Neutral Citation Number: [2012] EWCA Civ 1365

Case No: B3/2011/2019

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
The Hon Mr Justice Owen
[2011] EWHC 1676 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2012

Before:

LORD NEUBERGER, MASTER OF THE ROLLS
LORD JUSTICE MOSES
and
LORD JUSTICE RIMER

- -

Between:

Susan Smith (on her own behalf and as administrator of The Estate of Philip Hewett, Deceased)	**1st Appellant**
Colin Redpath (on his own behalf and as Executor of the Will of Kirk James Redpath, Deceased)	**2nd Appellant**
Courtney Ellis (a Child) by her Litigation Friend Karla Ellis and Karla Ellis	**3rd and 4th Appellants**
- and -	
The Ministry of Defence	**Respondent**

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- -

Mr Robert Weir QC and **Ms Jessica Simor** (instructed by **Hodge Jones & Allen Solicitors**) for the **1st 2nd, 3rd and 4th Appellants,**
Mr James Eadie QC, Ms Sarah Moore and Ms Karen Steyn (instructed by **The Treasury Solicitors**) for the **Respondent**

Case No: B3/2011/1927

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Between:

The Ministry of Defence	**Appellant**
- and -	
Courtney Ellis (A Child) by her Litigation Friend, Karla Ellis	**Respondent**

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- -

Mr James Eadie QC, Ms Sarah Moore and Ms Karen Steyn (instructed by **The Treasury Solicitors**) for the **Appellant** and **Mr Robert Weir QC** and **Ms Jessica Simor** (instructed by **Hodge Jones & Allen Solicitors**) for the **Respondent**

Case No: B3/2011/1928

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- -

Between:

The Ministry of Defence	**Appellant**
- and -	
Deborah Allbutt	
Daniel Twiddy	**Respondents**
Andrew Julien	

- -
- -

Mr James Eadie QC, Ms Sarah Moore and Ms Karen Steyn (instructed by **The Treasury Solicitors**) for the **Appellant** and **Mr Richard Hermer QC** and **Mr Ben Silverstone** (instructed by **Leigh Day & Co Solicitors)** for the **Respondents**

Hearing dates: 25th-27th June, 2012

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Approved Judgment

Lord Justice Moses:

1. Shortly after 1.15 a.m. on 16 July 2005, Private Hewett of the 1st Battalion, The Staffordshire Regiment, was on patrol in a Snatch Land Rover in Al Amarah in Iraq, when he was killed by an IED detonated beside that vehicle. His mother claims that his death was the consequence of the failure of the Ministry of Defence to provide suitably armoured equipment for soldiers on active service in Iraq, in breach of their obligation to safeguard his right to life, enshrined in Article 2 of the European Convention on Human Rights.

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

3. On 9 August 2007, Lance Corporal Redpath of the 1st Battalion, Irish Guards was killed when travelling north in a Snatch Land Rover, by an IED detonated beside the vehicle. His father brings a similar claim under Article 2.

4. These claims are known as the "Snatch Land Rover Claims". In his judgment, dated 30 June 2011, [2011] EWHC 1676 (QB), Owen J struck out the Article 2 claims under CPR r.3.4(2)(a) on the grounds that the deceased were outwith the jurisdiction of the Convention under Article 1 at the time they were killed. The claimants appeal. Owen J refused to strike out the claims made by the Ellis claimants in relation to a failure to provide suitable equipment, but struck out part of their claim relating to the re-introduction of the Snatch Land Rovers because it fell within the scope of "combat immunity". The MOD appeals, asserting that all negligence claims should be struck out; Courtney and Karla Ellis cross-appeal.

5. On 25 March 2003, Corporal Allbutt, Trooper Twiddy and Trooper Julien, serving with the Royal Regiment of Fusiliers, in the course of the fourth day of the offensive on Basra, were in a Challenger II tank, hull down, at 1.15 a.m., when Corporal Allbutt was killed, and Troopers Twiddy and Julien injured by shells from a similar tank fired by soldiers of the 1st Battalion Black Watch. Corporal Allbutt's wife and Troopers Twiddy and Julien bring claims in negligence alleging a failure to provide available technology to protect against the risk of "friendly fire", and a failure to provide adequate vehicle recognition training.

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

Convention Jurisdiction

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

8. Since his judgment, the Grand Chamber has delivered its judgment in *Al-Skeini v United Kingdom* [2011] 53 EHRR 18 (7 July 2011). It concluded that in South East Iraq the United Kingdom had, through its soldiers, exercised such authority and control over civilians killed by United Kingdom soldiers as to bring those civilians within the United Kingdom's Convention jurisdiction. This appeal, accordingly, raises the question whether this court is bound to follow the decision of the Supreme Court in *Smith,* even if the decision of the Grand Chamber is authority for the claimants' assertion of United Kingdom Convention jurisdiction over its armed forces when fighting abroad. If this court is bound by *Smith*, then the Article 2 claims must fail. If a binding precedent is inconsistent with Strasbourg authority, this court must follow the binding precedent (*Kay v Lambeth LBC* [2006] 2 AC 465, [43]).

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

10. The decision in *Smith* was that a soldier who died on his army base was within the United Kingdom Convention jurisdiction and, accordingly, was entitled, during the course of an inquest, to the procedural protection implicit in Article 2. The Secretary of State conceded that a fresh inquest should be held which satisfied the procedural requirements of Article 2, particularly in relation to disclosure. Nevertheless, the Supreme Court chose to give its ruling on the question whether a soldier on military service in Iraq *outside* his base was subject to the protection of the Human Rights Act 1998 (Lord Phillips [2]).

11. Three of the Justices suggested that the exercise on which the Court had embarked was inappropriate. (Lord Walker referred to his disquiet that the court "may be going some way beyond its proper exercise of judicial power" [129], Lady Hale doubted whether "the interesting things said" were binding [135], and Lord Collins said that the question was academic and recognised the "obvious danger in giving what are in substance advisory opinions on hypothetical facts" [223].) Lord Phillips thought the issue was "largely academic, though the Secretary of State's concessions did not bind the coroner [2]; Lord Mance said the issue was "of potential relevance" to the fresh inquest [159].

12. I do not accept, as Mr. Weir QC, on behalf of the Snatch Land Rover claimants, suggested, that the Supreme Court had merely embarked on an exercise designed to engage in a dialogue with Strasbourg (as Lord Brown had it in *Rabone v Pennine Care Trust* [2012] 2 WLR 381 [114]) and to communicate its views on the question of jurisdiction, in the hope that they would subsequently be adopted by the ECtHR. The jurisdiction issue was regarded as of public importance. It would be odd if the Supreme Court believed that it could satisfy the importance of the issue by a decision, after full argument, which was merely advisory and had no value as a precedent.

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

14. That recognition adds to the puzzle. Lord Phillips acknowledged that Strasbourg was the proper tribunal to resolve the issue of jurisdiction [60]. In *Rabone* Lord Brown took the same view [114]. If the issues as to jurisdiction, founded on the meaning of Article 1, are ultimately for Strasbourg, then the "more fundamental reason" expressed by Lord Bingham in *Kay* for obliging lower domestic courts to follow the binding precedent of the Supreme Court, has no application.

15. In *Kay* Lord Bingham identified "the more fundamental reason" for adherence to domestic rules of precedence as being the margin of appreciation accorded by Strasbourg to national authorities including national courts, who apply Strasbourg principles in the context of national legislation, law, practice and social conditions [44]. But there is no margin of appreciation to be accorded to national authorities in relation to Convention jurisdiction. The jurisdictional scope of the Human Rights Act 1998 is identical to that of the Convention (*R (Al-Skeini)* [88] [150]). Either the United Kingdom armed forces are within the jurisdiction of the United Kingdom when serving outside its territory or they are not. That is a matter to be resolved by the correct interpretation of Article 1. The effect of a margin of appreciation on domestic rules of precedence has no application to issues of jurisdiction. Accordingly, the more fundamental reason for applying those rules of precedence does not apply. This court is then left with the demands of certainty (Lord Bingham at [43]). But pending the authoritative ruling of Strasbourg on this issue, there can be no certainty.

16. I incline to the view that this court is not bound to follow *Smith* on a strict application of the rules of precedence, although, for reasons which will become apparent, it does not matter whether Smith is binding or not. Accordingly, I reach no concluded view. Even if it is not binding, *non sequitur* that the conclusion must be that the armed forces operating outside their base are within the United Kingdom Convention jurisdiction. Firstly, I suggest this court should be wary of reaching a view contrary to the considered conclusion reached by the majority in the Supreme Court. If the point of the exercise on which they embarked was merely to enter into dialogue with Strasbourg, it seems undesirable that lower courts should speak with a different voice:

to whom is Strasbourg supposed to listen? That court is seized of the very issue decided by *Smith* in a pending application in *Pritchard v United Kingdom* (Application No.1573/11). It seems to me that, in those circumstances, this court should not differ from *Smith* unless the decision of the Grand Chamber in *Al-Skeini* compels the conclusion that the decision of the majority of the Supreme Court was wrong.

17. Secondly, the claimants' invitation to this court not to follow *Smith* assumes that *Smith* is inconsistent with *Al-Skeini*. But whilst the issue in *Smith* was whether the United Kingdom forces operating outside its territorial jurisdiction were within its Convention jurisdiction, that was not the question in *Al-Skeini*. *Al-Skeini* related to Convention jurisdiction over third parties killed by armed forces acting outside their base. It remains to be resolved whether it follows that because civilians killed by armed forces of a High Contracting Party are within that country's Convention jurisdiction, the armed forces are themselves within that jurisdiction.

18. I turn, firstly, to the majority's construction of Article 1 in *Smith*. Article 1 provides:

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

19. Their starting point was that Article 1 reflects the territorial notion of jurisdiction. Other bases of jurisdiction are exceptional and require special justification (Lord Collins [305], Lord Phillips [47], founded on the decision of the Grand Chamber in *Banković v Belgium* (*q.v. supra*) [61]). This view was based in part on an analysis of the *travaux préparatoires* (Lord Collins [303]). They were of particular importance since Article 1 is not to be interpreted as a living instrument [303], *Banković* [65]. This essentially territorial notion of jurisdiction is consistent with public international law and state practice (Lord Collins [241]-[246] and *Banković* [60]).

20. Accordingly, to extend Convention jurisdiction beyond the territorial jurisdiction of the High Contracting Parties is exceptional and requires special justification (Lord Collins [258], *Banković* [67]). The majority found no sufficient reason for such an extension in relation to the United Kingdom armed forces operating outside their base, and good policy reasons for not doing so (Lord Phillips [52-60], Lord Hope [91][104]). Paramount in the Justices' reasoning was their opinion that issues relating to armed hostilities were essentially non-justiciable and outwith the scope of questions likely to arise in relation to the article most likely to be invoked, namely Article 2 (see Lord Roger [125] [127] and Lord Collins[308]).

21. The conclusion of the majority in *Smith* found support not only in Strasbourg jurisprudence (apart from the one passage in the decision of the Commission in *Cyprus v Turkey* [1975] 2 DR 125 [8], cited and dismissed by Lord Phillips at [49]) but also in *Al-Skeini* in the House of Lords and *R* (*Gentle) v Prime Minister* [2008] AC 1356, see Lord Phillips [21] and [31]. It is this reliance on *Al-Skeini* which, so the claimants contend, affords an opportunity for this court to disagree with *Smith*. Now

that the Grand Chamber has reached a conclusion contrary to that of the House of Lords, it is submitted that this court should, like the Supreme Court in *Smith*, follow the sign-post of *Al-Skeini*, even though, after the Grand Chamber decision, it points in the opposite direction.

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

23. It is important, at the outset of any analysis of *Al-Skeini*, to recognise that the Grand Chamber did not abandon the principle that Convention jurisdiction under Article 1 is primarily territorial and that extension outside territorial boundaries requires exceptional circumstances which justify extra-territorial jurisdiction [131] and [132].

24. The Grand Chamber identified two features which, in combination, justified extra-territorial jurisdiction. The first is where state agents use force to bring an individual under the control of the state's authorities [136]. The examples given by the Grand Chamber were all of those detained and for that reason under the control of the state. "What is decisive in such cases is the exercise of physical power and control over the person in question" [136].

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

> "137. It is clear that, whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation under 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, the Convention rights can be 'divided and tailored'." (The reference to the division of rights is noted as a departure from *Banković* [75].)

26. That passage is no authority for the proposition that because a state's armed authorities may be said to be under the control and authority of the state it follows that they too are within the scope of the state's Convention jurisdiction. As the Grand Chamber makes clear in the preceding paragraph and, in particular, in the passage I have cited from [136], its reference to "authority and control" is a reference to bringing individuals within the power and control of a state in circumstances analogous to detention and internment. In essence the source of the Convention jurisdiction is the action of the state in bringing an individual within its custody, power and control. It is worth recalling that in a subsequent case, *Al-Jedda v United Kingdom* [2011] 53 EHRR 18, it is that very paragraph [136] which is cited as authority for the proposition that where internment took place in a detention facility, the internee was within the authority and control of the United Kingdom and thus within its jurisdiction [85].

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

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

29. The second feature which the Grand Chamber identified was the effective control exercised over the area in question [138]-[148]. That affords no support to the claimants. It was the combination of both those two elements, the control over the individual and over the territory, which led to the Grand Chamber's conclusion:-

> "149. It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom assumed authority and responsibility for the maintenance of security in South-East Iraq. In these exceptional 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".

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

31. The claimants advance a separate argument based on *Soering v United Kingdom* [1989] 11 EHRR 439. The claimants sought to liken the case of armed forces sent to fight abroad to the German whose extradition was sought by United States of America where he faced a capital sentence: this would have been a violation of Article 3. Owen J said all that needs saying in order to reject that argument [46] :-

> "There is nothing in the ECtHR jurisprudence since *Soering* to suggest that it is a principle of general application outside forcible removal cases".

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

Negligence

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

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

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

> 26.1 Failing to limit the patrol to better/medium/heavily armoured vehicles. Snatch Land Rovers had been taken out of front line use in Al Amarah following the death of soldiers in a Snatch Land Rover hit by an IED on 16 July 2005 and should not have been put back into such use.
>
> 26.2 Failing to provide any or any sufficient better or medium armoured vehicles for use by LE's commander. Had such vehicles been provided, they would or should have been used for LE's patrol in place of the Snatch Land Rovers.
>
> 26.3 Failing to ensure that Element A had been fitted to the ECM on LE's Snatch Land Rover. LE should not have been permitted to leave the camp without this equipment.

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

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

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

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

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

41. But the instant cases are different, submits the MOD. The claims relating to inadequate equipment give rise to issues of procurement. Such issues involve consideration of questions as to the scarcity and allocation of resources, and questions of policy. The courts ought not to trespass, warns the MOD, into such territory, which is the province of those in command, and of politicians answerable to

Parliament. In short, no duty of care should be imposed in relation to the procurement of equipment; such issues are not justiciable.

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

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

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

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

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

> "But questions, say, as to whether it would have been feasible to fit stronger protection, or as to why those vehicles, as opposed to vehicles with stronger protection, were originally purchased by the Ministry of Defence…all raise issues which are essentially political rather than legal. That being so, a curious aspect of counsel's submissions before this court was

> the complete absence of any reference to Parliament as the forum in which such matters should be raised and debated and in which Ministers should be held responsible."[127]

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

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

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

48. In such cases the mere fact that questions might arise as to policy, and as to the allocation of scarce resources, did not preclude the existence of a duty to take care. In *Barrett* the House of Lords accepted that the existence of a duty of care owed by a local authority to a child in care was arguable even though the case raised policy questions as to defensive conduct by care authorities, and the exercise of discretion in a difficult field (Lord Slynn 568E-G, Lord Hutton 591 A-D). In *Phelps v Hillingdon BC* [2001] 2 AC 616, the House of Lords recognised a duty of care in the provision of education where difficult professional judgement is required.

49. The mere existence of discretionary powers usually conferred by statute, and inevitably involving policy considerations, does not preclude the existence of liability in negligence. This is implicit in the courts' reminder (which was, at one time, in danger of being forgotten) that: -

> "it is neither helpful or necessary to introduce public law concepts as to the validity of a decision into the question of liability at common law for negligence" (Lord Browne-

> Wilkinson in *X (Minors) v Bedfordshire CC* [1995] 2 AC 633, 736f, cited by Lord Steyn in *Gorringe* and Lord Hutton in *Barrett*).

If no such duty existed in cases involving questions of policy and discretionary power, then the possibility of introducing public law concepts into questions of liability in negligence would simply not arise.

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

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

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

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

> "it appears to him expedient to do so-
>
> a) by reason of any imminent national danger or of any great emergency that has arisen; or
>
> b) for the purposes of any warlike operations in any part of the world outside the United Kingdom or of any other operations which are or are to be carried out in

> connection with the warlike activity of any persons in any such part of the world."

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

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

55. It is not possible to distinguish consideration by the courts of the duty of care owed by the MOD to its employees, the armed forces, from the duty owed by other public authorities, save in one well-recognised respect: combat immunity. But the very existence of that immunity fortifies the view that in respect of actions or omissions outside its scope there is no reason to preclude an action in negligence.

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

57. The rationale justifying the immunity was explained in *Shaw Savill and Albion Company Limited v The Commonwealth* [1940] 66 CLR 75:-

> "It could hardly be maintained that during an actual engagement with the enemy or a pursuit of any of his ships the navigating officer of a King's ship of war was under a common-law duty of care to avoid harm to such non-combatant ships as might appear in the theatre of operations….It would mean that the Courts could be called upon to say whether a soldier on the field of battle or the sailor fighting on his ship might reasonably have been more careful to avoid causing civil loss or damage… No-one can imagine a court undertaking the trial of such an issue, either during or after the war."(361).

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

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

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

61. It is true that in relation to issues of causation, a decision will have to be made as to events on the battlefield leading to the deaths or injuries. But such findings of fact may not trench upon decisions made in active operations. They may require no judgment by the court on the actions of service personnel on active service or of the MOD during the course of the active operations. They may require no more than findings of fact as to what happened. Such findings do not undermine the rationale for combat immunity. After all, there are many situations in which public inquiries, Boards of Inquiry or inquests are required to find facts relating to events in active operations.

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

63. Owen J expressed reservations about the allegation that Private Ellis was permitted to leave camp without Element A fitted (26.3). Rightly, in my view, he thought that the issue as to whether that was a decision made in the heat of battle, or was attributable to earlier acts or omissions, should be left to trial [112]. But it seems to me that he did err in striking out the allegation at 26.1 [113] and [114]. That did not, as explained to this court, relate to decisions made in active operations, and does not purport to do so. It is an allegation of failures of the MOD away from the theatre of war. Accordingly, if that allegation is made good, it is arguable that it would not fall within the scope of combat immunity. I would allow the appeal in relation to Private

Ellis in that respect. There may be factual questions arising as to the circumstances in which decisions were made which would permit the MOD to raise the immunity at trial, on a particular view of the facts, as Owen J recognised in relation to deficiencies in in-theatre training [112]. But it is premature to strike out the claims on that basis.

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

Lord Justice Rimer:

65. I agree.

Lord Neuberger, Master of the Rolls:

66. I also agree.