Trinity Term
[2013] UKSC 41
On appeal from: [2011] EWHC 1678 QB; [2012] EWCA Civ 1365

JUDGMENT

Smith and others (FC) (Appellants) *v* The Ministry of Defence (Respondent)

Ellis (FC) (Respondent) *v* The Ministry of Defence (Appellant)

Allbutt and others (FC) (Respondents) *v* The Ministry of Defence (Appellant)

before

Lord Hope, Deputy President
Lord Walker
Lady Hale
Lord Mance
Lord Kerr
Lord Wilson
Lord Carnwath

JUDGMENT GIVEN ON

19 June 2013

Heard on 18, 19, 20 and 21 February 2013

Appellant (Smith)
Robert Weir QC
Jessica Simor QC

(Instructed by Hodge Jones & Allen LLP)

Respondent
James Eadie QC
Sarah Moore
Karen Steyn
David Pievsky
(Instructed by Treasury Solicitors)

Intervener (JUSTICE)
Alex Bailin QC
Iain Steele
Edward Craven
(Instructed by Herbert Smith Freehills LLP)

Intervener
Helen Mountfield QC
Elizabeth Prochaska

(Instructed by The Equality and Human Rights Commission)

Appellant
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Respondent (Ellis)
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Appellant
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Respondent (Allbutt)
Richard Hermer QC
Ben Silverstone

(Instructed by Leigh Day & Co)

LORD HOPE (with whom Lord Walker, Lady Hale and Lord Kerr agree)

1. These proceedings arise out of the deaths of three young men who lost their lives while serving in the British Army in Iraq and the suffering by two other young servicemen of serious injuries. The units in which they were serving were sent to Iraq as part of Operation TELIC. This operation, which lasted from January 2003 to July 2009, had two distinct phases of military activity. The first began on 19 March 2003 when Iraq was invaded by coalition forces including those from the United Kingdom. The second phase began on 1 May 2003 when major combat operations ceased and were replaced by a period of military occupation. During much of that time there was a constant threat of enemy action by insurgents opposed to the interim Iraqi government.

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

3. Lt Pinkstone's tank fired a first round of high explosive shell at about 0120 hrs and a second round shortly afterwards. The hot spots that he had observed were in fact men on top of Cpl Albutt's Challenger II tank at the dam. The first shell landed short of the tank, but the explosion blew off the men who were on top of it including Lance Corporal Twiddy. The second shell entered the tank and killed Cpl Allbutt, injured Trooper Julien and caused further injury to Lance Corporal Twiddy. It also killed Trooper David Clarke: see *R (Gentle and another) v Prime Minister* [2008] UKHL 20, [2008] AC 1356, para 1. Lt Pinkstone did not know of the presence at the dam of the Royal Regiment of Fusiliers battle group. He did not realise that he was firing back across the canal, as he was disorientated and believed that he was firing in a different direction.

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

5. On 15 July 2005 Pte Hewett was assigned to a mobile unit which was sent that evening to patrol around Al Amarah. The unit consisted of three Snatch Land Rovers. Snatch Land Rovers are lightly armoured. Their armour is designed to provide limited protection against ballistic threats, such as those from small arms fire. It provided no protection, or no significant protection, against improvised explosive devices ("IEDs"). It was escorted into, but not around, the town by a Warrior fighting vehicle. Warriors are heavily armoured and tracked, and are capable of carrying seven or eight personnel as well as the crew. Pte Hewett was in the lead Snatch Land Rover as its driver with 2nd Lt Richard Shearer. It had no electronic counter measures ("ECMs") to protect it against the threat of IEDs.

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

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

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

The claims

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

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

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

12. The particulars of the Ellis claim under article 2 and in negligence are that the MOD failed (i) to limit his patrol to better, medium or heavily armoured vehicles, (ii) to provide any or any sufficient better or armoured vehicle for use by Pte Ellis's commander which, had they been provided, would or should have been

used for his patrol and (iii) to ensure that Element A had been fitted to the ECM on Pte Ellis's Snatch Land Rover, without which it should not have been permitted to leave the Camp.

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

14. The strike-out applications were heard by Owen J, who handed down his judgment on 30 June 2011: [2011] EWHC 1676 (QB), [2011] HRLR 795. He struck out the Snatch Land Rover claims under article 2 on the ground that Pte Hewett and Pte Ellis were not within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention when they died: para 48. He based this decision on *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2010] UKSC 29, [2011] 1 AC 1. He went on nevertheless, in a carefully reasoned judgment, to address the question whether, if the deceased were within the Convention jurisdiction, the MOD was under a substantive article 2 duty of the kind that the Snatch Land Rover claimants were contending for. He said that he would not have struck out their claims relating to the supply of equipment: para 80. But in his judgment there was no sound basis for extending the scope of the implied positive duty under article 2 to decisions made in the course of military operations by commanders: para 81. Holding that the doctrine of combat immunity should be narrowly construed, he refused to strike out the Challenger claims and the second and third of the three Ellis claims in negligence because he was not persuaded that their equipment and pre-deployment training claims were bound to fail: paras 110, 111. But he struck out the first of the Ellis claims because he was of the opinion that this claim fell squarely within the scope of combat immunity: para 114.

15. On 19 October 2012 the Court of Appeal (Lord Neuberger MR, Moses and Rimer LJJ) dismissed appeals by the Snatch Land Rover claimants on the question whether the deceased were within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention: [2012] EWCA Civ 1365, [2013] 2 WLR 27. It found it unnecessary to deal with the extent of the substantive obligations implicit within that article. It also dismissed the MOD's appeal against the judge's refusal to strike out the Challenger claims and the second and third of the Ellis claims in negligence on the ground of combat immunity. But it allowed a cross-appeal by the Ellis claimants against the striking out of the first Ellis claim. This

was because, although the allegation was of failures of the MOD away from the theatre of war, there might be factual questions as to the circumstances in which the decisions were made which would enable the MOD to raise the defence of combat immunity at the trial: para 63. All these issues are now the subject of appeals by the claimants and a cross-appeal by the MOD to this court.

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

I. Jurisdiction: article 1 ECHR

(a) the domestic authorities

17. Article 1 of the Convention provides as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention."

In *Soering v United Kingdom* (1989) 11 EHRR 439 at para 86 the Strasbourg court said that article 1 sets a limit, notably territorial, on the reach of the Convention and that the engagement undertaken by a contracting state is confined to securing the listed rights and freedoms to persons within its own jurisdiction. It does not govern the actions of states not parties to it, nor does it purport to be a means of requiring the contracting state to impose Convention standards on other states. The essentially territorial notion of jurisdiction was also emphasised by the Grand Chamber in *Bankovic v Belgium* (2001) 11 BHRC 435, para 67, where it said that it is only in exceptional cases that acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of article 1 of the Convention. In *Andrejeva v Latvia*, (Application No 55707/00), given 18 February 2009, para 56, the Grand Chamber reiterated that the concept of jurisdiction for the purposes of article 1 reflects that

term's meaning in public international law and that it is closely linked to the international responsibility of the state concerned.

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

19. In *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] AC 153 ("*Al-Skeini (HL)")* the House of Lords was asked to consider the case of the deaths of six Iraqi civilians which were the result of actions by a member or members of the British armed forces in Basra. One of them, Mr Baha Mousa, had died as a result of severe maltreatment in a prison occupied and run by British military personnel. It was argued for the civilians that, because of the special circumstances in which British troops were operating in Basra, the conduct complained of, although taking place outside the borders of the United Kingdom and any other contracting state, fell within the exceptions recognised by the Strasbourg jurisprudence.

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

21. Three aspects of the discussion of the issue in that case should be noted at this stage. First, the appellants were all citizens of Iraq. They were not state agents of the United Kingdom or otherwise subject to its control or authority.

British servicemen, on the other hand, are under the complete control of the UK authorities and are subject exclusively to UK law. Secondly, the House was plainly much influenced by the ruling on jurisdiction by the Grand Chamber in *Bankovic* which emphasised the centrality of territorial jurisdiction, the regional nature of the Convention and the indivisibility of the package of rights in the Convention: Lord Rodger at para 69. As Lord Brown noted in para 109, *Bankovic* stood, among other things, for the proposition that the rights and freedoms defined in the Convention could not be divided and tailored. In para 75 of *Bankovic* the proposition which attracted these observations was in these terms:

> "... the Court is of the view that the wording of article 1 does not provide any support for the applicants' suggestion that the positive obligation in article 1 to secure 'the rights and freedoms defined in section 1 of this Convention' can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question."

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

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

23. The appellants then sought just satisfaction in Strasbourg. In the meantime the jurisdiction question was considered by the domestic court in two further cases: *R (Gentle) v Prime Minister* [2008] AC 1356 and *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)*

[2010] UKSC 29, [2011] 1 AC 1 ("*Catherine Smith"*). The question in *Gentle* was whether article 2 of the Convention imposed a substantive duty on the state to take timely steps to obtain reliable legal advice before committing its troops to armed conflict: see para 3. The claimants were the mothers of two soldiers who were killed while serving in Iraq, one of whom was killed by the same shell as killed Cpl Allbutt and injured Trooper Julien and Lance Corporal Twiddy: see para 3, above. The issue which the claimants wished to explore was the lawfulness of the military action on which the United Kingdom had been engaged in Iraq before it was legitimised by United Nations Security Council Resolution 1546 of 8 June 2004. Lord Bingham said at para 8(3) that, although the soldiers were subject to the authority of the United Kingdom, they were clearly not within its jurisdiction as that expression in the Convention had been interpreted in *Al-Skeini (HL)*, paras 79 and 129. But the case was decided on the basis that the claimants were unable to establish the duty which they asserted: see Lord Bingham at para 6. In para 39 Lord Rodger said article 2 of the Convention did not impose an obligation on the government not to take part in an invasion that was unlawful in international law: see also Baroness Hale of Richmond, para 57. In para 19 I said that the guarantee in the first sentence of that article was not violated simply by deploying servicemen and women on active service overseas as part of an organised military force which was properly equipped and capable of defending itself, even though the risk of their being killed was inherent in what they were being asked to do.

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

25. The Court was divided on the issue by six to three. The majority held that the contracting states, in concluding the provisions of the Convention, would not have intended it to apply to their armed forces when operating outside their territories. Lord Collins, who delivered the leading judgment on behalf of the majority, said in para 307 that the case came within none of the exceptions recognised by the Strasbourg court, and that there was no basis in its case law, or in principle, for the proposition that the jurisdiction which states undoubtedly have over their armed forces abroad both in national law and international law means that they are within their jurisdiction for the purposes of article 1. Repeating a

point that had been made by Lord Rodger in *Al-Skeini (HL)*, he said that, to the extent that *Issa v Turkey* stated a principle of jurisdiction based solely on authority and control by state agents, it was inconsistent with *Bankovic*. In para 308 he said that there were no policy grounds for extending the scope of the Convention to armed forces abroad, as this would ultimately involve the courts in issues relating to the conduct of armed hostilities which was essentially non-justiciable.

26. The leading judgment for the minority was delivered by Lord Mance, with whom Lady Hale and Lord Kerr agreed. It is not possible to do justice to it in a brief summary. But some points that are of particular importance should be noted. In para 188 he said that, to the extent that jurisdiction under the Convention exists over occupied territory, it does so only because of the occupying state's pre-existing authority and control over its own armed forces. An occupying state cannot have any jurisdiction over local inhabitants without already having jurisdiction over its own armed forces, in both cases in the sense of article 1 of the Convention. In para 194 he said that the United Kingdom's jurisdiction over its armed forces was essentially personal. It could not be expected to take steps to provide in Iraq the full social and protective framework and facilities which it would be expected to provide domestically. But the United Kingdom could be expected to take steps to provide proper facilities and proper protection against risks falling within its responsibility or its ability to control or influence when despatching and deploying armed forces overseas. In paras 195-197 he examined the question whether there would be consequences beyond or outside any that the framers of the Convention could have contemplated and concluded that none of the matters that might give cause for concern justified giving to the concept of jurisdiction a different or more limited meaning to that which in his opinion followed from the guidance that the Strasbourg court had already given in *Bankovic*. It is however worth noting that he did not attach the same importance as the majority did to the proposition in *Bankovic* that the rights and freedoms defined in the Convention could not be divided and tailored, and that he was inclined to give more weight than they were to a principle of jurisdiction based on the authority and control which the contracting state had over its armed forces.

(b) Al-Skeini in Strasbourg

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

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

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

> "131 A state's jurisdictional competence under article 1 is primarily territorial. Jurisdiction is presumed to be exercised normally throughout the state's territory. Conversely, acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of article 1 only in exceptional cases.
>
> 132 To date, the Court in its case law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a contracting state outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the state was exercising jurisdiction extra-territorially must be determined with reference to the particular facts."

30. One can take from these paragraphs two important points. First, the word "exceptional" is there not to set an especially high threshold for circumstances to cross before they can justify a finding that the state was exercising jurisdiction extra-territorially. It is there to make it clear that, for this purpose, the normal presumption that applies throughout the state's territory does not apply. Secondly, the words "to date" in para 132 indicate that the list of circumstances which may require and justify a finding that the state was exercising jurisdiction extra-territorially is not closed. In *Catherine Smith*, para 303 Lord Collins said that *Bankovic* made it clear in paras 64 and 65 that article 1 was not to be interpreted as a "living instrument" in accordance with changing conditions. That can no longer

be regarded as an entirely accurate statement. The general principles are derived from the application to particular facts of the requirement of jurisdictional competence. The particular facts to which those principles must now be applied may be the product of circumstances that were not foreseen by the framers of the Convention. But that is no reason to disregard them if they can be shown to fall within the general principles relevant to jurisdiction under article 1.

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

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

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

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

33. The first principle is set out in para 134. It refers to the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law. This may amount to an exercise of jurisdiction when these agents exert authority and control over others. The cases cited are *X v Federal Republic of Germany* (1965) 8 Yearbook of the European Convention on

Human Rights 158; *X v United Kingdom* (1977) 12 DR 73; *M v Denmark* (1992) 73 DR 193; and *Bankovic*, para 73, where the Court noted

> "that other recognised instances of the extra-territorial exercise of jurisdiction by a state include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant state."

34. The second principle is set out in para 135. It refers to the fact that the Court has recognised the exercise of extra-territorial jurisdiction by a contracting state when, through the consent, invitation or acquiescence of the government of that territory, it exercises all or some of the public powers normally to be exercised by that government: *Bankovic*, para 71. So, where in accordance with custom, treaty or other agreement, authorities of the contracting state carry out executive or judicial functions on the territory of another state, the contracting state may be responsible for breaches of the Convention that result from their exercise, so long as the acts in question are attributable to it rather than to the state in whose territory the acts take place. The cases cited are *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745; *Gentilhomme v France* (Application Nos 48205, 48207 and 48209), given 14 May 2002; and *X and Y v Switzerland* (1977) 9 DR 57.

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

principle is to be found in *Jamaa v Italy* (2012) 55 EHRR 627, where the applicant asylum seekers were detained on an Italian ship after their vessels had been intercepted by the Italian Revenue Police and Coastguard.

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

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

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

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

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

38. The point that the Grand Chamber was making in para 137, as is made clear by the last sentence, is that the package of rights in the Convention is not indivisible, as *Bankovic*, para 75, which is cited here, appeared to indicate. The Grand Chamber had stated in that paragraph of its judgment in *Bankovic* that it was of the view that the wording of article 1 did not "provide any support for the applicants' suggestion that the positive obligation in article 1 to secure 'the rights and freedoms defined in section 1 of this Convention' can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question." The effect of para 137 of the *Al-Skeini* judgment is that this proposition, which informed much of the thinking of the House of Lords in *Al-Skeini (HL)* and of the majority in *Catherine Smith*, that the rights in Section 1 of the Convention are indivisible, is no longer to be regarded as good law. The extra-territorial obligation of the contracting state is to ensure the observance of the rights and freedoms that are relevant to the individual who is under its agents' authority and

control, and it does not need to be more than that. The dividing and tailoring concept relative to the situation of the individual was applied in the *Hirsi Jamaa* case to resolve the issue whether the asylum seekers were subject to the jurisdiction of Italy while they were detained on the ship flying the Italian flag: 55 EHRR 627, para 74.

39. The second part of the judgment of the Grand Chamber applies the principles described in the first part to the facts of the case. The state of affairs in Iraq during the period when the applicants' deaths at the hands of British forces occurred is reviewed in paras 143 to 148. They were killed on various dates between May and September 2003. This was during a period when the United States and the United Kingdom were exercising the powers of government for the provisional administration of Iraq through a Coalition Provisional Authority, which had been created for the purpose in May 2003. They included the maintenance of civil law and order. That remained the position until 28 June 2004, when full authority for governing Iraq passed from the Coalition Provisional Authority to the Interim Iraqi Government.

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

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

(c) discussion

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

43. Care must, of course, be exercised by a national court in its interpretation of an instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court: *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para 20 per Lord Bingham. He had already acknowledged in *Brown v Stott* [2003] 1 AC 681 that, as an important constitutional instrument, the Convention was to be seen as a 'living tree capable of growth and expansion within its natural limits' (*Edwards v Attorney General for Canada* [1930] AC 124 at p 136 per Lord Sankey LC). But he said that those limits will often call for very careful consideration. As he put it at the end of para 20 in *Ullah*, the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time. Lord Bingham's point was that Parliament never intended by enacting the Human Rights Act 1998 to give the courts of this country the power to give a more generous scope to the Convention rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court's own creation. In *Al-Skeini (HL)*, paras 105-106, Lord Brown of Eaton-under-Heywood saw a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly.

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

clearly shows it to reach. I would take that as being for us, as a national court, the guiding principle.

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

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

47. The second is to be found in the way, albeit with a degree of reticence, that this formulation resolves the inconsistency between *Issa v Turkey* and *Bankovic* on the question whether the test to be applied in these exceptional cases can be satisfied by looking only at authority and control or is still essentially territorial. The problem that was created by this inconsistency was articulated most clearly by Lord Rodger in *Al-Skeini (HL)*, paras 71-75. How can one reconcile the decision in *Bankovic*, which showed that an act which would engage the Convention if committed on the territory of a contracting state does not ipso facto engage the Convention if carried out by that contracting state on the territory of another state outside the Council of Europe, with the test that was described in *Issa* that required the court to ascertain whether the deceased were under the authority and control of the respondent state? We now know that *Issa* cannot be dismissed as an aberration because, as Lord Collins said in *Catherine Smith*, para 307, it is inconsistent with *Bankovic*. It is *Bankovic* which can no longer be regarded as authoritative on this

point. The fact that *Issa* is included in para 136 as one of the examples of cases that fall within the general principle of state agent authority and control is particularly noteworthy. It anchors that case firmly in the mainstream of the Strasbourg court's jurisprudence on this topic.

48. The third is to be found in the way that the Grand Chamber has departed from the indication in *Bankovic* that the package of rights in the Convention is indivisible and cannot be divided and tailored to the particular circumstances of the extra-territorial act in question. It was always going to be difficult to see how, if that was to be the guiding principle, it could be possible to accept that a state's armed forces abroad in whatever circumstances were within their jurisdiction for the purposes of article 1 as its ability to guarantee the entire range of the Convention rights would in many cases be severely limited. The problem was solved in the case of the actions of Turkish soldiers in northern Cyprus because the Convention rights were also engaged by the acts of the local administration which survived by virtue of Turkish military and other support: *Cyprus v Turkey* (Application No 25781/94), given 10 May 2001, para 77. Other cases were likely to be more difficult, and Lord Collins recognised in *Catherine Smith*, para 302 that cases such as *Markovic v Italy* (2006) 44 EHRR 1045 suggested that some qualification would have to be made to the principle of indivisibility of Convention rights.

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

50. There is one other point arising from the Grand Chamber's *Al-Skeini* judgment that should not pass unnoticed. The Equality and Human Rights Commission points out in para 49 of its written case that the anterior question that presents itself in state agent cases is whether the state agent himself is within his state's jurisdiction within the meaning of article 1. As Lord Mance observed in *Catherine Smith*, para 188, to the extent that a state's extra-territorial jurisdiction over local inhabitants exists because of the authority and control that is exercised over them, this is because of the authority and control that the state has over its own armed forces. It would seem to follow therefore that an occupying state cannot have any jurisdiction over local inhabitants without already having jurisdiction over its own armed forces, in each case in the sense of article 1 of the Convention. That this is so has never been questioned by the Strasbourg court, and it may be said that it is the premise from which extra-territorial jurisdiction based on state agent authority and control has been developed.

51. In *Cyprus v Turkey* (1975) 2 DR 125, which appears to have been the first case in which the concept of state agent authority and control was mentioned (see *Al-Skeini*, para 121), the European Commission of Human Rights observed at p 136, para 8, that

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

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

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

53. In *Demir and Baykara v Turkey* (Application No 34503/97), given 12 November 2008, para 74, the Grand Chamber said that in a number of judgments it had used, for the purposes of interpreting the Convention, intrinsically non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly. These resolutions and recommendations constitute agreements within the meaning of article 31(3)(a) of the Vienna Convention, account of which may be taken in the interpretation of a treaty or the application of its provisions. It is therefore worth noting recommendation 1742 (2006) of the Parliamentary Assembly on the human rights of members of the armed forces of 11 April 2006, which was made in the light of a debate on a report on this issue of its Committee on Legal Affairs and Human Rights (doc 10861).

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

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

II. The article 2 ECHR claims

56. Article 2(1) of the Convention provides as follows:

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

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

57. We are not concerned here with the procedural obligation which is implied into the article in order to make sure that the substantive right is effective in practice: see *R (Gentle) v Prime Minister* [2008] AC 1356, para 5, per Lord Bingham. The Snatch Land Rover claims, details of which are set out in paras 11 and 12, above, are all directed to the substantive obligation, which requires the state not to take life without justification and also, by implication, to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life: *R (Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 AC 182, para 2. As Owen J pointed out, these claims involve issues of procurement as well as allegations relating to operational decisions made by commanders: [2011] EWHC 1676 (QB), para 51.

(a) preliminary observations

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

59. It may be noted in this context that the intervener JUSTICE drew attention to article 15 of the Convention in reply to concerns about the practical consequences of finding that soldiers are within the jurisdiction of the United

Kingdom under article 1. It provides that in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under the Convention to the extent required by the exigencies of the situation. But the phrase "threatening the life of the nation" suggests that the power to derogate under this article is available only in an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed: *Lawless v Ireland (No 3)* (1961) 1 EHRR 15, para 28.

60. It will be recalled that in *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 it was held that the Human Rights Act 1998 (Designed Derogation) Order 2001, which had been made to derogate from the right to personal liberty under article 5(1) to enable the appellants to be detained indefinitely without trial, should be quashed. And in *R (Al-Jedda) v Secretary of State for Defence (JUSTICE intervening)* [2007] UKHL 58, [2008] AC 332, para 38, Lord Bingham said that it was hard to think that the conditions of article 15 could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw. He also noted that it had not been the practice of states to derogate in situations such as those in Iraq in 2004 and that as subsequent practice in the application of a treaty may, under article 31(3)(b) of the Vienna Convention, be taken into account in interpreting the treaty it seemed proper to regard the power in article 15 as inapplicable. I do not think therefore that it would be right to assume that concern about the practical consequences in situations such as those with which we are dealing in this case can be answered by exercising the power to derogate. The circumstances in which that power can properly be exercised are far removed from those where operations are undertaken overseas with a view to eliminating or controlling threats to the nation's security. The jurisprudence of the Strasbourg court shows that there are other ways in which such concerns may be met.

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

determine where the boundary lies between the two extremes in the circumstances that the armed forces were facing in Iraq in 2005 and 2006.

62. In *Gentle*, para 19, I said that the proper functioning of an army in a modern democracy includes requiring those who serve in it to undertake the operations for which they have been recruited, trained and equipped, some of which are inherently dangerous, and that the jurisprudence developed from the decision in *Soering v United Kingdom* (1989) 11 EHRR 439 about decisions taken in this country to send people abroad to places where they face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment does not apply. The guarantee in the first sentence of article 2(1) is not violated simply by deploying servicemen and women on active service overseas as part of an organised military force which is properly equipped and capable of defending itself, even though the risk of their being killed is inherent in what they are being asked to do.

63. The other side of the coin, as Lord Mance explained in *Catherine Smith*, para 195, is that there is nothing that makes the Convention impossible or inappropriate of application to the relationship between the state and its armed forces as it exists in relation to overseas operations in matters such as, for example, the adequacy of equipment, planning or training. Lord Rodger recognised in the same case at para 126 that, while a coroner will usually have no basis for considering at the outset that there has been a violation of article 2 where a serviceman or woman has been killed by opposing forces in the course of military operations, new information might be uncovered as the investigation proceeds which does point to a possible violation of the article. He referred to the death of a soldier as a result of friendly fire from other British forces as an extreme example. And, as I said in *Catherine Smith*, para 105, one must not overlook the fact that there have been many cases where the death of service personnel indicates a systemic or operational failure on the part of the state, ranging from a failure to provide them with the equipment that was needed to protect life on the one hand to mistakes in the way they are deployed due to bad planning or inadequate appreciation of the risks that had to be faced on the other. So failures of that kind ought not to be immune from scrutiny in pursuance of the procedural obligation under article 2 of the Convention.

64. The extent to which the application of the substantive obligation under article 2 to military operations may be held to be impossible or inappropriate will, however, vary according to the context. Military operations conducted in the face of the enemy are inherently unpredictable. There is a fundamental difference between manoeuvres conducted under controlled conditions in the training area which can be accurately planned for, and what happens when troops are deployed on active service in situations over which they do not have complete control. As Lord Rodger observed in *Catherine Smith*, para 122, the job of members of the

armed forces involves their being deployed in situations where, as they well know, opposing forces will be making a determined effort, and using all their resources, to kill and injure them. The best laid plan rarely survives initial contact with the enemy. The best intelligence cannot predict with complete accuracy how the enemy will behave, or what equipment will be needed to meet the tactics and devices that he may use to achieve his own ends. Speed may be essential if the momentum of an attack is to be maintained or to strengthen a line of defence. But lines of communication may become stretched. Situations may develop where it is simply not possible to provide troops in time with all they need to conduct operations with the minimum of casualties. Things tend to look and feel very different on the battlefield from the way they look on such charts and images as those behind the lines may have available to them. A court should be very slow indeed to question operational decisions made on the ground by commanders, whatever their rank or level of seniority.

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

66. This, then, is a field of human activity which the law should enter into with great caution. Various international measures, such as those contained in the 3rd Geneva Convention of 1929 to protect prisoners of war, have been entered into to avoid unnecessary hardship to non-combatants. But subjecting the operations of the military while on active service to the close scrutiny that may be practicable and appropriate in the interests of safety in the barrack block or in the training area is an entirely different matter. It risks undermining the ability of a state to defend itself, or its interests, at home or abroad. The world is a dangerous place, and states cannot disable themselves from meeting its challenges. Ultimately democracy itself may be at risk.

(b) the Strasbourg authorities

67. Fundamentally, article 2 requires a state to have in place a structure of laws which will help to protect life: *Savage v South Essex NHS Trust* [2008] UKHL 74, [2009] AC 681, para 19, per Lord Rodger. As he explained, with reference to the European court's discussion of this issue in *Osman v United Kingdom* (1998) 29 EHRR 245, para 115, the primary duty is to secure the right to life by putting in place effective criminal law offences backed up by law-enforcement machinery. But the state's duty goes further than that. It may also imply, in certain well defined circumstances, a positive obligation on the authorities to take preventive operational measures to protect the lives of those within their jurisdiction.

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

69. The Strasbourg court has not had occasion to examine the extent to which article 2(1) offers protection at any level to a state's armed forces when engaged in operations such as those that were being conducted in Iraq in 2005 and 2006. But there are some straws in the wind which may offer some guidance.

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

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

71. These comments, however brief, do seem to make it clear that it would not be compatible with the characteristics of military life to expect the same standard of protection as would be afforded by article 2(1) to civilians who had not undertaken the obligations and risks associated with life in the military. That is plainly so in the context of the exercise of military discipline over members of the armed forces when they are on active service. It is hard to see why servicemen and women should not, as a general rule, be given the same protection against the risk of death or injury by the provision of appropriate training and equipment as members of the police, fire and other emergency services. But it is different when the serviceman or woman moves from recruitment and training to operations on active service, whether at home or overseas. It is here that the national interest requires that the law should accord the widest measure of appreciation to commanders on the ground who have the responsibility of planning for and conducting operations there.

72. This approach receives some support from *Stoyanovi v Bulgaria* (Application No 42980/04), given 9 November 2010, where an application was made under article 2(1) by the family of a soldier who had died during a parachute exercise. In paras 59-61 the Court examined the difference between the primary positive obligation under that article to establish a framework of laws and procedures to protect life and the obligation to take preventative operational measures to protect the life of an individual which may be imposed by implication, as it was put in *Osman v United Kingdom* (1998) 29 EHRR 245, para 115, only in certain and well-defined circumstances. In para 59, recalling what was said in para 116 of *Osman* where the allegation was of a failure to take preventive measures where there was a known risk of a real, direct and immediate threat to the life of an individual posed by another individual, the Court said:

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

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

> "Whenever a state undertakes or organises dangerous activities, or authorises them, it must ensure through a system of rules and through sufficient control that the risk is reduced to a reasonable minimum. If nevertheless damage arises, it will only amount to a breach of the state's positive obligations if it was due to insufficient regulations or insufficient control, but not if the damage was caused through the negligent conduct of an individual or the concatenation of unfortunate events."

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

74. Another example of the Strasbourg court's concern not to impose a disproportionate and unrealistic obligation on the state is provided by *Giuliani and Gaggio v Italy* (Application No 23458/02), given 24 March 2011. The applicants in that case complained of the death of their son and brother during demonstrations surrounding the G8 summit in Genoa which had degenerated into violence. The Court held that the Italian authorities did not fail in their obligation to do what could reasonably be expected of them to provide the level of safeguards required during operations potentially involving the use of lethal force. It drew a contrast between dealing with a precise and identifiable target and the maintenance of order in the face of possible disturbances spread over the entire city as regards the extent to which the officers involved could be expected to be highly specialised in dealing with the tasks assigned to them.

75. So too, in the case of the armed forces, a contrast can be drawn between their situation in the training area that can be planned for precisely and that which they are likely to encounter during operations when in contact with the enemy. The same approach is indicated by *Finogenov v Russia* (Application Nos 18299/03 and 27311/03), given 20 December 2011, para 213, where the Court was prepared to give a margin of appreciation to the domestic authorities, in so far as the military and technical aspects of the situation were concerned, in connection with the storming of a theatre in which many people were held hostage by terrorists, even if with hindsight some of the decisions they took might appear open to doubt.

76. The guidance which I would draw from the Court's jurisprudence in this area is that the court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate. But it must give effect to those obligations where it would be reasonable to expect the individual to be afforded the protection of the article. It will be easy to find that allegations are beyond the reach of article 2 if the decisions that were or ought to have been taken about training, procurement or the conduct of operations were at a high level of command and closely linked to the exercise of political judgment and issues of policy. So too if they relate to things done or not done when those who might be thought to be responsible for avoiding the risk of death or injury to others were actively engaged in direct contact with the enemy. But finding whether there is room for claims to be brought in the middle ground, so that the wide margin of appreciation which must be given to the authorities or to those actively engaged in armed conflict is fully recognised without depriving the article of content, is much more difficult. No hard and fast rules can be laid down. It will require the exercise of judgment. This can only be done in the light of the facts of each case.

(c) should the claims be struck out?

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

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

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

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

81. I would therefore dismiss the MOD's appeal against Owen J's decision, which the Court of Appeal found it unnecessary to consider, that none of these

claims should be struck out. The claimants are, however, on notice that the trial judge will be expected to follow the guidance set out in this judgment as to the very wide measure of discretion which must be accorded to those who were responsible on the ground for the planning and conduct of the operations during which these soldiers lost their lives and also to the way issues as to procurement too should be approached. It is far from clear that they will be able to show that the implied positive obligation under article 2(1) of the Convention to take preventative operational measures was breached in either case.

III. Combat immunity

(a) background

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

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

needed to determine the question whether a duty of care was owed to the claimant. The scope of this rule deserves attention as a separate issue in its own right.

(b) the authorities

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

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

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

86. At p 362 he acknowledged that it might not be easy under conditions of modern warfare to say in a given case upon which side of the line an act or omission falls. But the uniform tendency of the law had been to concede to the armed forces complete legal freedom in the field, that is to say in the course of active operations against the enemy, so that the application of private law by the

ordinary courts may end where the active use of arms begins. Starke J said at pp 355-356 that acts done in the course of operations of war are not justiciable and that this had been decided by *Ex P D F Marais* [1902] AC 109, where the Judicial Committee of the Privy Council applied the test of whether actual war was raging at the time of the incident.

87. In *Groves v Commonwealth* (1982) 150 CLR 113, para 3 Gibbs CJ said that he had no difficulty in accepting the correctness of what was said by Dixon J:

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

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

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

(c) discussion: combat immunity

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

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

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

claimants are careful to avoid any criticism of the actions of the men who were actually engaged in armed combat at the time of the incident.

92. The question which these claims raise is whether the doctrine of combat immunity should be extended from actual or imminent armed conflict to failures at that earlier stage. I would answer it by adopting Elias J's point, with which Owen J agreed in para 99 of his judgment in this case, that the doctrine should be narrowly construed. To apply the doctrine of combat immunity to these claims would involve an extension of that doctrine beyond the cases to which it has previously been applied. That in itself suggests that it should not be permitted. I can find nothing in these cases to suggest that the doctrine extends that far.

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

94. Then there is the point that, as was noted in *Jones v Kaney* [2011] UKSC 13, [2011] 2 AC 398, paras 108 and 161, any extension of an immunity needs to be justified. It has to be shown to be necessary. Starke J observed in the *Shaw Savill* case at p 354 that not every warlike operation done in time of war is an operation or an act of war. It is to operations or acts of war only that the doctrine extends, on the ground that the armed forces must be free to conduct such operations without the control or interference of the courts of law. As Dixon J said in the same case at p 361, no-one can imagine a court undertaking the trial of an issue as to whether a soldier on the field of battle or a sailor fighting on his ship might reasonably be more careful to avoid causing civil loss or damage. The principle, as he described it, is not limited to acts or omissions in the course of an actual engagement with the enemy. It extends to all active operations against the enemy. While in the course of actually operating against the enemy, the armed forces are under no duty of care to avoid causing loss or damage to those who may be affected by what they

do. But, as Dixon J also said at p 362, there is a real distinction between actual operations against the enemy and other activities of the combatant services in time of war. He referred by way of example to a warship proceeding to her anchorage or manoeuvring among other ships in a harbour. At that stage no reason was apparent for treating her officers as under no civil duty of care, remembering always that the standard of care is that which is reasonable in the circumstances.

95. The same point can be made about the time when the failures are alleged to have taken place in the Challenger claimants' case. At the stage when men are being trained, whether pre-deployment or in theatre, or decisions are being made about the fitting of equipment to tanks or other fighting vehicles, there is time to think things through, to plan and to exercise judgment. These activities are sufficiently far removed from the pressures and risks of active operations against the enemy for it to not to be unreasonable to expect a duty of care to be exercised, so long as the standard of care that is imposed has regard to the nature of these activities and to their circumstances. For this reason I would hold that the Challenger claims are not within the scope of the doctrine, that they should not be struck out on this ground and that the MOD should not be permitted, in the case of these claims, to maintain this argument.

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

(d) discussion: fair, just and reasonable

97. Mr Eadie QC also renewed the argument that was advanced below that the common law claims should be struck out on the ground that it would not be fair, just and reasonable to impose a duty of care at common law to protect against such death or injury as occurred in these cases. He referred, for example, to *Van Colle v*

Chief Constable of Hertfordshire Police [2008] UKHL 50, [2009] AC 225, *Brooks v Comr of Police of the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495 and *Stovin v Wise* [1996] AC 923 in support of this part of his argument. In *Brooks*, para 30 Lord Steyn affirmed what he described as the core principle in *Hill v Chief Constable of West Yorkshire* [1989] AC 53, where it was held on grounds of public policy that the police did not owe legal duties to victims or witnesses in the performance of their function in keeping the Queen's peace: see also *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335, where Lord Steyn held, also on grounds of public policy, that the Crown Prosecution Service did not owe a duty of care to those whom it was prosecuting; and *Hughes v National Union of Mineworkers* [1991] ICR 669, where May J held that it would be detrimental to the public interest if police officers charged with deploying of other officers in times of serious public disorder were to have to concern themselves with possible negligence claims from their subordinates. These can all be seen as cases where, for reasons of public policy, it was not fair, just or reasonable for the defendant to be under a duty of care to avoid injury.

98. The closest the cases have come to applying that reasoning to cases involving members of the armed forces is *Mulcahy v Ministry of Defence* [1996] QB 732, where Neill LJ said at p 750 that there was no duty on the defendants in battle conditions to maintain a safe system of work and Sir Iain Glidewell said at p 751 that one soldier does not owe to another a duty of care when engaged in battle conditions. As in the other cases, the question whether a duty should be held not to exist depends on the circumstances – on who the potential claimants are and when, where and how they are affected by the defendant's acts. The circumstances in which active operations are undertaken by our armed services today vary greatly from theatre to theatre and from operation to operation. They cannot all be grouped under a single umbrella as if they were all open to the same risk, which must of course be avoided, of judicialising warfare. For these reasons, I think that the question whether the claims in this case fall within the exclusion that was recognised in *Mulcahy* or any extension of it that can be justified on grounds of public policy cannot properly be determined without hearing evidence. In *Van Colle*, para 58 Lord Bingham said that one would ordinarily be surprised if conduct which violated a fundamental right or freedom of the individual under the Convention did not find a reflection in a body of law as sensitive to human needs as the common law. So Lord Rodger's observation in *Catherine Smith*, para 126 that there would be reason to believe that the military authorities may have failed in their article 2 duty if a soldier dies as a result of friendly fire from other British forces is capable of being read across as indicating that the question in the case of the Challenger claims is not whether a duty was owed but whether, on the facts, it was breached. Whether the situation in Iraq at the time of the incidents that gave rise to the Ellis claims was comparable to battle conditions when a nation is at war is a matter that also needs to be investigated.

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

100. The sad fact is that, while members of the armed forces on active service can be given some measure of protection against death and injury, the nature of the job they do means that this can never be complete. They deserve our respect because they are willing to face these risks in the national interest, and the law will always attach importance to the protection of life and physical safety. But it is of paramount importance that the work that the armed services do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong. The court must be especially careful, in their case, to have regard to the public interest, to the unpredictable nature of armed conflict and to the inevitable risks that it gives rise to when it is striking the balance as to what is fair, just and reasonable.

Conclusion

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

LORD MANCE (with whom Lord Wilson agrees)

Introduction

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

103. On this basis, this case raises once again for consideration the "difficult line" or inter-relationship between national law and substantive Convention rights, to which I referred in *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, para 121. It is in general terms clear from Strasbourg jurisprudence that article 2 of the Human Rights Convention includes substantive duties on the part of the state, namely (a) a systems or framework duty, viz to establish a framework which is appropriately protective of life and (b) an operational duty, viz "in appropriate circumstances, a positive duty … to take preventive operational measures to protect an individual whose life is at risk": *Watts v United Kingdom* (2010) 51 EHRR SE66, para 82.

104. Although the operational duty was said in *Osman v United Kingdom* (1998) 29 EHRR 245 to apply "in certain well-defined circumstances", the subsequent recognition of its application in new sets of circumstances (including by this Court in *Rabone*) leaves its scope uncertain. As Lady Hale notes in *Rabone*, para 97-99, it is conceivable that the Strasbourg jurisprudence accepts or is moving towards a broad principle that engages article 2 and requires the state to react reasonably in any situation where the state knows or ought to know of a real and immediate threat to human life. It is also unclear how far the two substantive duties are separated, with middle ground between them, or form part of a continuum covering almost every aspect of state activity.

105. In *Öneryildiz v Turkey* (2005) 41 EHRR 325, paras 89-90 the Strasbourg court treated the framework duty as "indisputably apply[ing] in the particular context of dangerous activities", where "special emphasis must be placed on regulations geared to the special features of the activity in question", adding that "They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks".

106. On the other hand, there are some circumstances in which death occurs as a result of the activities of state agents, but article 2 is not engaged. They include "casual errors of judgment or acts of negligence" (which I described in *R (Catherine Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29; [2011] 1 AC 1, para 201, as "operational as opposed to systematic failures"), a principle established in the context of medical negligence.

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

The claims

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

109. Second, the particulars relied upon in Mrs Smith's claim under article 2 include both decisions or omissions on the ground and equipment and tactical decisions at a higher level. Third, the particulars relied upon in the Ellis claims in negligence and/or under article 2 relate mainly at least to equipment and tactical decisions at a higher level (although they also embrace allegations as to what equipment should have been used if available). As pleaded, the complaint regarding the decision to deploy Snatch Land Rovers on the patrol might be read as a complaint about a decision made on the ground. But their case (para 188)

explains that it relates to a decision made "well away from the heat of battle at a time when the decision-maker was neither under attack nor threat of attack. It did not form part of the planning of this particular patrol".

Common law

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

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

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

> from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate."

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

113. In *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344, *Ex p Marais* was cited by Starke and Williams JJ, but all the members of the High Court also assimilated the question of "justiciability" with the question whether the state owed a legal duty to take care in the particular circumstances. Starke J stated that it is for the court to determine whether a state of war exists and whether "the matters complained of were done or omitted in the conduct of an operation or act of war". He added (consistently with *Ex p Marais*) that "the immunity arising from conduct of war cannot be confined to the theatre of operations where combatants are actively engaged: it must extend, in modern times, to all theatres in which action on the part of the King's enemies is imminent".

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

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

116. In *Bici v Ministry of Defence* [2004] EWHC 786 (QB), concerning the killing of two civilians by British soldiers during the course of peace-keeping operations in Kosovo, Elias J treated separately the doctrine of combat immunity and the question whether there existed a duty of care, viewing the former as an exclusion of justiciability and so as a doctrine to be strictly confined on constitutional grounds. But on that basis it was still necessary to consider whether any duty of care existed. Elias J held it did, because the case involved the single question whether the soldiers were justified in firing on the civilians, and there was no basis for concluding that they did not owe a duty of care in doing so: "Troops" he said (para 104) "frequently have to carry out difficult and sensitive peace keeping functions, such as in Northern Ireland, whilst still being subject to common law duties of care. The difficulties of their task are reflected in the standard of the duty rather than by denying its applicability."

117. As Lord Hope has noted, the cases on combat immunity are focused on acts or omissions occurring and causing injury or death in the course of hostilities. In the present case the Challenger claimants are careful to put their case in a way which relies solely on allegedly negligent conduct occurring prior to and distant from the actual hostilities, and involving failures, in Whitehall or elsewhere, properly to equip and train the soldiers sent to fight in Iraq. The same applies, at least for the most part, to the Ellis claims. The question is whether the state, or indeed those of its officers responsible for procurement and training decisions, owe any duty of care in respect of injury or death in the course of combat operations allegedly attributable to their negligence in the performance of such responsibility.

118. This is a question of public policy about the answer to which Lord Rodger (at para 127), with whom Lord Walker expressly agreed (at para 131), can, I think, have had no doubt in *R (Catherine Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, [2011] 1 AC 1. Although they were addressing explicitly the position under article 2, they cannot have thought that their remarks were or could be made irrelevant simply be reformulating a claim in negligence. It is not difficult to identify situations in which the common law has concluded on policy grounds that no duty of care should exist. I agree with all that Lord Carnwath has said in this connection in paras 161 to 175 of his judgment.

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

> "From time to time they [the police] make mistakes in the exercise of that function, but it is not to be doubted that they apply their best

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

120. In *Brooks v Comr of Police of the Metropolis* [2005] 1 WLR 1495, the House applied similar reasoning when holding that the police have no duty of care not to cause by positive acts or omissions harm to victims of serious crime, or witnesses to serious crime, with whom they have contact. Lord Steyn said (para 30):

"It is, of course, desirable that police officers should treat victims and witnesses properly and with respect: compare the Police (Conduct) Regulations 2004 (SI 2004/645). But to convert that ethical value into general legal duties of care on the police towards victims and witnesses would be going too far. The prime function of the police is the preservation of the Queen's peace. The police must concentrate on preventing the commission of crime; protecting life

> and property; and apprehending criminals and preserving evidence: ….. A retreat from the principle in *Hill's* case would have detrimental effects for law enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in *Hill's* case, be bound to lead to an unduly defensive approach in combating crime."

121. *Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening)* [2008] UKSC 50, [2009] AC 225 is a further case in which there was in Lord Hope's words "a highly regrettable failure to react to a prolonged campaign by Jeffrey threatening the use of extreme criminal violence" against Mr Smith, which in the event did culminate in Jeffrey attacking Mr Smith and very severely injuring him. The House again applied the approach in *Hill* and *Brooks* in concluding that there was no actionable duty of care.

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

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

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

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

124. In considering the Challenger claims and the Ellis claim for negligence, Owen J referred to his previous decision in *Multiple Claimants* as well as to Elias J's decision in *Bici*. He accepted the latter as standing for the proposition that any exception on grounds of combat immunity should be narrowly construed. He confined the extension of the doctrine of combat immunity, recognised in *Multiple Claimants,* to the planning and preparation of the particular operations in which injury was sustained, as opposed to planning and preparation "made …. in general for possible unidentified further military operations" (para 94). He was not persuaded that the fact that the equipment claims were likely to give rise to issues of procurement and allocation of resources demonstrated conclusively that it would not be fair, just and reasonable to impose the duties of care for which the claimants contend (para 107). He was not persuaded that either the equipment or the claims based on lack of pre-deployment training had no real prospect of

success. He thought that different considerations might apply to the claims so far as based on lack of in-theatre training, but that this issue would be better determined by the trial judge. He struck out the Ellis claim for negligence in para 26.1 (failure to limit patrols to other vehicles) as falling squarely within combat immunity. The Court of Appeal upheld Owen J's conclusion that the equipment and training claims arguably fall outwith the scope of combat immunity, and also allowed the appeal in respect of para 26.1.

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

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

127. Third, both in that connection and more widely, I consider that Owen J was clearly right to conclude in *Multiple Claimants* that

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

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

> "The third [matter] is the danger of overkill. It is to be hoped that, as a general rule, imposition of liability for negligence will lead to a higher standard of care in the performance of the relevant type of act; but sometimes not only may this not be so, but the imposition of liability may even lead to harmful consequences. In other words, the cure may be worse than the disease".

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

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

> "Once it is established, say, that a soldier died because the blast from a roadside bomb penetrated the armour-plating on his vehicle, it may well be inferred that he would not have died if the plating had been stronger. And that simple fact may be worth pointing out as a possible guide for the future. But questions, say, as to whether it would have been feasible to fit stronger protection, or as to why the

particular vehicles were used in the operation or campaign, or as to why those vehicles, as opposed to vehicles with stronger protection, were originally purchased by the Ministry of Defence, or as to whether it would have been better to have more helicopters available etc, all raise issues which are essentially political rather than legal. That being so, a curious aspect of counsel's submissions before this court was the complete absence of any reference to Parliament as the forum in which such matters should be raised and debated and in which ministers should be held responsible. Of course, in consequence of pressure brought to bear by Parliament, the government might set up an independent inquiry with wide terms of reference to look into all aspects of a situation, including the political aspects."

130. Also in *Catherine Smith* Lord Brown at para 146 asked rhetorically:

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

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

131. The claimants' case is that during or after any war any injured soldier or the relatives or dependants of any soldier killed in combat could sue the state for alleged failures in the preparation or equipping of the armed forces for combat. Logically, if that is so, then a soldier might, even during the war, complain that his or her equipment or training was inadequate and that it would be a breach of the state's common law duty of care and/or duties under the Human Rights Convention even to order him or her to go into combat with it. If domestic legislation compelled this, then the soldier could seek relief in the Strasbourg court - maybe even interim relief prohibiting the further use or giving of orders to use the allegedly defective equipment. One may also recall the facts of *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 AC 136, where protestors sought to disrupt Fairford Airbase in order to prevent intervention in Iraq, and pleaded in defence that they were preventing the international crime of aggression. Pointing to

defective equipment and seeking to ban its use could have a considerable disruptive effect. Not only would there be a huge potential diversion of time and effort in litigation of such issues in an area of essential national interest (whether before, during or after hostilities). There must be risks that the threat of exhaustive civil litigation following any active military operation would affect decision-making and lead to a defensive approach, both at the general procurement and strategic stages and at the tactical and combat stages when equipment was being deployed.

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

133. The relevant question for present purposes is therefore whether the state owed a duty of care to avoid the death or injury during the course of active service which actually occurred. It will often not be difficult with hindsight to point to different decisions that might have been made or preparations made. Would the disaster of Isandlwana have been avoided had the army command equipped Lord Chelmsford's forces with the heliograph? Or was the cause the failure to form a laager? Or the deployment of troops over too wide a perimeter? Or the lack of screwdrivers to open the ammunition boxes quickly enough? And would many disastrous casualties of the First World War have been avoided if the War Office had recognised the significance of the proposal for a tank put to it in 1912, 1914 and 1916 by the Australian engineer Lancelot de Mole - of whom a post-war Commission on Awards to Inventors said in 1919:

> "We consider that he is entitled to the greatest credit for having made and reduced to practical shape as far back as the year 1912 a very brilliant invention which anticipated and in some respects surpassed

> that actually put into use in the year 1916. It was this claimant's misfortune and not his fault that his invention was in advance of his time, and failed to be appreciated and was put aside because the occasion for its use had not then arisen."

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

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

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

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

137. Moses LJ suggested in the Court of Appeal (para 60) that it was necessary to consider the evidence in order to decide when "active operations" start and when they finish and that Owen J had recognised that the present cases may not fall within the scope of combat immunity. But, so far as this suggests that Owen J doubted whether active operations were afoot at the dates relevant to either the Smith claim (16 July 2005) or the Ellis claim (28 February 2006), it is wrong. No such argument even appears to have been raised before Owen J or before the Court of Appeal, in relation to either claim. Further, in paras 113-114 of his judgment

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

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

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

Article 2

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

> "Positive obligations will vary therefore in their application depending on their context. …. In the present case, which concerns an accident during a military training exercise, the Court notes that while it may indeed be considered that the armed forces' activities pose a risk to life, this is a situation which differs from those

> ‘dangerous’ situations of specific threat to life which arise exceptionally from risks posed by violent, unlawful acts of others or man-made or natural hazards. The armed forces, just as doctors in the medical world, routinely engage in activities that potentially could cause harm; it is, in a manner of speaking, part of their essential functioning. Thus, in the present case, parachute training was inherently dangerous but an ordinary part of military duties. Whenever a State undertakes or organises dangerous activities, or authorises them, it must ensure through a system of rules and through sufficient control that the risk is reduced to a reasonable minimum. If nevertheless damage arises, it will only amount to a breach of the State's positive obligations if it was due to insufficient regulations or insufficient control, but not if the damage was caused through the negligent conduct of an individual or the concatenation of unfortunate events (see, for comparison, *Kalender v Turkey*, Application No 4314/02), §§ 43-47, 15 December 2009).”

139. The court’s reasoning appears to have been that, in so far as military life is inherently dangerous, there could be no question of any operational duty to prevent that danger. This seems fairly self-evident, and is certainly consistent with the Strasbourg court’s recognition in other cases of the need to “bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces” (*Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, para 54), meaning, for example, also that “many acts that would constitute degrading or inhuman treatment in respect of prisoners may not reach the threshold of ill-treatment when they occur in the armed forces, provided that they contribute to the specific mission of the armed forces in that they form part of, for example, training for battlefield conditions” (*Chember v Russia*, (Application No 7188/03) (unreported) given 3 July 2008, para 49). However, as the court stated in *Stoyanovi*, the state must by the same token have a system of rules and sufficient control to reduce the risks to a reasonable minimum. In *Kalender v Tutrkey* (Application No 4314/02) (unreported) given 15 December 2009, cited by the court, liability under the substantive aspect of article 2, was held to exist in the light of numerous failings in the structure and operation of a railway station, leading to passengers having, without supervision or warning, to disembark and cross a line used by other trains and being killed in the process. Accordingly, it appears that the framework duty may in appropriate circumstances operate at a low level.

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

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

141. The question is whether the Strasbourg court would take a similar attitude to the responsibility of a state for the death of a member of its own armed forces in circumstances alleged to have involved mistaken decisions in the course of an operation or act of war (such as alleged by Mrs Smith in at least paragraphs 26.2 to 26.5 of her claim), or failings in planning or in the equipping or training of such forces (such as alleged by Mrs Smith in paras 26.1 and it seems paras 26.6 and 26.7 of her claim and by the Ellis claimants in probably all three particulars in their para 26).

142. In this connection it is relevant to bear in mind that the Strasbourg court has curtailed the operational duty, so that it does not embrace mere casual acts of negligence, certainly in the field of health care and, as appears logical, in other fields: see my judgment in *Catherine Smith*, para 201 and the cases there cited, to which can now be added *Stoyanovi v Bulgaria* (Application No 42980/04), para 61, where the European Court of Human Rights said that a death occurring during an inherently dangerous training activity (parachute jumping) undertaken by a soldier would not involve any breach of article 2 if "caused through the negligent conduct of an individual" (see para 138 above). Mr Weir QC regretted this qualification as deeply unsatisfactory, and as a manifestation of the fact that (in his words) "the search for principle has been called off in this area". An alternative view might be that it would have been better if the Strasbourg court had left the development and application of the law of tort to domestic legal systems, subject to clearly defined criteria, rather than set about creating what amounts in many respects to an independent substantive law of tort, overlapping with domestic tort law, but limited to cases involving death or the risk of death. Be that as it may be, the exception for casual acts of negligence is relevant to show that liability under article 2 can be tailored and limited in what the Strasbourg court regards as appropriate circumstances. In the present circumstances, the question arises whether that the Strasbourg court would regard article 2 in its substantive aspect as making the state liable for the death in combat of one soldier due to alleged negligence of his commander or of another soldier. The prospect of the Strasbourg court reviewing the conduct of combat operations in this way seems to me

sufficiently striking, for it to be impossible to give this question a positive answer. If the European Court considers that the Convention requires it to undertake the retrospective review of armed conflicts to adjudicate upon the relations between a state and its own soldiers, without recognising any principle similar to combat immunity, then it seems to me that a domestic court should await clear guidance from Strasbourg to that effect.

143. That leaves for consideration whether the framework duty involves an obligation on the part of the state to exercise due care in the course of planning armed operations, and in equipping and training its armed forces, so as to reduce or limit the risks to life involved in such operations. In my opinion it is not possible to conclude that the Strasbourg court would hold that such matters are justiciable under the Convention, any more than they are at common law. I am not over-enamoured of the cautionary warning to this court that the road to Strasbourg is a one-way street, which a claimant can tread if this Court has not gone far enough, but which the state cannot tread if this Court goes too far. If it is clear from prior authority or this Court is otherwise confident about what Strasbourg will decide, then we should decide the issue as we believe correct. But in the present very difficult case, two connected considerations lead me to consider that caution is called for. First, having decided that the common law recognises no such duty or care or claims as the claimants advance, we should not lightly conclude, in so important and sensitive an area of national life, that the Strasbourg court would take a different view. Second, since I have no confidence about the scope or application of any positive duties which the Strasbourg court might recognise under article 2 in the area, I believe it would be wrong for this Court to advance way ahead of anything that it has yet decided. It should be for the Strasbourg court to decide whether it will review the procurement and training policy of the British army over recent decades in the context of claims under article 2 for compensation arising from deaths of serving soldiers during active military operations.

144. Support for the view that the Strasbourg court does recognise areas of policy into which the Convention protection does not stretch is afforded by two cases. First, in *Taylor v United Kingdom* (Application No 23412/94) (unreported) 30 August 1994, the Commission held that article 2 did not require the investigation into the killing by Beverley Allitt, a hospital nurse, of child patients to enquire into the responsibility in the NHS for alleged inadequate systems, resource shortages and weak leadership. In holding the application manifestly ill-founded and inadmissible, it stated:

> "The Commission acknowledges that neither the criminal proceedings nor the Inquiry addressed the wider issues relating to the organisation and funding of the National Health Service as a whole or the pressures which might have led to a ward being run subject to the shortcomings apparent on Ward Four. The procedural element

> contained in article 2 of the Convention however imposes the minimum requirement that where a state or its agents potentially bear responsibility for loss of life, the events in question should be subject to an effective investigation or scrutiny which enables the facts to become known to the public, and in particular to the relatives of any victims. The Commission finds no indication that the facts of this case have not been sufficiently investigated and disclosed, or that there has been any failure to provide a mechanism whereby those with criminal or civil responsibility may be held answerable. The wider questions raised by the case are within the public domain and any doubts which may consequently arise as to policies adopted in the field of public health are, in the Commission's opinion, matters for public and political debate which fall outside the scope of article 2 and the other provisions of the Convention."

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

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

146. In my opinion therefore this Court should proceed on the basis that the policy considerations which guide its domestic law in the present area of national interest will find an echo in Strasbourg, and not invade a field which would involve, in the context of claims for civil compensation, extensive and highly sensitive review with the benefit of hindsight the United Kingdom's country's policies, strategy and tactics relating to the deployment and use of its armed forces in combat. The United Kingdom's performance of its investigatory and procedural duties under article 2 is not in doubt, as attested by the sadly numerous inquests (investigating and recording the circumstances of each death) and the still incomplete Chilcot Enquiry (delayed inter alia it is understood by problems relating to the release or use of documents with national security implications). The issue with which this judgment is concerned is whether deaths and (at common law) injuries in combat fall to be investigated in the civil courts, at whatever level in the armed forces, Whitehall or the government responsibility for them is suggested to arise. The answer I would give is, no.

The majority approach

147. I agree with Lord Hope (para 100) about the "paramount importance that the work that the armed services do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong". But I do not consider that the majority approach reflects or meets this imperative. In summary, I understand that this approach:

> (a) recognises at common law a principle of combat immunity, as excluding "liability for negligence in respect of any act or omission on the part of those who are actually engaged in active combat" (paragraph 82), since "no-one can imagine a court undertaking the trial of an issue as to whether a soldier on the field of battle or a sailor on his ship might reasonably be more careful to avoid causing civil loss or damage" (para 94);
>
> (b) recognises allegations as "beyond the reach of article 2 …. if they relate to things done or not done when those who might be thought to be responsible for avoiding the risk of death or injury to others were actively engaged in direct contact with the enemy" (para 76), and extends this to "operational decisions made on the ground by commanders, whatever their rank or level of seniority" (para 64); but also;
>
> (c) suggests that liability (under the *Osman v United Kingdom* principle, (1998) 29 EHRR 245, para 115) for failure to take preventative operational measures in the face of a real, direct and immediate threat to life "could extend to procurement decisions taken on the ground about the provision of vehicles or equipment, as well as to decisions taken about their deployment" (para 78);
>
> (d) recognises that the more "political (in a broad or narrow sense)" a decision, the slower a court should be to impose liability at common law and/or under article 2 (para 65), so that it will easy to find that allegations are beyond the reach of article 2 and do not give rise to liability in common law negligence if they concern "decisions that were or ought to have been taken about training, procurement or the conduct of operations …. at a high level of command and closely linked to the exercise of political judgment and issues of policy" (paras 76 and 99).

148. It is unclear to me whether on this approach liability is said to be "beyond the reach" of article 2 because of its nature or simply because of an injunction that

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

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

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

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

Conclusion

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

LORD CARNWATH

Introduction

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

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

155. I also agree with Lord Mance that, contrary to the approach adopted by Lord Hope, we should first concentrate on the common law aspects of the claims. In this respect, the balance of the relevant issues may have been distorted by the

sequence of submissions at the hearing. It is understandable, given the importance of the jurisdictional issues arising under the Convention, that much of the oral hearing time was taken up with submissions on that subject, and as a natural extension with arguments about the substantive scope of article 2 itself.

156. On the latter aspect, I have nothing to add to Lord Mance's reasoning and conclusions, with which I agree. However, like him, I consider that our primary responsibility should be for the coherent and principled development of the common law, which is within our own control. We cannot determine the limits of article 2. Indeed, the multiplicity of views expressed by the nine members of this court, when this issue was previously considered in *Catherine Smith*, shows how difficult and unproductive it can be, even at this level, to attempt to predict how Strasbourg will ultimately draw the lines. The trial judge will be in no stronger position. With respect to Lord Hope (para 79), if the problem is a lack of directly relevant guidance from Strasbourg, it is hard to see how, simply by hearing further evidence or finding further facts, he or she will be better able to fill that gap, still less to do so "with complete confidence".

Common law - the nature of the issues

157. It is important to recognise that we are being asked to authorise an extension of the law of negligence (as indeed of article 2), into a new field. We have not been referred to any authority in the higher courts, in this country or any comparable jurisdiction, in which the state has been held liable for injuries sustained by its own soldiers in the course of active hostilities. Further we are concerned only with duties at common law, rather than under statute. As the Court of Appeal recognised [2013] 2 WLR 27 (para 38), statutory regulations governing the responsibilities of the Ministry as employers do not apply outside the United Kingdom.

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

159. There is some common ground. There is no dispute as to the existence in domestic law of a principle known as "combat immunity", relating to decisions and actions in the "heat of battle". Furthermore, at the other end of the spectrum

Lord Hope accepts, as I understand it, that "high level" decisions about procurement or conduct of operations are not open to review in the courts. This dichotomy is most clearly stated in his para 76:

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

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

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

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

162. The answer to that question raises issues of principle, policy and practicality. Mr Weir QC rightly emphasises that the importance of another policy consideration, the principle that "where there is a wrong there should be a

remedy", described by Lord Dyson JSC as "a cornerstone of our system of justice" (*Jones v Kaney* [2011] UKSC 13; [2011] 2 AC 398, para 113). From that principle he draws the submission that:

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

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

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

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

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

Working by analogy

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

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

Police "immunity"

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

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

> "…the Court is not persuaded that the House of Lords' decision that as a matter of law there was no duty of care in the applicants' case may be characterised as either an exclusionary rule or an immunity which deprived them of access to court… the House of Lords was concerned with the issue whether a novel category of negligence, that is a category of case in which a duty of care had not previously been held to exist, should be developed by the courts in their law-making role under the common law. *The House of Lords, after*

> *weighing in the balance the competing considerations of public policy, decided not to extend liability in negligence into a new area*. In so doing, it circumscribed the range of liability under tort law." (para 96, emphasis added)

Echoing that approach, in *Brooks v Comr of Police of the Metropolis* [2005] UKHL 24; [2005] 1 WLR 1495, the House confirmed but qualified the "core principle" established in *Hill*. In his leading speech Lord Steyn said:

> "…since the decision of the European Court of Human Rights in *Z v United Kingdom* (2001) 34 EHRR 97, 138, para 100, it would be best for the principle in *Hill's* case to be reformulated in terms of the absence of a duty of care rather than a blanket immunity." (para 27)

169. Finally, in *Van Colle v Chief Constable of the Hertfordshire Police* [2009] AC 225, the House by a majority held that the same principle applied even where the police were aware of a specific threat to an individual witness. That is particularly helpful in the present context because it was concerned with the scope of the state's liability both at common law and under article 2 of the Convention. I draw the following points from the judgments:

i) The common law claim was to be considered on its own merits ("stand on its own feet") rather than assimilated with the article 2 claim (para 82, per Lord Hope; para 136, Lord Brown).

ii) The common law analysis began from the three-fold test laid down in *Caparo* -

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

iii) The majority were able to support an exception based on "public policy reasons" which were accommodated within the third element of that test, that being accepted as –

> "… a price to be paid by individuals denied for public policy reasons (as not being 'fair, just and reasonable' within the *Caparo* principle…) a civil claim in the interests of the community as a whole" (para 139, per Lord Brown)

iv) There was no suggestion that, because the "core principle" involved an exception to ordinary principles of liability, it should be narrowly construed. On the contrary, as Lord Brown put it, "the wider public interest is best served by maintaining the full width of the *Hill* principle" (para 139).

v) The House was able to determine the limits of this principle on the basis of the pleadings. Again I quote Lord Brown (para 140):

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

vi) Finally, the policy considerations justifying immunity in respect of the police's function of investigating crime were contrasted with "civil operational tasks", in relation to which liability had been accepted in some decided cases (Lord Hope, para 79). Those examples were not regarded as undermining the core principle.

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

Negligence and the emergency services

171. Assuming a duty of care is not excluded under the principles considered so far, the closest analogies are to be found in cases relating to the duties owed by employees to their staff in the context of the delivery of emergency services. *King v Sussex Ambulance Service NHS Trust* [2002] ICR 1413 contains an authoritative exposition of the relevant principles. The Court of Appeal dismissed a claim related to injuries sustained by an ambulance technician, who was required in the course of an emergency call to help in carrying a patient downstairs. Hale LJ, giving the majority judgment, summarised the relevant law (paras 21-23):

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

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

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

and secondly (citing Colman J in *Walker v Northumberland County Council* [1995] ICR 702, 712):

> "what is reasonable may have to be judged in the light of the service's duties to the public and the resources available to it to perform those duties…"

172. In *Hughes v National Union of Mineworkers* ([1991] 4 All ER 278, cited by Lord Hope, para 97), this approach was taken a stage further so as to deny the existence of a duty of care at all. The claim was by a police officer who had been injured when, in the course of policing a strike at a colliery, he was knocked to the ground by an advancing crowd of pickets. He alleged negligence by the police officers on the day, rather than wider issues relating to police deployment generally or training (p 281a). The claim was rejected. It was held by May J, applying *Caparo* principles, and following *Hill v Chief Constable of West Yorkshire* that –

> "… public policy requires that senior police officers should not generally be liable to their subordinates who may be injured by rioters or the like for on the spot operational decisions taken in the course of attempts to control serious public disorder. That, in my judgment, should be the general rule in cases of policing serious public disorders." (p 288d-e).

173. In *Multiple Claimants* (at para 2.C.17) Owen J treated *Hughes* as example of the application of the combat immunity defence, noting that it had been cited in that context by the Court of Appeal in *Mulcahy v Ministry of Defence* [1996] QB 732, ((at pp 747, 751). He was considering the question:

> "Does the immunity apply to anti-terrorist, policing and peace-keeping operations of the kind in which British forces were engaged in Northern Ireland and in Bosnia?" (para 2.C.17)

He gave a qualified yes, concluding that the immunity would apply to "peace-keeping/policing operations in which service personnel are exposed to the attack or threat of attack" (para 2.C.20).

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

175. The decisions in both *King* and *Hughes* were concerned with the operations, rather than with prior policy decisions about the nature of the service and the resources to be committed to them, or issues such as procurement and training. To illustrate the possible limits of "operational" liability in relation to the emergency

services, a useful analogy can be found in *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242. The police were held liable by Taylor J for damage caused by firing a gas canister into the plaintiff's premises without having fire-fighting equipment available. On the other hand (relying on *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, and cases following it) the judge rejected a claim based on the failure of the Chief Constable to equip the force with an alternative CS gas device, known as "Ferret", which did not carry the same fire risk. In that respect he accepted the submission that the constable was exercising a statutory discretion which could not be impugned if exercised bona fide (pp 1250-1251). That decision, which is cited by *Wade* (op cit p 656) as an illustration of the "policy-operational decision", has not as far as I aware been questioned in later authority.

Statutory intervention

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

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

> "The Secretary of State shall not make an order reviving the effect of the said section 10 for any purposes unless it appears to him necessary or expedient to do so—
>
> > (a) by reason of any imminent national danger or of any great emergency that has arisen; or

> (b) for the purposes of any warlike operations in any part of the world outside the United Kingdom or of any other operations which are or are to be carried out in connection with the warlike activity of any persons in any such part of the world."

178. Although we were not referred by the parties to any background materials relating to that change, the Parliamentary history is of some interest. A written answer by the Secretary of State for Defence explains that it followed a review of the working of section 10 (Hansard HC Deb 08 December 1986 vol 107 cc85-86W). He said:

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

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

179. This invitation was taken up by Mr Winston Churchill MP (HC Deb 13 February 1987 vol 110 cc567-609). The Parliamentary Under-Secretary of State, welcoming the Bill on the part of the government commented:

> "The Bill seeks to retain the power to reactivate section 10 at a time of great national emergency or in the event of actual or impending hostilities. That is widely accepted by the House. Indeed, I have not

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

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

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

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

in so far as liability is so established that the scope of immunity under the Act becomes relevant.

183. Finally, under this section, it is of interest to note how similar issues have been dealt with in the USA, although again we have not heard any submissions on this aspect. Until 1946 claims against the Federal Government without its consent were barred by the doctrine of sovereign immunity. This position was altered by the Federal Tort Claims Act ("FTCA"), 28 U.S.C.A §1346(b), which can be seen as the equivalent of the Crown Proceedings Act 1947 in the United Kingdom. The FTCA abrogated sovereign immunity in relation to the Federal Government in most circumstances. However, pursuant to 28 U.S.C.A. §2680(j), the sovereign immunity of the Federal Government is not abrogated in respect of "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war".

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

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

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

Conclusions

185. I have discussed these issues at some length, albeit in a minority judgment, because in my view they deserve greater attention than they have been given in the oral argument or the majority judgment. They remain matters which will need to

be considered when the case goes to trial. In this respect I do not regard my analysis as conflicting significantly with the majority's approach. The main difference is that I would have preferred to reach decisions at this stage.

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

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

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