

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL  
CIVIL DIVISION (ENGLAND & WALES)

B E T W E E N:

SUSAN SMITH and others

Appellants / Cross-Respondents

- v -

THE MINISTRY OF DEFENCE

Respondent / Cross-Appellant

EQUALITY AND HUMAN RIGHTS COMMISSION

-and-

JUSTICE

Interveners

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CASE FOR THE INTERVENER JUSTICE

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Introduction

1. On 24 January 2013 JUSTICE was granted permission to intervene in these proceedings by way of written and oral submissions. JUSTICE confines its submissions solely to the 'jurisdiction issue': whether British soldiers operating outside UK-controlled territory are 'within the jurisdiction' of the UK for the purposes of Article 1 of the European Convention on Human Rights ('the Convention').
2. JUSTICE's written case is structured as follows:

- A. Overview of JUSTICE's case
- B. State agent authority and control: the primary exception to territorial jurisdiction
- C. State agent authority and control: soldiers under Article 1
- D. State agent authority and control in AI-Skeini: exercise of public powers
- E. Dividing and tailoring Convention rights
- F. The Court of Appeal's misinterpretation of AI-Skeini
- G. Consequences of the Court of Appeal's approach
- H. Public international law
- I. The status of Catherine Smith in the light of AI-Skeini
- J. Conclusion

#### **A. Overview of JUSTICE's case**

- 3. JUSTICE submits that the decision of the Court of Appeal in this case cannot stand in the light of the Grand Chamber judgment in *AI-Skeini v United Kingdom* (2011) 53 EHRR 18 (GC) ('AI-Skeini').
- 4. The Court of Appeal wrongly distinguishes AI-Skeini by reference to *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1 ('Catherine Smith'), where the majority held, for differing reasons, that British soldiers operating outside UK-controlled territory are not 'within the jurisdiction' of the UK for the purposes of Article 1 of the Convention.<sup>1</sup> Three members of the Supreme Court (Lady Hale,<sup>2</sup> Lord Mance and Lord Kerr) concluded that they are.
- 5. In summary, by reference principally to the judgment in AI-Skeini – which closely resembles the earlier reasoning of Lord Mance in Catherine Smith – JUSTICE submits that:

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<sup>1</sup> It is well-established that the reach of the Human Rights Act 1998 is coterminous with Article 1 of the Convention: see Lord Phillips in *Catherine Smith* at §5.

<sup>2</sup> Lady Hale considered that, as the jurisdiction issue did not arise on the facts before the Court, all the judgments were obiter and that the views expressed therein were 'not binding, but they are of course persuasive': §§135-8. See also §129 (Lord Walker); §223 (Lord Collins); §2 (Lord Phillips); §159 (Lord Mance).

- (a) Jurisdiction under Article 1 is 'primarily territorial'. 'Whether exceptional circumstances exist which require and justify a finding ... that the state was exercising jurisdiction extra-territorially must be determined with reference to the particular facts'. But in deciding that question, there are a number of 'General principles relevant to [extra-territorial] jurisdiction under article 1 of the Convention', the primary one<sup>3</sup> being 'state agent authority and control' (Al-Skeini at §§131-3).
- (b) Under Strasbourg case law, extra-territorial jurisdiction arises whenever a state exerts authority and control over individuals abroad. It also arises whenever state agents exercise effective de facto control and authority over persons outside the state's territory<sup>4</sup> (Al-Skeini, §137, Catherine Smith §§174-183).
- (c) Soldiers are subject to UK military law wherever they serve and are entitled to bring claims under UK law against the state in respect of conduct occurring outside the UK (Catherine Smith, §§189-190). In international law the UK has near absolute responsibility and control – and hence jurisdiction – over its soldiers (Catherine Smith, §191). The UK's jurisdiction over its armed forces is essentially personal and not territorial (Catherine Smith, §192, §194).
- (d) In exchange for their complete allegiance and obedience to the UK, and reflecting the fact that they are subject to the control and authority of the UK (including UK criminal law) wherever they are, British soldiers are entitled to the protection of UK law at all times. This includes the protection of the Human Rights Act 1998 ('HRA') (Catherine Smith, §192, §199).
- (e) Because of the exceptional nature of extra-territorial jurisdiction, where jurisdiction is founded on personal control and authority over

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<sup>3</sup> State agent authority and control is the first example of extra-territoriality considered by the Court. It is addressed before, and at greater length than, effective territorial control.

<sup>4</sup> This category extends, for example, to military operations conducted in foreign territories where the state is not an occupying power (lawful or otherwise).

an individual, the state's duty to secure Convention rights may be tailored according to all the circumstances (Al-Skeini, § 137). This resolves any perceived pragmatic concerns regarding the state's ability to secure the full range of Convention rights outside territory which it controls (Catherine Smith, §§193-194).

6. The Grand Chamber in Al-Skeini did not rule directly on the status of soldiers under the Convention, being instead concerned with the position of individuals who come into contact with soldiers conducting operations outside a military base. Nevertheless, the principles expounded in Al-Skeini are clear and impossible to reconcile with the reasoning of the majority in Catherine Smith or of the Court of Appeal in this case, as explained below. Their application in the present context can yield only one conclusion: that the soldiers in this case were within the jurisdiction of the UK for the purposes of Article 1 of the Convention.
7. The Supreme Court is effectively obliged to apply the unanimous reasoning of the Grand Chamber, even where there is a conflicting prior decision of the Supreme Court.<sup>5</sup> The Court's duty is 'to give practical recognition to the principles laid down by the Strasbourg Court' since 'the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles it lays down': Kay v Lambeth LBC [2006] 2 AC 465 per Lord Bingham at §28 (emphasis added).<sup>6</sup> Whatever latitude section 2(1) of the HRA may permit, 'the authority of a considered statement of the Grand Chamber is such that our courts have no option but to accept and apply it': Secretary

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<sup>5</sup> The Supreme Court is free to depart from its previous decisions when it appears correct to do so: Supreme Court Practice Direction §3.1.3, echoing Practice Statement (Judicial Precedent) [1966] 1 WLR 1234. '[I]t is obvious that the interests of human rights law would not be well served if the House were to regard itself as bound by a previous decision as to the meaning or effect of a Convention right which was shown to be inconsistent with a subsequent decision in Strasbourg. Otherwise the House would be at risk of endorsing decisions which are incompatible with Convention rights' per Lord Hope in R (Purdy) v Director of Public Prosecutions [2010] 1 AC 345 at §32-4.

<sup>6</sup> This duty is exemplified by the departure by the Supreme Court from the substantive ruling of the House of Lords in Kay, following subsequent Strasbourg case law, in Manchester City Council v Pinnock [2011] 2 AC 104 at §48.

of State for the Home Department v AF (No. 3) [2010] 2 AC 269 at §108.<sup>7</sup> As Lord Rodger explained in R(GC) v Metropolitan Police Commissioner [2011] 1 WLR 1230 at §103, when considering a decision of the House of Lords which could not be reconciled with a subsequent decision of the Grand Chamber, the former ‘must accordingly be overruled’.

8. There can be no question of having to wait for a direct Strasbourg ruling on the status of soldiers off base, even if this Court ‘ought not to construe article 1 as reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach’: R (Al-Skeini) v Secretary of State for Defence [2008] 1 AC 153 (‘Al-Skeini HL’) per Lord Brown at §107. Indeed, as Lord Brown more recently stated:

**‘Nobody has ever suggested that, merely because a particular question which arises under the Convention has not yet been specifically resolved by the Strasbourg jurisprudence, domestic courts cannot determine it – in other words that it is necessary to await an authoritative Strasbourg decision more or less directly in point before finding a Convention violation. That would be absurd.’ (Rabone v Pennine Care NHS Trust [2012] 2 AC 72 at §112)**

9. That principle has considerable additional force in the unusual circumstances of this appeal. The question raised in this appeal is now before the Strasbourg Court in Pritchard v United Kingdom (App. No. 1573/11). However, Pritchard has been adjourned pending this Court’s decision in the present case. The Strasbourg Court has, in adjourning Pritchard and by its clear reasoning in Al-Skeini, paved an unobstructed path for this Court to apply Article 1 to the case of a soldier off base in a manner consistent with the principles and reasoning of Al-Skeini.

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<sup>7</sup> Per Lord Carswell; see also Lord Brown at §§114, 121 and Lord Rodger at §98; R (Anderson) v Secretary of State for the Home Dept. [2003] 1 AC 837 at §18 (Lord Bingham); Cadder v HM Advocate [2010] 1 WLR 2601 at §46 (Lord Hope) and §93 (Lord Rodger); HM Treasury v Ahmed [2010] 2 WLR 378 at §74 (Lord Hope).

**B. State agent authority and control: the primary exception to territorial jurisdiction**

10. The Grand Chamber's unanimous judgment in *Al-Skeini* dispels any lingering doubt that 'state agent authority and control' is a general, free-standing basis for establishing jurisdiction under Article 1, contrary to the express submissions of the Secretary of State in *Catherine Smith* at §17.
11. The Grand Chamber at §§133-136 identified three broad examples of jurisdiction under the heading 'state agent authority and control'. These align with those identified by Lord Mance in *Catherine Smith*:
  - (a) First, the Grand Chamber held that 'the acts of diplomatic and consular agents, who are present on foreign territory in accordance with the provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others' (*Al-Skeini*, §134). Lord Mance also recognised jurisdiction where 'the activities of [a state's] diplomatic or consular agents abroad and on board craft and vessels in, or flying the flag of, that state' (*Catherine Smith*, §179).
  - (b) Secondly, the Grand Chamber noted that jurisdiction exists where 'through the consent, invitation or acquiescence of the government of that territory [the state] exercises all or some of the public powers normally to be exercised by that government', citing as examples *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745 and *Gentilhomme, Schaff-Benhadj and Zerouki v France*<sup>8</sup> (*Al-Skeini*, §135). Lord Mance noted that 'certain relationships, such as those between a national judge and those under his or her authority, may attract the operation of the Convention, irrespective of whether they take place within the territory of the judge's state', again citing

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<sup>8</sup> Application Nos. 48205/99, 48207/99 and 48209/99 (unreported) 14 May 2002.

Drozd and Gentilhomme (Catherine Smith, §177).<sup>9</sup>

- (c) Thirdly, the Grand Chamber stated that ‘in certain circumstances, the use of force by a state’s agents operating outside its territory may bring the individual thereby brought under the control of the state’s authorities into the state’s art. 1 jurisdiction... What is decisive in such cases is the exercise of physical power and control over the person in question’ (Al-Skeini, §136). Similarly, Lord Mance identified cases where ‘state A exercises authority over an individual in state B by consent of state B, and... it does so in order to lead to exercise of state A’s ordinary domestic jurisdiction over that individual’, giving the example of ‘forcible removal by state A from state B and with state B’s consent’ (Catherine Smith, §§174-175).
12. The Grand Chamber identified that these examples were merely manifestations of a broader general principle, namely that, jurisdiction arises ‘whenever the state through its agents exercises control and authority over an individual’ (§137).
13. In Catherine Smith, Lord Mance also identified a single general principle, viz. ‘the exercise by state A abroad of state power and authority over individuals, particularly nationals of state A, by consent, invitation or acquiescence of the foreign state B’ (§183). He concluded that soldiers of an occupying force were in an analogous position to those present with the host state’s consent for the purposes of this general principle. The Grand Chamber did not see consent of the host state as a potentially relevant factor for the purposes of the operation of the general principle of state agent authority and control, albeit that the issue of consent had been relevant in some cases where jurisdiction had been established.
14. Post Al-Skeini, it is clear that the starting point for the establishment of jurisdiction based on state agent authority and control is de facto authority

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<sup>9</sup> The Drozd principle is further supported by the applicability of the Convention to UK courts martial held outside the UK: see Al-Skeini HL at §§39-42 and 140, giving the example of Scottish judges sitting in Holland in the Lockerbie case.

and control. Consent or acquiescence of the 'host' state cannot be a precondition of establishing jurisdiction. The Strasbourg jurisprudence contains no such limitation. It expressly countenances jurisdiction arising where state agents exercise authority and control over individuals without the consent of the host state. This includes where the state takes control of a territory outside its jurisdiction, either lawfully or unlawfully (Issa v Turkey (2005) 41 EHRR 27, Isaak v Turkey (App. No. 44587/98, 28 September 2006 (Admissibility)), Solomou v Turkey (App No. 36832/97, 24 June 2008) and Pad v Turkey (App. No. 60167/00, 28 June 2007 (Admissibility)) Issa at §71, Isaak at p20, Solomou at §45, Pad at §53). It would be anomalous if consent were an essential factor for the purposes of jurisdiction in cases where a state is exercising control over a group of persons; but not over an area or territory. De facto control, rather than the circumstances by which that control came to be, was accepted by the Court as the key issue by the Grand Chamber in Medvedyev v France (2010) 51 EHRR 39 (GC), §67.<sup>10</sup>

15. The reasoning in Al-Skeini also corresponds exactly with Lord Kerr's judgment in Catherine Smith. Lord Kerr agreed with Lord Phillips that the Strasbourg Court had not yet expounded a principle that jurisdiction automatically arises whenever a state exercises legislative, judicial or executive authority which affects a Convention right of a person. However, he held that 'where the exercise of such authority is combined with control over the individual affected, it appears that the extra-territorial extension of jurisdiction is undeniable' (§329, emphasis added). Thus, Lord Kerr correctly anticipated the Al-Skeini statement of principle that extra-territorial jurisdiction arises 'whenever the state through its agents exercises control and authority over an individual' (§137).

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<sup>10</sup> Any other outcome would create anomalous and arbitrary consequences. Civilians in an illegally invaded state would be denied the protection of the Convention, whereas civilians in lawfully occupied states would be protected. Likewise, a soldier deployed in an illegal invasion would enjoy no Convention protection, whereas a soldier deployed in a legal invasion would be protected.

16. Lord Kerr identified the touchstone of personal jurisdiction as the exercise of 'effective control' (§329) or 'effective power' (§330) over a person:

**'[W]here the control of an individual is of a sufficiently comprehensive nature as to qualify for the description, 'effective power', there is no reason in logic or principle that he should not be regarded as being within the jurisdiction of the state which wields that power over him. If a state can 'export' its jurisdiction by taking control of an area abroad, why should it not equally be able to export jurisdiction when it takes control of an individual?' (§330)**

**C. State agent authority and control: soldiers under Article 1**

17. Al-Skeini establishes that jurisdiction arises 'whenever the state through its agents exercises control and authority over an individual' (§137). The language of the Grand Chamber is clear and unqualified.
18. The state's ability to bring individuals within its jurisdiction through the agency of its soldiers presupposes a high degree of control and authority over the soldiers themselves. The assimilation of soldiers' acts with acts of the state for the purposes of Article 1 reflects a relationship of overriding subordination and obedience, on the one hand, and command and authority, on the other.
19. British soldiers serving abroad are under the complete control of the UK authorities and are subject exclusively to UK law. The armed forces operate on a 'hierarchical basis' the 'essence' of which is 'obedience to orders': see R v HM Attorney-General [2003] UKPC 22, [2004] 1 LRC 132 per Lord Scott at §41. The principal legislation that regulates the Armed Forces applies to soldiers wherever they are in the world.<sup>11</sup>
20. In Catherine Smith Lord Kerr observed that the control the UK has over its

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<sup>11</sup> See the Armed Forces Act 2011, Explanatory Note 13: 'The Act is part of the law of every part of the United Kingdom. It may also be extended by Order in Council to the Channel Islands, the Isle of Man and British overseas territories. The provisions applicable to members of the armed forces will apply to them wherever they are in the world.'

soldiers is 'as complete as it is possible in today's world to be' (§319). They are subject to compulsion, underpinned by the possibility of prosecution and imprisonment for disobedience, to comply with all lawful orders.<sup>12</sup> Further, the UK 'brought its soldiers into Iraq' and 'not only asserted complete authority over them while they remained there', but also 'explicitly excluded the exercise of authority over those soldiers by any other agency or state' (§322).

21. It is instructive to recall the submission of the respondent Governments, including the UK Government, in *Bankovic v Belgium* (2001) 11 BHRC 435 (GC):

**'The exercise of "jurisdiction" ... involves the assertion or exercise of legal authority, actual or purported, over persons owing some form of allegiance to that state or who have been brought within that state's control. They also suggest that the term "jurisdiction" generally entails some form of structured relationship normally existing over a period of time.'** (Submission recorded in the Court's judgment at §36.)

22. Whilst *Al-Skeini* demonstrates that the respondent Governments were wrong to contend in *Bankovic* that extra-territorial jurisdiction is restricted to this situation, their submissions in *Bankovic* must mean that it cannot plausibly be maintained that it does not include this situation. The relationship of soldier and state is the paradigm case of allegiance and control arising from a structured, long-term relationship.

23. As Lord Mance said in *Catherine Smith* at §192:

**'The relationship between the United Kingdom and its armed forces is effectively seamless. Members of the armed forces serve under the same discipline and conditions wherever they are, and they are required to go wherever they are ordered. The relationship is not territorial, it depends in every context and respect on a reciprocal bond, of authority and control on the one hand and allegiance and obedience on the other.'**

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<sup>12</sup> A soldier who deliberately or recklessly disobeys a lawful order may be punished by up to ten years' imprisonment: s.12 Armed Forces Act 2006.

24. The conclusion of this analysis – that British soldiers are within the UK’s jurisdiction under Article 1 whenever they are operating abroad – reflects the cardinal principle that ‘[h]e who is subject to English law is entitled to its protection’: *R v Secretary of State for the Home Department, ex p Khawaja* [1984] AC 74 at §111, per Lord Scarman, applied in *A v Secretary of State for the Home Department* [2005] 2 AC 68 at §48, per Lord Bingham. There can be no principled reason to deny British soldiers the protection of their fundamental rights under the HRA, when they are subject to the rest of UK law wherever they may be.<sup>13</sup>

#### **D. State agent authority and control in Al-Skeini: exercise of public powers**

25. At §§143-150 in *Al-Skeini* the Grand Chamber applied the principles set out at §§133-137 to the facts of the applicants’ cases. It observed that the UK and United States had created the Coalition Provisional Authority ‘to exercise powers of government temporarily’. These powers included ‘the provision of security in Iraq’. At §149 the Court set out its conclusions on jurisdiction:

**‘It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South-East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of art. 1 of the convention.’ (emphasis added)**

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<sup>13</sup> It can be no objection that British soldiers are only under the control and authority of the state as a result of their voluntary decision to enlist in the Armed Forces. Convention rights may only be waived if the waiver ‘does not run counter to an important public interest’ and is ‘attended by minimum safeguards commensurate with its importance’ (*Hermi v Italy* (App. No. 18114/02, 18 October 2006 (GC) at §73)). The waiver must be established in an unequivocal manner, in full knowledge of the facts and on the basis of informed consent (*D.H. v Czech Republic* (App. No. 57325/00, 13 November 2007 (GC) at §202). Neither condition is satisfied in the case of soldiers serving in the British Armed Forces. If correct, it would mean that conscripted soldiers enjoyed greater protection of their human rights than non-conscripted ones.

26. The analysis of the factual background at §§143-148 and the words ‘the exercise of some of the public powers normally to be exercised by a sovereign government’ (at §149) demonstrate that the Court was applying the category of state agent authority and control discussed at §135 (where ‘a contracting state... exercises all or some of the public powers normally to be exercised by that government’). Jurisdiction arose because the UK, through its soldiers, exercised public functions (namely ‘responsibility for the maintenance of security in South East Iraq’) that would normally be exercised by the Iraqi Government. It thereby brought within its jurisdiction everyone who was potentially affected by the performance of those functions.
27. It is clear, therefore, that the applicants’ relatives were not brought within the UK’s jurisdiction by the exercise of physical power and control over them by British soldiers. The third applicant’s wife, for example, was an innocent bystander killed in her home by a bullet fired during an exchange of fire between British soldiers and unidentified gunmen. Plainly, she was not under the physical control of British troops: she was never held in custody and had no interaction with any soldiers before the fatal shot was fired. Nor can jurisdiction have arisen through the gunshot itself, since the Court does not recognise ‘instantaneous’ extra-territorial acts (see *Medvedyev v France* (2010) 51 EHRR 39 (GC), §64 and Lord Mance in *Catherine Smith* at §169, explaining *Bankovic*) and because, in any event, it was unclear which side fired the fatal bullet (*Al-Skeini*, §150). It necessarily follows that the applicants were within the UK’s jurisdiction before the specific acts that caused their deaths.
28. In *Catherine Smith*, Lord Mance applied the general principle of ‘state power and authority over individuals’ and concluded that British soldiers were within the UK’s jurisdiction for the purposes of Article 1 (§183, §192). JUSTICE endorses Lord Mance’s reasoning. However, it also submits that the position of soldiers can, if necessary, fall within the second category of state agent authority and control identified at §135 in *Al-Skeini*.

29. Establishing and maintaining a sufficient<sup>14</sup> military presence in an overseas territory is a quintessentially public function: it involves the exercise of sovereign authority over armed forces owing allegiance to the state and represents a classic state activity. Accordingly, whenever a state establishes such a military presence on foreign territory it necessarily 'exercises... some of the public powers' normally exercised by the Government of that territory. *Al-Skeini* demonstrates that all persons potentially affected by those powers are brought within the state's jurisdiction by the exercise of military powers. This must logically include the individual soldiers through whose agency that public function is performed.

#### **E. Dividing and tailoring Convention rights**

30. In *Catherine Smith* Lord Kerr emphasised the illogicality of soldiers being within the UK's jurisdiction for all purposes except for Article 1: 'To suggest... that soldiers are within the jurisdiction of the United Kingdom for every conceivable purpose other than article 1 seems to me to involve the acceptance of one anomaly too many.' (§325). He rightly posed the question why that should be so and noted that there had been no satisfactory reply (§317).

31. The Secretary of State's answer in *Catherine Smith* was that, on the premise that it is impossible to secure the whole package of Convention rights for soldiers serving abroad, it should be concluded that they cannot be within the UK's jurisdiction for Article 1 purposes (§326). The claimant contended for the opposite conclusion: that Article 1 jurisdiction was established and carried with it the whole package of Convention rights (see the submission recorded at [2011] 1 AC 1 at 70E that the 'divided and tailored rule' only applies to 'effective control of an area' jurisdiction).

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<sup>14</sup> The question whether a military presence might alone give rise to jurisdiction, absent the UK assuming responsibility for maintaining security, did not arise on the facts of *Al-Skeini* or *Catherine Smith* and does not arise on the facts of the present cases. Following *Al-Skeini*, whether the circumstances of a particular military intervention or activity will attract jurisdiction by virtue of the nature of its function would appear to involve a factual assessment on a case by case basis.

32. The argument in *Catherine Smith* was thus wrongly polarised between two extreme positions: that soldiers off base either enjoyed all Convention rights, or none. In fact, as Lord Kerr identified (§§327-328) and as the Grand Chamber has now authoritatively determined in *Al-Skeini*, it is in the 'state agent authority' scenario that the 'divided and tailored' principle applies.
33. Notwithstanding that polarisation, both the majority and the minority in *Catherine Smith* recognised that Convention rights are capable of being divided and tailored to particular factual situations, so that the applicability of the Convention is not a binary choice:
- (a) Lord Phillips noted that the Strasbourg case law recognised situations where a person was 'within the jurisdiction' in relation to 'those rights that are affected'. In such cases 'there can be no question of the 'whole package principle' applying' (§42).
  - (b) Lord Mance explained that in cases falling within the exceptional categories 'the state's Convention duties are limited to those falling within the scope of the relationship giving rise to the exception in question' (§193). The UK would not be expected to provide the full social and protective regime that it must provide domestically (§194).
  - (c) Lord Collins stated the Strasbourg case law suggested that 'some qualification is necessary to the principle of indivisibility of Convention rights... there may be cases in which a person may be within the jurisdiction of a contracting state for limited purposes only' (§302).
  - (d) Lord Kerr said there were 'certain settings in which the 'whole package' principle does not apply'. There is no 'invariable pre-condition that one must be able to have access to the entire panoply of Convention rights in order to be able to claim that one is within the jurisdiction of the member state for the purposes of article 1' (§327).
34. Following *Al-Skeini*, the divisibility of Convention rights where jurisdiction is

based on state agent authority is now beyond dispute. The Grand Chamber held at §137:

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

35. The position is different where jurisdiction is based on effective control of an area.<sup>15</sup> The Grand Chamber held at §138:

**'The controlling state has the responsibility under art. 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified.'**

36. As Lord Kerr explained in *Catherine Smith*, it makes sense to apply a 'whole package' principle where it is being asserted that a state has extra-territorial jurisdiction by virtue of its effective control of an area of another state, since '[i]n that instance the capacity of the state (or its lack of capacity) to deliver [all the protections secured by the Convention] can be seen as a measure of the extent of its control of the territory' (§328). By contrast, whilst it may in certain circumstances be possible to secure all Convention rights to an individual who is outside an area of effective control, the appropriate test is a combination of the nature and degree of authority and control exercised over the individual together with the prevailing circumstances in the territory in which they are present.

37. The consequence is that, when on the UK base, the soldier enjoys the full range of Convention rights, whereas when off base the soldier's rights are tailored according to the circumstances. Other individuals affected by soldiers are treated comparably: they enjoy the full basket of Convention

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<sup>15</sup> c.f. In *Ila•cu v Moldova and Russia* (2005) 40 EHRR 46 (GC) at §§331-3, the Grand Chamber applied the Convention in qualified form where Moldova had lost effective control over part of its territory following a separatist uprising (considered by Lord Mance at §193 in *Catherine Smith*).

rights when held on base, but their rights are similarly tailored when off base.

38. The ability to divide and limit Convention rights in this way (to the extent that this is genuinely and strictly necessary) meets the 'pragmatic' objection raised by the Secretary of State in Catherine Smith. There is no question of the UK being subject to an impossible burden. Nor, contrary to Lord Collins' misgivings (§308), does the applicability of Convention rights to soldiers off base necessarily lead to the courts being called upon to decide non-justiciable issues concerning the conduct of armed hostilities.

#### **F. The Court of Appeal's misinterpretation of Al-Skeini**

39. Unlike the Supreme Court in Catherine Smith, the Court of Appeal in the present case did have the benefit of the Grand Chamber's judgment in Al-Skeini. However, as set out below, the Court of Appeal misinterpreted and failed properly to apply the principles identified in that judgment.

40. Having cited the statement of principle at Al-Skeini §137, Moses LJ held at §26:

**'That passage is no authority for the proposition that because a state's armed authorities may be said to be under the control and authority of the state it follows that they too are within the scope of the state's Convention jurisdiction. As the Grand Chamber makes clear in the preceding paragraph and, in particular, in the passage I have cited from paragraph 136, its reference to "authority and control" is a reference to bringing individuals within the power and control of a state in circumstances analogous to detention and internment. In essence the source of the Convention jurisdiction is the action of the state in bringing an individual within its custody, power and control.'**

41. This is an incorrect reading of Al-Skeini. Moses LJ was wrong to read §137 as being concerned only with the cases of physical control described in §136:

- (a) First, it is clear from the structure of this part of the Grand Chamber's judgment that the situations described at §134, §135 and §136 are specific applications of the general principle identified at §137. This is

clear from the broad and unconditional language of §137: 'It is clear that, whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction...' That statement also corresponds with the heading 'state agent authority and control' which the Court uses to embrace all three categories described at §§134-136 as non-exhaustive examples of the general principle.

- (b) Secondly, §137 states that Convention rights can be divided and tailored 'whenever the state through its agents exercises control and authority over an individual'. The Court cannot have intended to confine this principle to the specific category of case described at §136. If it had, then the judgment would leave uncertain the position under the first and second categories of state agent authority and control (§§134-135). Either Convention rights can be divided and tailored in those cases (in which case it would be surprising that the Court did not say so) or they cannot. If they cannot, this produces the anomalous outcome that rights can only be divided and tailored in situations where physical power and control is exercised over a person – the category of personal jurisdiction most closely aligned to 'effective control over an area', in respect of which the Court has expressly stated that rights cannot be divided and tailored (§138).
- (c) Thirdly, it is wrong to suggest that the Court's reference to 'authority and control' in §137 is 'a reference to bringing individuals within the power and control of a state in circumstances analogous to detention and internment'. In §134 the Court uses the expression 'authority and control' in relation to the acts of diplomatic and consular agents. Diplomatic and consular agents do not usually perform detention functions. None of the cases cited by the Court as examples of this category<sup>16</sup> involves a restriction on the applicants' liberty.

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<sup>16</sup> X v Federal Republic of Germany, 25 September 1965; X v United Kingdom (1977) 12 DR 73; WM v Denmark (App no 17392/90, Commission decision of 14 October 1993).

(d) Fourthly, in applying the principles to the facts in *Al-Skeini*, the Strasbourg Court held that all the applicants were within the 'authority and control' of the UK's soldiers without drawing any analogy with detention or internment. Moreover, had the Court applied such a test, it is difficult to see how it could have been met on the facts. For example, the third applicant's wife was an innocent bystander killed by a stray bullet in an exchange of gunfire between British soldiers and unidentified gunmen. Her position cannot be compared to detention or internment, yet she too was within the UK's jurisdiction.

42. In summary, therefore, Moses LJ was wrong to interpolate an additional hurdle to the establishment of Article 1 jurisdiction whereby the particular type of 'authority and control' exercised by state agents must be analogous to detention and internment.

43. Once that point is recognised, the remainder of Moses LJ's analysis falls away. The acceptance at §27 that the armed forces of a state are under the state's authority and control was correct, but the qualification 'but not in the sense described by the Grand Chamber' was not. In order to reconcile his analysis to the result in *Al-Skeini*, Moses LJ was driven to assert at §28 that '[t]he situation of the civilians killed in security operations in Basra was analogous to those detained in custody', which, as explained above, is unsustainable.

44. Further, Moses LJ suggested at §§29-30 that the result in *Al-Skeini* shows that the two sources of extra-territorial jurisdiction examined in detail by the Grand Chamber are cumulative rather than alternative tests. That suggestion is contrary to the whole structure and content of the Grand Chamber's analysis. As is clear from its judgment, the Grand Chamber did not hold that the UK exercised effective territorial control over any area of Iraq. It made no finding whatsoever about the degree of territorial control exercised by the UK. Contrast the detailed factual findings in this regard in cases which have been decided on the 'effective control over an area' basis of jurisdiction, e.g. *Ila•cu v Moldova and Russia* (2005) 40 EHRR 46 (GC) at §§388-394 (cited in *Al-*

Skeini at §139).

45. Moreover, the conflation of the two bases for extra-territorial jurisdiction advocated by Moses LJ would be unworkable in circumstances where, as explained above, the Grand Chamber drew a clear distinction between the two bases as regards whether the state is required to secure the 'whole package' of Convention rights. That important distinction in the legal consequences of jurisdiction would make no sense if 'state agent authority and control' jurisdiction could only ever be established where 'effective control over an area' jurisdiction was also present. There would never be any cause to divide and tailor Convention rights in the way the Court envisaged and was so careful to elucidate.
46. In fact, contrary to the suggested conflation of the two bases for jurisdiction, the Court has held on numerous occasions that effective control of territory by a state's armed forces is sufficient in itself to establish jurisdiction: see for example *Loizidou v Turkey* (1995) 20 EHRR 99 (Admissibility) §62, *Loizidou v Turkey* (1996) 23 EHRR 513 (Merits) §52; *Ila•cu v Moldova and Russia* (2005) 40 EHRR 46 (GC), §314. Contrary to §30 of the Court of Appeal's judgment, the Strasbourg Court has never imposed an additional qualification that the 'effective control over an area' must also be accompanied by the exercise of 'physical power and control' by state agents.
47. Further, the fact that control over individuals by state agents is a distinct and free-standing basis of jurisdiction, and that it was this basis that arose on the facts in *Al-Skeini*, has been put beyond doubt by a Grand Chamber decision handed down on the same day as the Court of Appeal's judgment:

**'The Court recalls that it has held that a State can, in certain exceptional circumstances, exercise jurisdiction extra-territorially through the assertion of authority and control by that State's agents over an individual or individuals, as for example occurred in *Al-Skeini* (cited above, §149). However, the Court has also held that a State can exercise jurisdiction extra-territorially when, as a consequence of lawful or**

**unlawful military action, a Contracting State exercises effective control of an area outside that national territory.**<sup>17</sup>

48. The Strasbourg Court has previously found violations of Convention rights on the basis of state agent authority and control where the acts in question occurred within a 'neutral UN buffer zone' – a paradigm example of territory that is not within the state's effective control.<sup>18</sup>

#### **G. Consequences of the Court of Appeal's approach**

49. On Moses LJ's analysis a state agent may bring individuals within the UK's jurisdiction through his actions without himself ever being within the UK's jurisdiction. This is illogical. By definition, the agent must be within the authority and control of the state himself – otherwise he could not properly be described as an agent of the state. It also overlooks the fundamental point that individual soldiers are under the authority and control of both the state itself (through the laws that dictate soldiers' rights, obligations and terms of service) and the state's agents (the commanding officers who issue binding orders which soldiers must obey).

50. The result reached by the Court of Appeal is also fundamentally unjust and ambiguous. The stark position reached by Moses LJ at §27 is that civilians, and even foreign insurgents, affected by the actions of soldiers have human rights, whereas the soldiers themselves have none. It would mean, for example, that the soldiers who killed the various Al-Skeini victims off base would not be within the UK's Article 1 jurisdiction, whereas the victims themselves were. Applying the Court of Appeal's reasoning, a civilian killed by a British soldier is caught by Article 1; but if a British soldier kills another British soldier the perpetrator is not caught and the position of the soldier who is killed is unclear. That position cannot be justified.

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<sup>17</sup> *Catan v Moldova and Russia* (App nos. 43370/04, 8252/05 and 18454/06, 19 October 2012 (GC)) at §114.

<sup>18</sup> See *Isaak v Turkey* (App. No. 44587/98, 28 September 2006 (Admissibility) and 24 June 2008 (Merits)) and *Solomou v Turkey* (App. No. 36832/97, 24 June 2008).

51. Contrast the principled statement of Lord Mance in Catherine Smith at §188:

**'In the context of Bankovic, the European Court may in para 60 have been thinking primarily of jurisdiction exercised by a state through occupying forces over local inhabitants. But to the extent that such jurisdiction exists, it does so only because of the 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 each case in the sense of article 1 of the Convention. That is not of course to equate a state's jurisdiction over third parties with its pre-existing and more widely based jurisdiction over its own armed forces...'**

52. For his part, Lord Phillips expressed reservations about accepting the logic of the proposition that state agents whose acts bring those affected by them within Article 1 jurisdiction must, in consequence, themselves also be within the Article 1 jurisdiction of the state whose agents they are (§52).

53. However, Al-Skeini shows that those reservations were misplaced. As the Grand Chamber explained at §§149-150, UK Article 1 jurisdiction in respect of the victims in Al-Skeini arose because they were killed during operations by UK state agents who had exercised authority and control over them, in circumstances where the UK had assumed some powers normally exercised by sovereign states. In other words, the vehicle or mechanism for establishing jurisdiction over the victims was the UK's soldiers and their actions.

54. That conclusion can only have arisen if the occupying state equally has Article 1 jurisdiction over its own agents. It cannot be correct that soldiers are to be treated as wearing a legal 'shield' that prevents them from being subject to their own state's Article 1 jurisdiction, whilst nevertheless conferring that same jurisdiction upon those with whom they come into contact.

55. Such a construction would be impossible to reconcile with the reasoning of the Commission in *Cyprus v Turkey* (1975) 2 DR 125, 136, which stated that: 'authorised agents of a State (including diplomatic or consular agents and armed forces) not only remain under its jurisdiction when abroad but bring other persons or

property 'within the jurisdiction' of that State, to the extent that they exercise authority over such persons or property.' That statement of principle was endorsed in *M v United Kingdom and Ireland* (App. No. 9837/82, 4 March 1987 (Admissibility)), §25; *W v Ireland* (1983) 32 DR 211, 28 February 1983 (Admissibility), §14; and *Loizidou v Turkey* (App. Nos. 15299/89, 15300/89, 15318/89, 4 March 1991 (Admissibility)), §32.

## **H. Public international law**

56. The position of soldiers under international law reinforces JUSTICE's analysis. In *Catherine Smith*, Lord Mance recognised the status of soldiers vis-à-vis the state in international law:

**'[I]t is in my view possible to give a clear answer to the question whether the United Kingdom had jurisdiction under international law over its armed forces wherever they were in Iraq. If the United Kingdom did not, then no state did. The invasion clearly and finally ousted any previous government. The United Kingdom was the only power exercising and having under international law authority over its soldiers... As an occupying power, the UK was necessarily in complete control of the armed forces by which it achieved such occupation, and had under international law 'an almost absolute power' as regards their safety (Oppenheim, para 169, above), as well as duties regarding the effective administration of Iraq and the restoration of security and stability, to be performed through such forces.'** (§191)

57. The application of the doctrine of state agent authority and control by other international human rights bodies also supports JUSTICE's submissions. For example, in relation to the International Covenant on Civil and Political Rights ('ICCPR'), the UN Human Rights Committee's General Comment No 31 of 29 March 2004 stated at §10 that:

**'[A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power and effective control of that State Party, even if not situated within the territory of the State Party... This principle also applies to those within the power or effective control of**

the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained...  
(emphasis added)

58. This broad reading of state agent authority and control is consistent with the Committee's earlier case law in *López Burgos v Uruguay*,<sup>19</sup> where the Committee decided that the subject of an extra-territorial arrest was within the state's jurisdiction for the purposes of the ICCPR. The Committee held that the expression 'individuals subject to its jurisdiction' in Article 1 of the Optional Protocol is not a reference to the location of the alleged violation 'but rather to the relationship between the individual and the State' (§12.2). Similarly, the expression 'to all individuals within its territory and subject to its jurisdiction' in Article 2 covers violations committed by state agents abroad, whether with the acquiescence of the host state or in opposition to it. This is because 'it would be unconscionable to interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory' (§12.3). The Committee applied a very similar analysis in *Celiberti de Casariego v Uruguay*.<sup>20</sup>
59. Similarly, in *Alejandro and others v Cuba*<sup>21</sup> the Inter-American Commission of Human Rights held at §23 that:

**'Since individual rights are inherent to the human person, all the American States are obliged to respect the protected rights of any person subject to their jurisdiction. Although this ordinarily refers to persons who are within the territory of a State, in certain circumstances it can refer to behavior having an extraterritorial locus, where a person is present on the territory of one State, but is subject to the control of another State, generally through the acts of the agents abroad of the latter State. In principle, the investigation has no reference to the nationality of the alleged victim or his presence in a given geographical**

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<sup>19</sup> (1981) 68 ILR 29, referred to by Lord Collins at §280.

<sup>20</sup> (1981) 68 ILR 41, referred to by Lord Collins at §280.

<sup>21</sup> Case 11.589, IACommHR Report No 86/99 (29 September 1999).

zone, but rather to whether in those specific circumstances the State observed the rights of a person subject to its authority and control.'  
(emphasis added)

60. The Commission adopted an almost verbatim analysis in *Coard v United States*.<sup>22</sup>
61. The Strasbourg Court applied *López Burgos*, *Celiberti de Casariego* and *Coard* as part of its reasoning in *Isaak v Turkey* (App. No. 44587/98, 28 September 2006 (Admissibility)) and *Issa v Turkey* (2005) 41 EHRR 27, §71. JUSTICE submits that the focus of the international case law is clear: it is the relationship of control and power over an individual by the state that determines the question of jurisdiction, regardless of the circumstances in which such control is obtained. A ruling that British soldiers are outside the UK's jurisdiction for the purposes of Article 1 would therefore be contrary to the clear and consistent approach of the international jurisprudence.
62. Under international humanitarian law the state is responsible for 'all acts committed by its armed forces'.<sup>23</sup> This general rule of attribution, which forms part of customary international law, reflects the relationship of total control and authority that exists between the state and the members of the armed forces.

#### **I. The status of Catherine Smith in the light of Al-Skeini**

63. JUSTICE submits that the Grand Chamber's judgment in *Al-Skeini* inescapably invalidates the majority reasoning in *Catherine Smith*. In particular:
- (a) In *Catherine Smith* the Secretary of State contested the existence of any general principle of state agent authority and control (see §17).
- (b) Lord Collins (with whom Lords Hope, Rodger, Walker and Brown

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<sup>22</sup> (1999) 9 BHRC 150 at §37, referred to by Lord Collins at §286.

<sup>23</sup> Hague Convention (IV), Article 3; Additional Protocol I, Article 91.

agreed) accepted this proposition (§§288-289, §307). Lord Collins said the Strasbourg case law only recognised extra-territorial jurisdiction involving ‘extensions of territorial jurisdiction by analogy’ and ‘commonsense extensions of the notion of jurisdiction to fit cases which plainly should be within the scope of the Convention’ (§305). In his view there were no policy reasons for extending the Convention to armed forces serving abroad (§308).

(c) Lord Phillips recognised that the existing jurisprudence might support jurisdiction based on a state’s exercise of authority and control over individuals, whether or not they are within the territory of the state. However, in his view the Strasbourg Court was the appropriate tribunal to decide the point (§47, §60).

(d) Lord Brown recognised that it could ‘respectably be argued’ that soldiers operating off base are within the UK’s jurisdiction (§144). However, he rejected this conclusion because it would confer Convention protection on British soldiers but not the local population (§145) and would involve the Supreme Court going beyond the existing Strasbourg jurisprudence on Article 1 (§147). Nevertheless, he acknowledged that a finding in the applicants’ favour in *Al-Skeini* would be ‘likely to transform our understanding of the scope of article 1 in cases of this sort’ (§141).

64. None of these objections can stand in the light of *Al-Skeini*. The Grand Chamber’s judgment not only confirms the existence of a general doctrine of state agent authority and control; the structure and sequence of the Grand Chamber’s judgment indicate that it is the primary exception to ordinary territorial jurisdiction. This undermines the supremacy afforded to effective territorial control by the majority in *Catherine Smith* (see Lord Collins at §305) and highlights the error in rejecting state agent authority and control as a freestanding basis of jurisdiction (see Lord Collins at §307).

65. Moreover, *Al-Skeini* establishes that civilians are within the UK's jurisdiction when they are under the authority and control of British soldiers. Accordingly, Lord Brown's understandable concern about creating an unattractive asymmetry between soldiers and civilians militates in favour of recognising that soldiers are also within the UK's jurisdiction.
66. There is nothing unusual or surprising about the Convention applying to soldiers on active service abroad. In particular, it is well established that the Convention is capable of applying to situations of military intervention. The derogation mechanism in Article 15 expressly envisages the Convention binding states (albeit in potentially attenuated form) during times of war and Article 7 applies to war crimes. The Strasbourg jurisprudence contains numerous examples of the Court applying the Convention to claims arising from military operations.<sup>24</sup>
67. Finally, following *Al-Skeini*, concerns about the practical consequences of finding that soldiers are within the UK's jurisdiction under Article 1 are misplaced. First, as explained at Section E above, perceived concerns about imposing an intolerable burden on military planners are resolved by the divisibility and tailoring of Convention rights when jurisdiction is based on state agent authority and control. Secondly, the exigencies of armed conflict will, to the extent genuinely necessary, provide a legitimate justification for restrictions upon qualified Convention rights. Thirdly, under Article 15 in times of war or other public emergency threatening the life of the nation the UK has, provided that the necessary pre-conditions are met, the power to derogate from all Convention rights other than Article 2 (except in respect of deaths resulting from lawful acts of war) and Articles 3, 4(1) and 7 – but only to the extent strictly required by the exigencies of the situation.<sup>25</sup>

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<sup>24</sup> See, for example, *Al-Skeini*; *Al-Jedda v United Kingdom* (2011) 53 EHRR 23 (GC); *Cyprus v Turkey* (2002) 35 EHRR 30; *Issa v Turkey* (2005) 41 EHRR 27; *Pad v Turkey* (App. No. 60167/00, 28 June 2007) (Admissibility); *Ilaçcu v Russia and Moldova* (2005) 40 EHRR 46 (GC).

<sup>25</sup> Considered in *Catherine Smith* by Lord Phillips at §57 and Lord Mance at §198. c.f. *Bankovic* at §62; *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332 at §§38, 152. The text of Article 15 was introduced by a

## J. Conclusion

68. Whatever uncertainty previously existed in the Strasbourg case law,<sup>26</sup> the path is now clear for this Court to apply Al-Skeini and to endorse the correct reasoning and conclusion of the minority in Catherine Smith. Further, by adjourning Pritchard v United Kingdom pending the outcome of this appeal, the Strasbourg Court has, consistent with the principle of subsidiarity, deliberately given this Court the opportunity to apply Article 1 in a manner consistent with the principles and reasoning of Al-Skeini. JUSTICE respectfully invites the Court to do so, consistent with its duty under section 2 HRA, for all the reasons above. There is no need for this Court cautiously to await the decision of the Strasbourg Court in Pritchard; the outcome is already clear from its reasoning in Al-Skeini – British soldiers operating outside UK-controlled territory are ‘within the jurisdiction’ of the UK for the purposes of Article 1. This Court would not be ‘leaping ahead’ of Strasbourg were it to rule so now; it would be ‘lagging behind’ were it to decline the invitation.

**ALEX BAILIN QC**

**Matrix Chambers**

**IAIN STEELE**

**Blackstone Chambers**

**EDWARD CRAVEN**

**Matrix Chambers**

**30 January 2013**

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UK amendment: Travaux Préparatoires vol.2 p.355; vol.3 p.280; Alternative B proposed by UK to Committee of Experts’ for the draft Convention of Human Rights (6/3/50, CM/WP1 (50) 2; A 915). The previous draft had followed the wording of Article 29(2) of the Universal Declaration of Human Rights which permitted general, proportionate limitations on rights and did not contain any express limitation preventing derogation from the prohibition from torture or ill-treatment.

<sup>26</sup> See e.g. Al-Skeini, Concurring Opinion of Judge Bonello at §6.

IN THE SUPREME COURT OF THE  
UNITED KINGDOM

ON APPEAL

FROM HER MAJESTY'S COURT OF  
APPEAL  
CIVIL DIVISION (ENGLAND &  
WALES)

B E T W E E N:

SUSAN SMITH and others  
Appellants / Cross-Respondents

- v -

THE MINISTRY OF DEFENCE  
Respondent / Cross-Appellant

EQUALITY AND HUMAN RIGHTS  
COMMISSION

-and-

JUSTICE

Interveners

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CASE FOR THE INTERVENER JUSTICE

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