed facts here. Indeed both cases were very different on the facts. For present purposes they simply identify the question to be asked.

33. As we see it, the specific exceptions recognised by *Bankovic* are examples of the link to which Lord Rodger refers. We therefore turn to consider whether the soldier serving in Iraq falls within any of those exceptions if at the relevant time he is not

within a British base or hospital. In our judgment he does. As already stated, there was a plain link between Private Smith and the UK because he was serving in the British army. He was in a position not dissimilar from that of the French judge in *Drozd*. As Lord Brown put it at sub-paragraph (4)(iii) of [109] in *Al-Skeini*, if the French judge had been exercising jurisdiction extra-territorially in Andorra in his capacity as a French judge, then anyone complaining of a violation of his Convention rights would be regarded as within France's jurisdiction. See also per Lord Brown at [121]. The same would surely be the case if the French judge were the victim because, in Lord Rodger's phrase, he would be linked with France. So, in the case of a soldier in Iraq, he has a similar link with the UK.

34. Similar considerations seem to us to apply in the case of Lord Brown's category (4)(ii), namely the activities of a state's diplomatic or consular agents abroad. Again, it seems to us that they would have a sufficient link with the UK to entitle them to the protection of the Convention on the basis that they are for that purpose within the jurisdiction of the UK. As we see it, that is so whether or not they are at the relevant time in an embassy or consulate. We note in passing that in his quote from *Bankovic* at (4)(ii) of [104] Lord Brown referred to the activities of a state's diplomatic or consular agents abroad. Although he referred at [126] to the activities of embassies or consulates, we do not think that he can have intended the exception to be so limited because his analysis depends on the correct approach to *Bankovic*, which contains no such geographical limitation. On the contrary, it is an exception to the geographical nature of the state's jurisdiction.

35. We also note in passing that it was not suggested in the course of the argument that customary international law did not recognise the extra-territorial jurisdiction in the case of diplomats or consular agents. We should add that we see no distinction in principle between consular officials and military personnel. For the purpose of determining whether there is a sufficient link with the UK to qualify for protection, it seems to us to make no sense to hold that there is a distinction between a person inside and outside premises controlled by the UK, whether he or she is a consul or a soldier. The distinction raises questions such as whether the soldier or consul is protected in a vehicle or an ambulance. If in a hospital, why not in an ambulance? If in a British base or consulate, why not in a British army vehicle? If in a vehicle, why not when the soldier gets out of the vehicle? In short, if consular officials have that protection because there is a sufficient link between them and the UK to provide them with protection under the Convention (and therefore the HRA), we see no reason why the same should not be true of military personnel.

36. In this regard the claimant and Commission rely upon the fact that the European Commission of Human Rights has consistently observed 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 persons or property."

That is a quotation from *Cyprus v Turkey* (Application No 6780/74; 6950/75). For present purposes we refer to it only for the support it gives to the conclusion that no distinction is to be drawn between diplomatic or consular agents on the one hand,

which are expressly within the exceptional cases identified in *Bankovic*, and members of the armed forces on the other. See also *W v Ireland* Application No 9360/81, 32 DR 190.

37. We should also refer to Lord Brown's category (4)(i), which is also touched on at [122]. It is the case where the state

> "through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by [the government of that territory]."

At any rate during part of the time that the British army has been in Iraq, it appears to us that the army has, through the consent of the government of Iraq, been exercising some of the powers normally to be exercised by the government of Iraq, namely that of the army and security forces.

38. That too is a potential basis for establishing a sufficient link between army personnel in Iraq and the UK. However, it may not be established as at the time of the death of Private Smith. The facts found by the judge in this regard were set out at [12] and may be summarised as follows. The Coalition Provisional Authority in Iraq (following the ouster of the government of Saddam Hussain) had issued an order whereby the Multinational Force (of which British troops formed a part) should be "immune from Iraqi legal process" and that all personnel should be "subject to the exclusive jurisdiction of their sending States": see section 2(1) and (3) of the order. Thus the UK's jurisdiction over its own nationals was clearly maintained. However, it may well be that at the time of Private Smith's death the army was neither in effective control of Iraqi territory nor acting through the consent, invitation or acquiescence of the local government.

39. However, for the reasons we have given we conclude that on the assumed facts a soldier in the position of Private Smith was a potential victim within article 34 of the Convention. It is not necessary for us to resolve the question when he has to be a victim and/or within the jurisdiction of the Convention for the purpose of an alleged infringement of his Convention rights. We note that at sub-paragraph (4)(iii) of [109] in *Al-Skeini* Lord Brown quotes a passage from [69] of *Bankovic* which referred to "acts … which produced effects or were performed outside" a state's own territory. That would cover both cases where the effect, as here the death, occurred and cases where the acts (or presumably omissions) were committed outside a state's own territory. It is not necessary to resolve the issue here because on the assumed facts the death occurred in Iraq.

40. We note in passing that in *R (Al-Saadoon and Mufdhi) v The Secretary of State for Defence* [2009] EWCA Civ 7 this court gave further consideration to the scope of the jurisdiction of a Contracting State under the Convention but it did not consider the question which is before us because the applicants were Iraqis and not members of the British armed forces.

41. The question remains whether it is open to us to reach the conclusions we have set out above or whether we are bound by the decision of the House of Lords in *Gentle* to hold that on the assumed facts a soldier who lost his life as Private Smith did was at the relevant time outside the jurisdiction of the UK for the purposes of article 1 of the Convention. The argument advanced by the Secretary of State is that we are so bound. This depends upon whether Lord Bingham so held as part of the *ratio decidendi* of his speech and, if so, whether a sufficient number of the other members of the appellate committee agreed with him to make his decision on this point part of the *ratio* of the House.

42. In order to resolve this question it is in our opinion important to put the jurisdiction question in the context of *Gentle*, which was essentially concerned with a very different point. The principal point decided in *Gentle* may be summarised in this way. The claimants were the mothers of two soldiers who were killed while serving with the British armed forces in Iraq. Trooper Clarke was killed by "friendly fire" on 25 March 2003 and Fusilier Gentle was killed by a roadside bomb on 28 June 2004. The claimants sought judicial review of a refusal by the government to hold an independent inquiry (separate from an inquest) into the question whether the government had taken reasonable steps to be satisfied that the invasion of Iraq was lawful under international law. It was held by the House of Lords, dismissing an appeal from this court (comprising Sir Anthony Clarke MR, Sir Igor Judge P and Dyson LJ), that the implied procedural duty under article 2 of the Convention to investigate whether a death which had occurred involved a breach of the substantive duty to protect life imposed by article 2 was parasitic upon the substantive duty and did not exist independently of it, that, consequently, the claimants had to show at least an arguable case that the substantive duty arose on the facts of the case and that they could not do so.

43. The principal reason for that conclusion was, as Lord Bingham put it at [7], that there was no warrant for reading article 2 as a generalised provision protective of life, irrespective of any specific death or threat. The right and duty alleged by the claimants did not depend upon their sons' deaths. If they existed, they would have arisen before either was killed and would have existed even if they had survived the conflict. That was because the case against the government arose from an alleged failure to take reasonable steps before the deceased left England. As we read the speeches, an essential feature of the reasoning of the members of the appellate committee was that it was conceded by the claimants that they were not seeking an inquiry into the question whether the invasion of Iraq was lawful or unlawful and, moreover, that that question would indeed be outside the remit of an inquiry under article 2: see eg per Lord Bingham at [2], Lord Hoffmann at [13], Lord Hope at [22], Lord Rodger at [34] to [39], Baroness Hale at [56] to [58], Lord Carswell at [63] and [64], Lord Brown at [69] and Lord Mance at [72] and [73].

44. In particular, Lord Hoffmann said at [16] that, unless article 2 creates an obligation not to go to war contrary to the United Nations Charter (and thus contrary to international law), which was not contended for, he could not see how there could be an independent duty to use reasonable care to ascertain whether the war would be contrary to the Charter or not. Lord Hope said at [25] to [27] that, given that the question whether the war was a breach of international law was legally irrelevant, the claimants' argument did not get over the first hurdle, namely that there was arguably a

breach of the substantive obligation in article 2 to protect life. Lord Rodger also regarded the fact that it was not (and could not be) said that the war was unlawful as of critical importance. At [39] he described what was left as a *pis aller* of a duty to investigate whether the government took reasonable care. He rejected it at [39] to [44]. One of his reasons, which he stated at [44], was that it was simplistic to suggest that any lack of diligence in investigating the legality of the war could be a relevant cause of the deaths. At [59] Baroness Hale said that the point of taking reasonable care is to discover what you can and cannot do and if you do not owe a duty to individual soldiers not to send them off to fight in an unlawful war, it makes no difference whether or not you take reasonable care to discover whether or not it was lawful. You could have sent them anyway. As she put it at [60], it is not a breach of the substantive duty under article 2 to send troops to fight in an unlawful war; hence the duty to investigate does not arise. As is clear from [64] and [65], Lord Carswell determined the appeal on the basis of what he described as the engagement issue and the relevance issue. He concluded in short that article 2 was not engaged and, if it was, that any breach of duty was not a relevant cause of the deaths. Both Lord Brown and Lord Mance concluded that there was no arguable breach of the substantive duty under article 2 and thus no breach of the procedural duty under the same article.

45. There is very little discussion in the speeches of the point of jurisdiction which arises for decision now. That seems to us to be surprising if the House was really concluding that on the assumed facts of the instant case a British soldier would be outside the protection afforded by the Convention. As the Secretary of State recognises, it is a point of some general importance. If the House was considering such a point as a matter of decision we would have expected the members of the appellate committee to have addressed it much more fully than they did.

46. As we have already indicated, the submissions of the Secretary of State depend upon [8] in the speech of Lord Bingham and the reaction of the other members of the appellate committee to it. We referred above to [7] in the speech of Lord Bingham. He said at [8] that it may be significant that article 2 has never been held to apply to the process of deciding on the lawfulness of a resort to arms, despite the number of occasions on which member states have made that decision over the past half century and despite the fact that such a decision almost inevitably exposes military personnel to the risk of fatalities. Lord Bingham then gave three main reasons for that view. It is the third reason that is relied upon by the Secretary of State. We note, however, that Lord Bingham did not give his third reason as a free-standing jurisdictional reason for reaching the conclusion that article 2 did not apply to the facts of *Gentle*, only as a reason for the possible significance of the fact that it had not been held to apply to the process of deciding on the lawfulness of a resort to arms.

47. Lord Bingham's three reasons were these:

> "(1) The lawfulness of military action has no immediate bearing on the risk of fatalities. Indeed, a flagrantly unlawful surprise attack such, for instance, as that which the Japanese made on the US fleet at Pearl Harbour, is likely to minimise the risk to the aggressor. In this case, as Mr

Sumption QC for the respondents pointed out, Fusilier Gentle died after Security Council Resolution 1546 had legitimated British military action in Iraq, so that such action was not by then unlawful even if it had earlier been so.

(2) The draftsmen of the European Convention cannot, in my opinion, have envisaged that it could provide a suitable framework or machinery for resolving questions about the resort to war. They will have been vividly aware of the United Nations Charter, adopted not many years earlier, and will have recognised it as the instrument, operating as between states, which provided the relevant code and means of enforcement in that regard, as compared with an instrument devoted to the protection of individual human rights. It must (further) have been obvious that an enquiry such as the appellants claim would be drawn into consideration of issues which judicial tribunals have traditionally been very reluctant to entertain because they recognise their limitations as suitable bodies to resolve them. This is not to say that if the appellants have a legal right the courts cannot decide it. The respondents accept that if the appellants have a legal right it is justiciable in the courts, and they do not seek to demarcate areas into which the courts may not intrude. They do, however, say, in my view rightly, that in deciding whether a right exists it is relevant to consider what exercise of the right would entail. Thus the restraint traditionally shown by the courts in ruling on what has been called high policy – peace and war, the making of treaties, the conduct of foreign relations – does tend to militate against the existence of the right: *R v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136, paras 30, 65-67. This consideration is fortified by the reflection that war is very often made by several states acting as allies: but a litigant would be required to exhaust his domestic remedies before national courts in which judgments would be made about the conduct of states not before the court, and even if the matter were to reach the European Court of Human Rights there could be no review of the conduct of non-member states who might nonetheless be covered by any decision.

(3) The obligation of member states under article 1 of the Convention is to secure "to everyone within their jurisdiction" the rights and freedoms in the Convention. Subject to limited exceptions and specific extensions, the application of the Convention is territorial: the rights and freedoms are

> ordinarily to be secured to those within the borders of the state and not outside. Here, the deaths of Fusilier Gentle and Trooper Clarke occurred in Iraq and although they were subject to the authority of the respondents they were clearly not within the jurisdiction of the UK as that expression in the Convention has been interpreted (*R (Al-Skeini) v Secretary of State for Defence* (*The Redress Trust Intervening*) [2007] UKHL 26, [2008] 1 AC 153, paras 79, 129). The appellants seek to overcome that problem, in reliance on authorities such as *Soering v United Kingdom* (1989) 11 EHRR 439, by stressing that their complaint relates to the decision-making process (or lack of it) which occurred here, even though the ill-effects were felt abroad. There is, I think, an obvious distinction between the present case and *Soering*, and such later cases as *Chahal v United Kingdom* (1996) 23 EHRR 413 and *D v United Kingdom* (1997) 24 EHRR 423, in each of which action relating to an individual in the UK was likely to have an immediate and direct impact on that individual elsewhere. But I think there is a more fundamental objection: that the appellants' argument, necessary to meet the objection of extra-territoriality, highlights the remoteness of their complaints from the true purview of article 2."

48. There is no hint in sub-paragraph (3) that Lord Bingham was considering a submission of the kind that has been made here, namely that there is a distinction between the position of the alleged victims in A*l-Skeini* and the assumed victim here. None of the first five claimants in *Al-Skeini* was even arguably within the jurisdiction of the UK. The argument was that jurisdiction was conferred by the fact that they were killed by British troops, which the House of Lords held was precluded by the decision in *Bankovic*. The sixth claimant, Mr Mousa, was only within the jurisdiction because he was allegedly maltreated while within a British detention facility. The House of Lords was not considering the position of a victim such as the assumed soldier here.

49. The judge said that the House of Lords had not heard full argument on the jurisdiction question in *Gentle*. If by that he meant that the House had not heard any argument he was wrong, although he was right to say that it had not heard full argument. In this court the claimants did not argue the point raised here. Their position is recorded in the judgment of this court at [2006] EWCA Civ 1689, [2007] QB 689, at [81]. They accepted that in order to engage article 2 there had to be a death (or near death) and that the alleged breach of the state's obligation must have occurred within the territory of the relevant state. Their case was that the breach occurred in the UK because the forces were either sent to Iraq from the UK or from a military base overseas which for this purpose must be treated as part of the United Kingdom. They relied upon the principle in *Soering*. They did not put the case in the way in which it has been put in this appeal.

50. In the House of Lords the claimants did not withdraw their concession. They did however rely upon *Al-Skeini* on the basis that it was held that civilians under the effective control of the UK were entitled to the protection of the 1998 Act in post-invasion Iraq. They added that it would be strange if the soldiers constituting those armed forces enjoyed less state protection than the civilians under their control and that in international law the state is exercising control over its own nationals when it issues compulsory orders to them: see the argument at [2008] 1 AC at 1361B-C. Although there is a hint of the argument in the present case in that passage, it appears to take as a starting point the protection afforded by *Al-Skeini* to Iraqi citizens, which was limited to protection given to Mr Mousa. For the reasons we have given above, we do not think that it is appropriate to approach the matter in that way. The claimants further relied upon the *Soering* line of cases: see at page 1361C-D.

51. In the respondents' written case in the House of Lords they asserted at [17] that on the basis of *Al-Skeini* the Convention obligations of the UK did not apply in a foreign territory occupied by its troops unless (i) the foreign territory was part of the territory of another Convention state or (ii) the acts in question occurred in a place under the authority of a British diplomatic or consular agent or on a British ship or aircraft, or in analogous situations. They added that the House had held on the basis of (ii) that the Convention applied to the treatment of a person in the custody of British troops at a British military prison in Iraq but that it did not apply generally in those parts of Iraq in which British troops were operating. They further asserted at [19] that the sole basis upon which the claimants contended that the issue fell within the territorial ambit of the Convention was by way of analogy with *Soering*.

52. It seems to us that in these circumstances the case in *Gentle* was argued on a different basis from that here and is distinguishable from *Al-Skeini* for the reasons given above. There is no hint in sub-paragraph (3) of [8] of Lord Bingham's speech that he was considering the case that has been presented to us. If he had been, he would surely have dealt with it specifically. Although he referred to *Al-Skeini*, he did so by reference to [79] and [129], which seem to us to refer to the case where the troops had effective control of an area. Lord Bingham further rejected the *Soering* argument on the basis that in *Soering* and cases like it the action (or presumably inaction) related to an individual in the UK and was likely to have an immediate or direct impact on that individual elsewhere. As Lord Bingham put it, that was plainly not the case in *Gentle*.

53. Finally Lord Bingham added that there was a more fundamental objection, namely that the argument necessary to meet the objection of extra-territoriality highlighted the remoteness of the claimants' complaints from the true purview of article 2. In short the case which the House was considering, which was essentially about the legality of the war, was wholly outside the purview of article 2.

54. In these circumstances we do not think that Lord Bingham intended to decide the issue which arises in this appeal as part of the *ratio* of his decision. Moreover, we are of the opinion that a consideration of the other speeches leads to the same conclusion. Lord Hoffmann set out his own reasoning which did not refer to the jurisdiction question. He then said at [16] that for those reasons he would dismiss the appeal and added that he also agreed with the reasons given by Lord Bingham. Lord Hope said at [19] that *Soering* did not apply for the same reasons as given by Lord Bingham.

Apart from a passing reference to *Bankovic* in [25] Lord Hope did not otherwise express a view on the instant question, although at [28] he said that he agreed with the reasons for dismissing the appeal given by Lord Bingham, Lord Hoffmann and Lord Rodger, with whose speeches he agreed. Lord Scott said that he agreed with the reasons given by Lord Bingham and Lord Hoffmann for dismissing the appeals.

55. Lord Rodger did not refer to *Al-Skeini* or the jurisdiction point but, having set out his own reasons at some length, said at [46] that "for these reasons, which are essentially the same as those of … Lord Bingham and Lord Hoffmann, [he] would dismiss the appeal". He would surely not have put his conclusion in that way if he had thought that the jurisdiction point was part of the reasoning which led to Lord Bingham dismissing the appeal because his reasons without the jurisdiction point would not then be essentially the same as those of Lord Bingham and Lord Hoffmann.

56. We have already referred to Baroness Hale's conclusion that the article 2 duty to investigate did not arise and that it followed that the appeal failed. She added that had it been otherwise she would have been inclined to accept the other planks in the appellants' argument. In the present context she said this:

> "Nor have I much difficulty with the proposition that these soldiers were within the jurisdiction of the United Kingdom when they met their deaths. If Mr Baha Mousa, detained in a military detention facility in Basra, was within the jurisdiction, then a soldier serving under the command and control of his superiors must also be within the jurisdiction: see *R (Al-Skeini)* … The United Kingdom is in a better position to secure to him all his Convention rights, modified as their content is by the exigencies of military service, than it is to secure those rights to its detainees."

She then said at [61] that, agreeing with everyone in the result and in substantial agreement with the reasoning of Lord Bingham, Lord Hoffmann and Lord Hope, she would dismiss the appeal.

57. At [63] Lord Carswell identified the issues which had been argued in the appeal as the justiciability issue, the engagement issue and the relevance issue. As indicated above, he dismissed the appeal on the engagement issue and the relevance issue. As to the justiciability issue, he said that he would prefer to reserve his opinion for another occasion. At [66] he made some observations which are relevant for present purposes as follows:

> "[66] Having reached these conclusions, I do not need to discuss the question whether the occurrence of the fatal incidents took place within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention, although on the authority of the views expressed in *R (Al-Skeini)* … that appears questionable. Nor will the appellants get any further by seeking to bring the matter within the jurisdiction by claiming that the decision to go to war was made in the United Kingdom. For the reasons set out in

> paragraph 8 of Lord Bingham's opinion, I consider that the Strasbourg authorities do not support such an argument and that the presentation of such an argument highlights the remoteness of their complaints from the true purview of article 2."

58. The only explanation that we can see for Lord Carswell saying that the issues that were argued were those which he identified, which did not include the question considered at [66], is that he did not regard the jurisdiction question as a free-standing question. Otherwise he would surely have described it as one of the "issues which have been argued". So too in the case of Lord Brown. As referred to above, he expressed his opinion on the critical issue at [70] and added at [71]:

> "So many of your Lordships' speeches have so amply demonstrated all of this that I propose to content myself merely with a general concurrence in everything already said. I too would dismiss the appeal."

Lord Brown cannot have considered the jurisdiction issue to be of any real significance because, if he had, he would surely not have expressed himself in that way, given that there was some difference of view between other members of the appellate committee.

59. Lord Mance identified two strands in the claimants' case, namely whether article 2 contains a substantive duty, owed by the government, to soldiers whose lives would be put at risk in a war, to exercise due diligence before going to war that it would be lawful to do so under international law and, if so, whether it owed a procedural duty to set up an inquiry if it was arguably in breach of the substantive duty. He said that the reasoning of Lord Bingham and Lord Hoffmann led to the conclusion that both those questions must be answered in the negative. There is no indication that his conclusion was based on any view of the issue of jurisdiction which arises in the instant appeal.

60. We have reached the conclusion that, in all these circumstances, it cannot fairly be held that the House of Lords intended to express a view as part of the *ratio* of any of the opinions of the appellate committee that a soldier in the position in which Private Smith is to be assumed for the purposes of this appeal was not "within the jurisdiction" or "relevant de leur jurisdiction" within the meaning of article 1 of the Convention. In any event we are not persuaded that a majority of the appellate committee so held. Whatever view one takes of sub-paragraph 3 of [8] in Lord Bingham's speech and the general agreement expressed with the speech of Lord Bingham by Lord Hoffmann, Lord Hope and Lord Scott, for the reasons we have given we do not think that any such agreement can be spelled out of the speeches of Lord Rodger, Baroness Hale, Lord Carswell, Lord Brown or Lord Mance. It follows that we are not bound by the decision in *Gentle* to hold that he would be outside the jurisdiction.

61. It will be recalled that the jurisdiction question identified at [8] above is whether a British soldier in the TA who, like Private Smith, is on military service in Iraq, is subject to the jurisdiction of the UK within the meaning of article 1 of the Convention, so as to benefit from the rights guaranteed by the HRA while operating in Iraq or whether he is only subject to the jurisdiction for those purposes when he is

on a British military base or in a British hospital. It follows from the conclusions we expressed earlier that we answer that question in the affirmative, as the judge did. We accordingly dismiss the appeal on this ground.

The article 2 question

62. This question is entirely independent of the first and is also academic because it is agreed that the inquest to be held should proceed as if it were an inquest which conforms to the UK's procedural obligation under article 2 of the Convention. The Secretary of State put his concession in this way:

> "The Secretary of State agrees that he will not submit to the new coroner in the fresh inquest that the scope of that inquest is restricted in any way by any decision by him on the applicability (or not) of the enhanced art 2 investigation obligation".

We understand that to mean that the Secretary of State will not contend that either the scope of the investigation or the nature of the verdict should be less broad than is appropriate if the inquest itself must satisfy the UK's obligation to investigate Private Smith's death under article 2 of the Convention.

63. Notwithstanding that concession the article 2 question was argued both before the judge and before us. The question is whether the inquest into Private Smith's death must conform with article 2 of the Convention in a particular way. The Secretary of State submits that this too is an important question of principle upon which the judge reached the wrong conclusion and that we should rule upon it. The claimant did not submit that we should not and, since we agree that it raises a question of some general importance, we agreed to do so.

64. There are now two types of inquest. They are the traditional inquest and what we will call an article 2 inquest. The essential difference between them is that the permissible verdict or verdicts in a traditional inquest is significantly narrower than in an article 2 inquest. In addition, it is said that the scope of the investigation is or is likely to be narrower at a traditional inquest. We will now consider in a little more detail first the relative differences between them and then the circumstances in which an article 2 inquest must be held. We are bound to say that, given the long history of the traditional inquest and the jurisprudence which discusses the article 2 inquest, it is in our view surprising that the differences are not absolutely clear. We regret to say that this may in part be because of the difficulty in reconciling the differing views expressed in this regard by the House of Lords in *R (Hurst) v London District Coroner* [2007] UKHL 13, [2007] 2 AC 189.

65. We note in passing that the differences between the two types of inquest are likely to continue to be important because clause 5 of the Coroners Bill in its present form retains the same distinction without defining the difference. We think that this is a great pity and that it would be desirable for the new statute to set out clearly the differences between an article 2 inquest and any other type of inquest. It is surely desirable that parties and practitioners should simply be able to refer to the statute to appreciate the differences (if they are to persist) without the necessity to delve into the jurisprudence. We do, however, appreciate that that is not a matter for us and, in any

event, that the terms of the draft Bill are not relevant to the resolution of the issues in this appeal.

66. The provenance of the article 2 inquest is *R (Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 AC 182, in which Lord Bingham delivered the speech of the appellate committee. As Lord Bingham said at [4] and [5] of *Gentle*, the House of Lords summarised the effect of the European jurisprudence with regard to article 2 at [2] and [3] of *Middleton*. He summarised the substantive obligation under article 2 at [2] as follows, omitting the case references:

> "The [ECtHR] has repeatedly interpreted article 2 … as imposing on member states substantive obligations not to take life without justification and also to establish a framework of law, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life."

Lord Bingham added at [4] of *Gentle* that it was not suggested that later cases made that statement in any way inaccurate. The House summarised the procedural obligation at [3] of *Middleton* as follows, again omitting the references:

> "The European court has also interpreted article 2 as imposing on member states a procedural obligation to initiate an effective investigation by an independent official body into any death occurring in circumstances in which it appears that one of the foregoing substantive obligations has or may have been, violated, and it appears that agents of the state are, or may be, in some way implicated."

67. *Middleton* was a case of suicide in prison. The House was concerned with the verdict at a second inquest. The crux of the argument at the inquest was whether the deceased should have been recognised as a suicide risk and whether appropriate precautions should have been taken to prevent him taking his own life: see [45]. It was accepted by the claimant, who was the deceased's mother, that the issues surrounding the death were "thoroughly, effectively and sensitively explored": see [41]. The jury found the cause of death to be hanging and returned a verdict that the deceased had taken his own life when the balance of his mind was disturbed. The House held that that verdict was strictly in accordance with the guidance in *R v Coroner for North Humberside ex p Jamieson* [1995] QB 1, which was of course a case decided before the Convention became part of our law, but that the verdict was not adequate to meet the United Kingdom's obligations under article 2.

68. In *Middleton* the House considered three questions. They are set out at [4] and are these. First, what, if anything, does the Convention require (by way of verdict, judgment, findings or recommendations) of a properly conducted official investigation into a death involving, or possibly involving, a breach of article 2? Second, does the traditional regime for holding inquests meet those requirements? And third, if not can the regime be revised so as to do so, and if so how?

69. The House considered the first question at [6] to [20]. It did so by reference to a number of decisions of the ECtHR, including in particular *McCann v United Kingdom* (1995) EHRR 97 (a case of shooting by soldiers of three people believed to be

terrorists), *Keenan v United Kingdom* (2001) EHRR 913 (a case of suicide in prison), *Jordan v United Kingdom* (2001) 37 EHRR 52 (a case where the deceased was shot and killed by a police officer) and *Edwards v United Kingdom* (2002) 35 EHRR 487 (a case the killing of a prisoner by his cell-mate). At [16] the House noted that in a case where the death has been caused by the agents of the state and the inquest is the instrument which the state has chosen to discharge its investigative obligation under article 2, an explicit statement, however brief, of the jury's conclusion on the central issue is required. At [17] the House made it clear, based on *Keenan*, that the same requirement existed where the inquest did not permit any determination of liability, did not furnish the applicant with the possibility of establishing the responsibility of the prison authorities and did not constitute an investigation capable of leading to the identification and punishment of those responsible for deprivation of life. The House added that a statement of the main facts leading to the suicide of Mark Keenan would have precluded that comment.

70. There followed two important paragraphs:

> [18] Two considerations fortify confidence in the correctness of this conclusion. First, a verdict of an inquest jury (other than an open verdict, sometimes unavoidable) which does not express the jury's conclusion on a major issue canvassed in the evidence at the inquest cannot satisfy or meet the expectations of the deceased's family or next-of-kin. Yet they, like the deceased, may be victims. They have been held to have legitimate interests in the conduct of the investigation (*Jordan*, paragraph 109), which is why they must be accorded an appropriate level of participation (see also *R (Amin) v Secretary of State for the Home Department, supra*). An uninformative jury verdict will be unlikely to meet what the House in *Amin*, paragraph 31, held to be one of the purposes of an article 2 investigation:
>
> > "… that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."
>
> [19] The second consideration is that while the use of lethal force by agents of the state must always be a matter of the greatest seriousness, a systemic failure to protect human life may call for an investigation which may be no less important and perhaps even more complex: see *Amin*, paragraphs 21, 41, 50 and 62. It would not promote the objects of the Convention if domestic law were to distinguish between cases where an agent of the state may have used lethal force without justification and cases in which a defective system operated by the state may have failed to afford adequate protection to human life."

Paragraph 19 is important in a case of this kind, where, as we understand it (and as indicated above), one of the questions is whether Private Smith's death was caused by a defective system operated by the state to afford adequate protection to human life by ensuring, so far as reasonably practicable, that he was an appropriate person, with proper training and equipment, to expose to the extreme heat of Iraq.

71. These considerations led to this conclusion:

> "[20] The European Court has repeatedly recognised that there are many different ways in which a state may discharge its procedural obligation to investigate under article 2. In England and Wales an inquest is the means by which the state ordinarily discharges that obligation, save where a criminal prosecution intervenes or a public enquiry is ordered into a major accident, usually involving multiple fatalities. To meet the procedural requirement of article 2 an inquest ought ordinarily to culminate in an expression, however brief, of the jury's conclusion on the disputed factual issues at the heart of the case."

We return below to the relevance, in a case of this kind, of the fact that the claimant is able to (and is in fact) pursuing civil proceedings against the army.

72. The House considered the second question, namely whether the traditional regime for holding inquests meets those requirements at [21] to [32]. It did so largely by reference to the decision of this court in *Jamieson*. At [22] to [27] it set out the relevant statutory provisions, including the Coroners Act 1988 and the Coroners Rules 1984 which it is not necessary to repeat here. At [28] the House summarised the decision in *Jamieson*. It stated that the decision set out an orthodox analysis of the Act and Rules and an accurate, if uncritical, compilation of judicial authority as it then stood. It added:

> "Thus emphasis was laid on the function of an inquest as a fact-finding inquiry (page 23, conclusion (1)). Following *R v Walthamstow Coroner, Ex p Rubenstein* (19 February 1982, unreported), *R v HM Coroner for Birmingham, Ex p Secretary of State for the Home Department* (1990) 155 JP 107 and *R v HM Coroner for Western District of East Sussex, Ex p Homberg* (1994) 158 JP 357, the Court of Appeal interpreted "how" in section 11(5)(b)(ii) of the Act and rule 36(1)(b) of the Rules narrowly as meaning "by what means" and not "in what broad circumstances" (page 24, conclusion (2)). It was not the function of a coroner or an inquest jury to determine, or appear to determine, any question of criminal or civil liability, to apportion guilt or attribute blame (page 24, conclusion (3)). Attention was drawn to the potential unfairness if questions of criminal or civil liability were to be determined in proceedings lacking important procedural protections (page 24, conclusion (4)). A verdict could properly incorporate a brief, neutral, factual statement, but should express no judgment or opinion, and it was not for the jury to prepare detailed factual statements (page 24, conclusion (6)). It was acceptable for a jury to find, on appropriate facts, that self-neglect aggravated or contributed to the primary cause of death, but use of the expression "lack of care" was discouraged and a traditional definition of "neglect" was adopted (pages 24-25, conclusions (7), (8) and (9)). Where

> it was found that the deceased had taken his own life, that was the appropriate verdict, and only in the most extreme circumstances (going well beyond ordinary negligence) could neglect be properly found to have contributed to that cause of death (pages 25-26, conclusion (11)). Reference to neglect or self-neglect should not be made in a verdict unless there was a clear and direct causal connection between the conduct so described and the cause of death (page 26, conclusion (12)). It was for the coroner alone to make reports with a view to preventing the recurrence of a fatality (page 26, conclusion (13)). Emphasis was laid on the duty of the coroner to conduct a full, fair and fearless investigation, and on his authority as a judicial officer (page 26, conclusion (14)).”

73. At [30] the House noted that in some cases the article 2 obligation may be discharged by criminal proceedings, but not where the wider issues will not be explored, as in the case of a plea of guilty or where the only issue is the mental state of the defendant. At [31] it indicated that there may be some cases in which the obligation will be discharged by the nature of the jury’s verdict at an inquest but it also stressed that there were examples of cases where that would not be so, as in K*eenan*, where the inquest verdict of death by misadventure and the certification of asphyxiation by hanging as the cause of death did not express the jury's conclusion on the events leading up to the death. It added, more pertinently in the present context:

> “Similarly, verdicts of unlawful killing in *Edwards* and *Amin*, although plainly justified, would not have enabled the jury to express any conclusion on what would undoubtedly have been the major issue at any inquest, the procedures which led in each case to the deceased and his killer sharing a cell.”

The House concluded at [32] that it is inescapable that there are some cases in which the current regime for conducting inquests in England and Wales, as hitherto understood and followed, does not meet the requirements of the Convention.

74. The House considered the third question, namely whether the system could be revised to meet the article 2 obligations, at [35] to [38]. It held at [35] that only one change was needed. It was to interpret “how” in section 11(5)(b)(ii) of the Act in the broad sense previously rejected in cases such as *Jamieson*, namely as meaning not simply by what broad means but “by what means and in what circumstances”. The House then considered how that might be done, said that it was a matter for the coroner, in the exercise of his discretion, how best to do so in the particular case in order to elicit the jury’s conclusion on the central issue or issues and made some suggestions as follows:

> “ … This may be done by inviting a form of verdict expanded beyond those suggested in form 22 of Schedule 4 to the Rules. It may be done, and has (even if very rarely) been done, by inviting a narrative form of verdict in which the jury's factual conclusions are briefly summarised. It may be done by inviting the jury's answer to factual questions put by the coroner. If the coroner invites either a narrative verdict or answers to questions, he may find it helpful to direct the jury with

> reference to some of the matters to which a sheriff will have regard in making his determination under section 6 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976: where and when the death took place; the cause or causes of such death; the defects in the system which contributed to the death; and any other factors which are relevant to the circumstances of the death. It would be open to parties appearing or represented at the inquest to make submissions to the coroner on the means of eliciting the jury's factual conclusions and on any questions to be put, but the choice must be that of the coroner and his decision should not be disturbed by the courts unless strong grounds are shown.
>
> [37] The prohibition in rule 36(2) of the expression of opinion on matters not comprised within sub-rule (1) must continue to be respected. But it must be read with reference to the broader interpretation of "how" in section 11(5)(b)(ii) and rule 36(1) and does not preclude conclusions of fact as opposed to expressions of opinion. However the jury's factual conclusion is conveyed, rule 42 should not be infringed. Thus there must be no finding of criminal liability on the part of a named person. Nor must the verdict appear to determine any question of civil liability. Acts or omissions may be recorded, but expressions suggestive of civil liability, in particular "neglect" or "carelessness" and related expressions, should be avoided. Self-neglect and neglect should continue to be treated as terms of art. A verdict such as that suggested in paragraph 45 below ("The deceased took his own life, in part because the risk of his doing so was not recognised and appropriate precautions were not taken to prevent him doing so") embodies a judgmental conclusion of a factual nature, directly relating to the circumstances of the death. It does not identify any individual nor does it address any issue of criminal or civil liability. It does not therefore infringe either rule 36(2) or rule 42."

75. Finally the House noted at [38] that the jury's power to add a rider had been abolished but that under the 1984 Rules, the power is reserved to the coroner to make an appropriate report where he believes that action should be taken to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held. Although compliance with the Convention did not require that that power be exercisable by the jury, a coroner's exercise of it might well be influenced by the factual conclusions of the jury. The House then said that in the ordinary way the procedural obligation under article 2 will be most effectively discharged if the coroner announces publicly not only his intention to report any matter but also the substance of the report, neutrally expressed, which he intends to make.

76. That approach must be contrasted with the approach at a traditional inquest. As stated above, the restricted approach to the nature of the verdict remains as before. However, there has recently been some debate in *Hurst* as to whether, although the verdicts in the two classes of inquest must be approached differently, the investigation

carried out should be the same. The view that they should be the same was expressed by Baroness Hale and Lord Mance. Thus Baroness Hale expressed her opinion at [21], based upon statements by Croom-Johnson LJ in *R v Southwark Coroner, ex p Hicks* [1987] 1 WLR 1624 at 1634, by Lord Lane CJ in *R v South London Coroner, ex p Thompson* (1982) 126 SJ 625 and by the Brodrick Committee (Cmnd 1480) at paragraph 16.40. She also noted the final conclusion in paragraph 14 on page 26 of *Jamieson* alluded to above:

> "It is the duty of the coroner … to ensure that the relevant facts are fully, fairly and fearlessly investigated. … He must ensure that the relevant facts are exposed to public scrutiny … He fails in his duty if his investigation is superficial, slipshod or perfunctory. But the responsibility is his. He must set the bounds of the inquiry."

At [22] Baroness Hale stressed the width of the inquiry in such an inquest, although she did add that the Convention values are also some guide to what facts are in the public interest to investigate. Lord Mance essentially agreed with Baroness Hale: see eg [74] to [76]. Although Lord Mance suggested that at [8] Lord Rodger took the same view, we are not sure that that is quite right. Lord Rodger did however say at [7] that the scope of the inquiry, as opposed to the verdict, is a matter for the coroner.

77. Lord Brown, with whom Lord Bingham agreed, said this on the subject of a *Jamieson* inquest at [34]:

> "My noble and learned friends, Baroness Hale of Richmond and Lord Mance, whilst accepting all this, would nevertheless dismiss the Commissioner's appeal and so leave in force the Divisional Court's order that the inquest into Troy Hurst's death be re-opened (or require at least that the Coroner re-take the decision whether or not to re-open it), on the basis that even a *Jamieson* inquest would be likely, although of course at the Coroner's discretion, to "examine the conduct of the police and the housing authority that fateful day if not before" (para 22 of Lady Hale's opinion). Given, however, as both Lady Hale and Lord Mance in terms accept, that, upon the conclusion of such an inquest, the jury would be debarred from expressing any views whatever upon the conduct which they had been examining (the whole point of a *Middleton* inquest being, as I have explained above, to enable the jury to state their conclusions on the important underlying issues such as what risks should have been recognised and what precautions taken) the value of such an inquest may be doubted. It might, indeed, be thought the worst of all worlds. Lady Hale and Lord Mance expressly acknowledge that it would not satisfy the UK's international obligations under article 2 of the Convention. Nor would it satisfy the respondent's understandable desire for detailed findings to be made upon the circumstances leading to her son's death. At best it could occasion a report from the Coroner to a responsible authority under Rule 43 (see para 74

> of Lord Mance's opinion). Small wonder that such an inquest was not one for which Mr Starmer has ever contended."

78. In our view, that paragraph does not, as we read it, express disagreement with the views of Baroness Hale and Lord Mance as to the scope of the investigation at a *Jamieson* inquest but rather doubts the value of such an inquest if, as is the case, the findings must be limited because of the decision in *Jamieson.* There is much to be said for this view and some may regret the narrow approach to such findings in *Jamieson*. However that may be, whatever the difference of view as to the scope of a *Jamieson* investigation, that difference was not in our opinion part of the *ratio decidendi* of *Hurst* because, although Baroness Hale and Lord Mance dissented, the scope of the investigation as opposed to the findings of the inquest was not part of the reasoning which led to the decision of the majority to allow the appeal. That was in part because of the way, on the majority view, the case was argued. Thus Lord Brown said at [26] that it was not contended that the coroner's decision could be impugned except by reference to the article 2 duty, which all members of the House held did not arise. See also per Lord Rodger at [9] and [15].

79. In this court some consideration had earlier been given to the scope of a *Jamieson* inquest in *R (Takoushis) v Inner North London Coroner* [2005] EWCA Civ 1440, [2006] 1 WLR 461, which was in part concerned with the nature of a *Jamieson* inquest. It was a case in which the deceased committed suicide after he had left an NHS hospital. The central questions for investigation were why and how he had come to leave the hospital and, in particular whether he left as a result of a defect in the system or a breakdown of the system at the hospital. The judgment of the court, which comprised Sir Anthony Clarke MR and Chadwick and Moore-Bick LJJ, considered the scope of a *Jamieson* inquest. It stated at [41] that, although the possible verdicts are circumscribed, that did not mean that the facts should not be fully investigated and set out the quotation from [28] of *Middleton* which we have set out above and which of course includes the reference in paragraph (14) on page 26 of *Jamieson* to the duty of the coroner to conduct a full, fair and fearless investigation.

80. In *Takoushis* at [43] the court further noted the decision of this court in *R v Inner West London Coroner ex p Dallaglio* [1994] 4 All ER 139, to which both Sir Thomas Bingham MR and Simon Brown LJ were parties and which arose out of the many deaths consequent upon the collision of the *Marchioness* and the *Bowbelle* in the River Thames. In that case Simon Brown LJ drew attention to the tension between the apparently narrow definition of "how" in section 11(5)(b)(ii) of the Coroners Act and the wider provisions of section 8(3)(d) and of rule 43 of the Coroners Rules, which look to the future. As *Takoushis* noted at [45], Simon Brown LJ also approved the statement of Morland J in *R v HM Coroner for Western District of East Sussex* (1994) 158 JP 357 at 381, that rule 36 of the Coroners Rules should not be so interpreted as to defeat the purpose of section 8(3)(d) and that, if "proceedings and evidence" were narrowly confined, the answer to the "how" question would not serve the purposes of the section, namely the prevention or reduction of the risk of future injuries in similar circumstances.

81. At [46] in *Takoushis*, this court quoted paragraph (14) on page 26 of *Jamieson* and its [47] included the following:

> "[Simon Brown LJ] said that it was for the individual coroner to recognise and resolve the tension existing between section 11(5)(b) of the 1998 Act (and rule 36) on the one hand and section 8(3) on the other. The inquiry, he said, was almost bound to stretch more widely than strictly required for the purposes of a verdict, although how much more widely was a matter for the coroner. In *Dallaglio* Sir Thomas Bingham agreed with Simon Brown LJ's reasoning and at page 164 emphasised again the need for a full, fair and fearless investigation but observed that it was for the coroner to decide, on the facts of a given case, at what point the chain of causation becomes too remote to form a proper part of the investigation."

In *Takoushis* this court concluded that the coroner had not carried out a sufficiently full inquiry of the kind contemplated in *Jamieson* and *Dallaglio* because he had not sufficiently enquired into the system at the hospital: see [49] to [60]. It was for that reason that the verdict was quashed.

82. The approach to a *Jamieson* inquest in *Takoushis* seems to us to be essentially the same as that of Baroness Hale and Lord Mance in *Hurst*. We do not think that Lord Bingham or Lord Brown can have intended any different view because they were of course parties to both *Jamieson* and *Dallaglio* and there is no suggestion in either of their judgments in *Hurst* that they thought the approach in *Takoushis* was wrong. As we see it, the only difference between the approach of Baroness Hale and Lord Mance on the one hand and Lord Brown and Lord Bingham on the other may be that, in the case of a *Jamieson* inquest, the coroner has more latitude to decide whether, as Sir Thomas Bingham MR put it in *Dallaglio* at page 164, any particular line of inquiry involves a chain of causation which is too remote to form a proper part of the investigation: see *Takoushis* at [47] and [48]. In this regard we accept the submission made on behalf of the claimant that the coroner's decision whether it is or not too remote in a particular case depends, not upon the exercise of a discretion, but upon the exercise of judgment.

83. In *Takoushis* this court held that the coroner should have investigated the system at the hospital and that, treating the inquest as a *Jamieson* inquest, he erred in principle in that regard. The court also considered whether the inquest must satisfy article 2 and, if so, whether it did. This involved considering, at [70] to [108], the Strasbourg jurisprudence which discussed the different types of case which may engage article 2. We do not repeat that analysis here. So far as we are aware, the House of Lords has not suggested that it is wrong. It involves a distinction between two types of case. The first is where the ECtHR has held that it is the duty of the state to conduct its own investigation into a death. The paradigm example of this type of case is where a death has or may have been caused by an agent of the state or where the death has occurred when the deceased is in prison or otherwise in the custody of the state. The second type of case is where, in order to satisfy article 2, the state must facilitate an investigation but it is not necessary for the state to conduct its own investigation. The obligation may be satisfied by the provision of a combination of processes including the ability to bring a civil action before the courts.

84. Examples of the first type of case include *Middleton*, which we have discussed above, and *Amin*, where the deceased was murdered by his cellmate. *Amin* is discussed in

detail at [74] to [79] of *Takoushis*. The key points which may be derived from *Amin*, which are taken from the Strasbourg authorities, are these.

i) Where a person is in good health when detained and is killed (or found to be injured on release) it is incumbent on the state to provide a plausible explanation of what occurred.

ii) There must be an effective official investigation, which must ensure the accountability of state agents or bodies, and, although the form of the investigation may depend upon the circumstances, whatever mode is chosen, the state must act of its own motion and the investigation must be effective in the sense that it is capable of leading to a determination of whether any force used was or was not justified in the circumstances and to the identification and punishment of those responsible.

iii) There must be an appropriate element of public scrutiny and the next of kin must be involved in the process.

iv) In short, the investigation must be independent, effective and reasonably prompt.

85. See also to much the same effect per Lord Phillips in *R (L) v Secretary of State for Justice* [2008] UKHL 68, [2008] 3 WLR 1325 at [26] to [28]. Moreover, in *Amin* Lord Steyn stressed the importance of such an investigation, not only in the case where the death is caused by agents of the state, but also in cases of negligence. He said at [50] that the investigation of cases resulting in negligence resulting in the death of prisoners may often be more complex and may require more elaborate investigation than cases in which the death is caused by agents of the state. He added that systemic failures may also affect more prisoners: see the quote and references to the Strasbourg jurisprudence at [79] of *Takoushis*.

86. In *Takoushis* it was argued that the same should apply to cases of death which may have been caused by systemic failure in an NHS hospital, where the deceased had been a voluntary patient. This court discussed that question at [82] to [107] and concluded, by reference to the decision of Richards J in *R (Goodson) v Bedforshire and Luton Coroner* [2004] EWHC 2931 (Admin), [2006] 1 WLR 432, and a series of Strasbourg authorities, that it should not. We do not repeat that analysis here, save to note that at [98] the court said, in the context of alleged medical negligence in a hospital where the patient is not detained, that central to the court's approach throughout is that the relevant events should be subject to an effective investigation. In order to comply with article 2, the state must set up a system which involves a practical and effective investigation of the facts. While the cases do not support the conclusion that there is an independent obligation on the state to investigate every case in which it is arguable that there was, for example, medical negligence, the system must provide for a practical and effective investigation. That investigation may include the availability of civil process, although all will as ever depend on the circumstances: see eg [99] and [100].

87. So, for example, in *Vo v France* (2005) 40 EHRR 259, which is quoted at [102] of *Takoushis*, the ECtHR said at [89], by reference to article 2:

> "Those principles apply in the public-health sphere too. The positive obligations require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see *Powell v. the United Kingdom … Calvelli and Ciglio*, cited above, § 49)."

Powell is reported at (2000) 30 EHRR CD 362 and *Calvelli and Ciglio v Italy* is reported in Reports of Judgments and Decisions 2002-I, page 1.

88. In the result the conclusions reached in this respect in *Takoushis* were summarised at [105] to [107] as follows:

> "[105] It seems to us that, however it is analysed, the position is that, where a person dies as a result of what is arguably medical negligence in an NHS hospital, the state must have a system which provides for the practical and effective investigation of the facts and for the determination of civil liability. Unlike in the cases of death in custody, the system does not have to provide for an investigation initiated by the state but may include such an investigation. Thus the question in each case is whether the system as a whole, including both any investigation initiated by the state and the possibility of civil and criminal proceedings and of a disciplinary process, satisfies the requirements of article 2 as identified by the European Court in the cases to which we have referred, namely (as just stated) the practical and effective investigation of the facts and the determination of civil liability.
>
> [106] The question is whether the system in operation in England in this case meets those requirements. In our opinion it does. The system includes both the possibility of civil process and, importantly, the inquest. We can understand the point that the possibility of civil proceedings alone might not be sufficient because they do not make financial sense and may not end in a trial at which the issues are investigated. However, in the context of the other procedures available, an inquest of the traditional kind, without any reading down of the 1988 Act by giving a wider meaning to "how" as envisaged in *Middleton*, and provided that it carries out the kind of full and fair investigation which is discussed earlier in this judgment and which (we hope) will now take place, in our opinion satisfies the requirement that there will be a public investigation of the facts which will be both practical and effective. Moreover, the family will be able to take a full part.

> [107] In these circumstances, while article 2 is engaged in the sense described above, the present system including the inquest does not fall short of its requirements in any way. On the contrary it complies with it."

We see no reason to depart from those principles.

89. It is important to note in the present context that at [108] in *Takoushis* the court expressly rejected a submission that the principles in the custody cases applied on the ground that Mr Takoushis would have been detained under section 3 of the Mental Health Act 1983 if the hospital had been aware that he was about to leave. The court expressed the opinion that there is an important difference between those who are detained and those who, like Mr Takoushis, are not. Both the English courts and the ECtHR have stressed the difference, at any rate for the purposes of identifying the correct approach to an investigation under article 2, between a case where the deceased is the particular responsibility of the state and those in which he is not. Cases like *Powell* and *Takoushis* are in the latter category, whereas cases where the deceased (or in some cases near-deceased) are in custody, are in the former category.

90. The question in the instant appeal is whether what may be called the custody principles apply to a case like this where the deceased lost his life while serving as a soldier in the TA, or whether this is a case like *Powell* or *Takoushis*, where a *Jamieson* inquest, together with a civil process, suffices. The Secretary of State argues for the latter, whereas the claimant argues for the former. Thus the claimant submits that, if the state is to discharge its obligations under article 2 through the medium of an inquest, it must hold an article 2 inquest.

91. The distinction is clearly stated by Lord Rodger in the case of *L*, which was in fact a near-suicide case of a person in custody. He noted at [54] that, like the common law, Convention law draws a distinction between prisoners and individuals who are at liberty. The essential reason, as it was put in *Edwards* at [56], is that "persons in custody are in a vulnerable position" and the authorities are under a duty to protect them. Lord Rodger added at [55] that article 2 goes further than requiring the prison authorities not to harm those in their custody. In particular, although it has not gone as far as to hold that they must proceed on the footing that all prisoners are suicide risks, they do have to proceed on the footing that prisoners as a class present a particular risk of suicide. For this reason the prison authorities must take systemic measures and precautions to diminish the opportunities for prisoners to harm themselves, without infringing their personal autonomy. Lord Rodger noted at [57] that the authorities are also under an 'operational' obligation in well defined circumstances, namely where there is a real and immediate risk that the prisoner will commit suicide, to take reasonable steps to prevent it. That is of course the principle identified in *Osman v United Kingdom* (1998) 29 EHRR 245 and recently discussed by the House of Lords in *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50, [2008] 3 WLR 593.

92. It is important to note that at [59] Lord Rodger rejected a submission made on behalf of the Secretary of State that article 2 did not require an independent investigation to be held unless there was some positive reason to believe that the authorities had been in breach of their obligation to protect the prisoner. Lord Rodger said this:

> "[59] That argument is mistaken. Whenever a prisoner kills himself, it is at least *possible* that the prison authorities, who are responsible for the prisoner, have failed, either in their obligation to take general measures to diminish the opportunities for prisoners to harm themselves, or in their operational obligation to try to prevent the particular prisoner from committing suicide. Given the closed nature of the prison world, without an independent investigation you might never know. So there must be an investigation of that kind to find out whether something did indeed go wrong. In this respect a suicide is like any other violent death in custody. In affirming the need for an effective form of investigation in a case involving the suicide of a man in police custody, the European Court held that such an investigation should be held "when a resort to force has resulted in a person's death": *Akdogdu v Turkey*, para 52."

93. Lord Rodger then referred to [3] of Lord Bingham's speech in *Middleton*, to which we have referred above, and rejected the submission that Lord Bingham's formulation was inconsistent with the requirement for an independent investigation in all cases of suicide in custody. He said that, in summarising the case law, Lord Bingham was recognising that, where the circumstances of the death may indicate that the substantive obligations of the state have been violated, any violation, whether due to a systemic or operational failure, will necessarily have involved members of the prison service in one capacity or another. An independent investigation is therefore required to see whether there was, in fact, a violation.

94. To much the same effect Lord Mance said this at [113]:

> "In common, I understand, with all of your Lordships, I would reject the Secretary of State's submission that an article 2 investigation is only required where the State is in arguable breach of its substantive article 2 duty to protect life, in the sense that it ought arguably to have known of a real and immediate risk of a prisoner committing suicide and failed to take out reasonable preventive measures. While it is dangerous to generalise and I confine myself for the present to circumstances such as those of the present case, I agree that the relationship between the State and prisoners is such that the State is bound to conduct an article 2 compliant inquiry whenever its system for preventing suicide fails and as a result the prisoner suffers injuries in circumstances of near-suicide significantly affecting his or her ability to know, investigate, assess and/or take action by him or herself in relation to what has happened."

95. It is submitted on behalf of the Secretary of State that a person in the position of Private Smith was not in custody and that none of the principles to which we have referred apply to someone in his position. However, it is submitted on behalf of the claimant and of the Commission that the principle has been extended by the ECtHR to those detained under section 3 of the Mental Health Act 1983 and to conscripts and

that no distinction should be made between conscripts and either regular soldiers of members of the TA.

96. In *Savage v South Essex NHS Trust* [2008] UKHL 74, [2009] 2 WLR 115 the House of Lords was concerned with a case in which the allegation was that the death of a mental patient who was detained under the Mental Health Act 1983 was caused by a breach of the operational obligation of the UK under article 2 of the Convention described above. The House of Lords held that the questions for decision at a trial were whether there was a real and immediate risk that Mrs Savage would commit suicide and, if so, whether all reasonable steps were taken to prevent it. It further held that the action should be permitted to go to trial.

97. As Lord Rodger stressed at [17], the case was not concerned with the nature of the procedural obligation under article 2. The decision is not therefore directly in point but in the course of his speech Lord Rodger focused on various different aspects of the obligation to protect life under article 2. He discussed what may be called the *Osman* duty at [18] to [24]. He then discussed the duty to protect prisoners from suicide at [25] to [32]. He did so by reference to the now familiar cases of *Keenan* and *Edwards*, which, as Lord Rodger observed at [32], also demonstrated the influence of *Osman*. At [33] he described the position of other detainees and noted, by reference to *Slimani v France* (2004) 43 EHRR 1068, that the ECtHR has applied the same general approach to other detainees. This was on the basis that detainees are entirely under the control of the authorities and that, in view of their vulnerability, the authorities are under a duty to protect them. See also per Baroness Hale at [85].

98. Lord Rodger considered the position of conscripts at [34] to [38]. He recognised that the ECtHR had recognised that a somewhat similar duty to take steps to prevent suicides arises where a state conscripts young people into its armed forces. He referred in particular to *Alvarez Ramón v Spain*, Application No 51192/99, unreported, 3 July 2001 and *Kilinç v Turkey*, Application No 40145/98, unreported, 7 June 2005, where the ECtHR said at [41] that it was "incontestable" (sans conteste) that the duty to prevent suicides applied in the case of conscripts. He also referred to *Ataman v Turkey*, Application No 46252/99, unreported, 27 April 2006. In *Kilinç v Turkey* the court held that the death was caused by the authorities failure to establish proper systems and in *Ataman v Turkey* by the authorities failure to discharge their operational duty. See also per Baroness Hale at [82] to [84].

99. As to hospital patients, Lord Rodger referred to cases such as *Powell* and *Calvelli and Ciglio* to which we referred earlier in the passage quoted above from *Vo v France*, by reference to the state's obligation to protect life:

> "Those principles apply in the public-health sphere too. The positive obligations require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable …"

100. Lord Rodger described the position in this regard as follows at [45]:

> "These passages show that a State is under an obligation to adopt appropriate (general) measures for protecting the lives of patients in hospitals. This will involve, for example, ensuring that competent staff are recruited, that high professional standards are maintained and that suitable systems of working are put in place. If the hospital authorities have performed these obligations, casual acts of negligence by members of staff will not give rise to a breach of article 2. The European Court put the point quite shortly in *Powell v United Kingdom* 30 EHRR CD362, 364:
>
> > "The Court accepts that it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage [the State's] responsibility under the positive limb of Article 2. However, where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life."
>
> See also *Dodov v Bulgaria*, 17 January 2008, para 82."

101. As to mental patients, to whom Lord Rodger referred at [46] to [48], he simply said that the authorities must take account of their vulnerability, including a heightened risk of suicide, and in effect applied the principle identified above. Thus, if it turned out that the hospital authorities had not had in place appropriate systems, say, for preventing patients who were known to be suffering from mental illness from committing suicide, the state would have violated one of its positive obligations under article 2 to protect patients' lives.

102. Lord Rodger considered the position of detained mental patients at [49] and [50]. For present purposes it is sufficient to refer to [49]:

> "The fact that Mrs Savage was not only a patient, but a detained patient, is also relevant to the authorities' obligations under article 2. Any auction in the comparative vulnerability of prisoners, voluntary patients, and detained patients would be as unedifying as it is unnecessary. *Plainly, patients, who have been detained because their health or safety demands that they should receive treatment in the hospital, are vulnerable. They are vulnerable not only by reason of their illness which may affect their ability to look after themselves, but also because they are under the control of the hospital authorities. Like anyone else in detention, they are vulnerable to exploitation, abuse, bullying and all the other potential dangers of a closed institution. Mutatis mutandis, the principles in the case law which the European Court has developed for prisoners and administrative*

> *detainees must apply to patients who are detained.* As explained in *Herczegfalvy v Austria* (1992) 15 EHRR 437, 484, para 82:
>
> > "The Court considers that the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with."
>
> The hospital authorities are accordingly responsible for the health and well-being of their detained patients. Their obligations under article 2 include an obligation to protect those patients from self-harm and suicide. Indeed, as explained at para 28 above, the very fact that patients are detained carries with it a risk of suicide against which the hospital authorities must take general precautions: *Tanribilir v Turkey* (application no 21422/93) 16 November 2000, para 74, and *Akdogdu v Turkey* (application no 46747/99) 18 October 2005, para 47."

103. The passage we have italicised shows that the ECtHR applies the same substantive principles to detained mental patients as it does to prisoners and others in custody. See also per Baroness Hale at [97], where she expressed the same view. In these circumstances we do not think that there can be any doubt that the ECtHR would apply the same principles to the kind of investigation that is required in order to satisfy the investigative limb of article 2. In short, depending upon the precise circumstances, it would require a *Middleton* form of inquest and would not be satisfied with a *Jamieson* inquest.

104. The question remains whether the same is true of a case in which a soldier dies of heat stroke as a member of the armed forces in Iraq. Our answer to that question is yes. On the basis of the Strasbourg jurisprudence, there is no doubt that it would apply to Private Smith if he were a conscript. We do not think that it could be right to draw a distinction between a regular soldier who is not a conscript and a member of the TA when in active service. When in active service both regular soldiers and members of the TA are subject to army orders, instructions and discipline in the same way. So there could be no principled distinction between them.

105. The question is therefore whether the principles apply to soldiers on active service in Iraq. We conclude that they do. They are under the control of and subject to army discipline. They must do what the army requires them to do. If the army sends them out into the desert they must go. In this respect they are in the same position as a conscript. Once they have signed up for a particular period they can no more disobey an order than a conscript can. The army owes them the same duty of care at common law. We recognise that they may not be quite as vulnerable as conscripts but they may well be vulnerable in much the same way, both in stressful situations caused by conflict and in stressful situations caused, as in Private Smith's case, by extreme heat. We see no reason why they should not have the same protection as is afforded by article 2 to a conscript.

106. For these reasons we conclude that the procedural question, which is whether the inquest into Private Smith's death must satisfy the requirements of article 2 of the Convention as set out in *Middleton*, should be answered in the affirmative. We are

not persuaded that so to hold does any more than apply the principles adopted by the ECtHR. It does not therefore infringe the principle in *Ullah* at [20] and *Al-Skeini* at [106] referred to above. The precise limits of the inquest will of course be a matter for the coroner but we would expect the coroner to consider the questions whether there were any systemic failures in the army which led to Private Smith's death and, indeed, whether there was a real and immediate risk of his dying from heatstroke and, if so whether all reasonable steps were taken to prevent it.

CONCLUSION

107. For the reasons we have given we answer both questions in the same way that the judge did. It follows that the appeal must be dismissed on both aspects of the case which were argued before us.