

United Kingdom, *Al-Saadoon V. Secretary of State for Defence*

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: England and Wales High Court, *Al-Saadoon & Others v. Secretary of State for Defence* [2015] EWHC 715 (Admin), available at: <http://www.bailii.org/ew/cases/EWHC/Admin/2015/715.html>]

[...]

I. INTRODUCTION

1. One of the legacies of the Iraq war is litigation. Many claims have been brought in the courts of this country arising out of the British military involvement in Iraq between 2003 and 2009. [...] Most of the claims involve allegations of ill-treatment, unlawful detention and, in some cases, unlawful killing of Iraqi civilians by British soldiers. These claims fall into two groups.

2. The first group consists of claims for judicial review in which the claimants are seeking orders from the court to require the Secretary of State for Defence to investigate alleged human rights violations. I will refer to these claims as the “public law claims”. [...]

[...]

4. This judgment follows a trial of eleven preliminary issues raised by the public law claims. [...] The issues have been argued by reference to the assumed facts of certain cases which the parties have selected as test cases. [...]

[...]

The issues in brief

6. The source of the duty on the state to investigate allegations of wrongdoing on which the public law claimants rely is the European Convention on Human Rights, incorporated into English Law by the Human Rights Act 1998. Whether, and if so to what extent, the Convention applies to the activities of British armed forces in Iraq has itself been the subject of extensive litigation. It is now clearly established, however, and accepted by the Secretary of State, that anyone who was taken into the custody of British forces in Iraq had certain rights under the Convention which the United Kingdom was bound to respect: in particular, the right to life under article 2 [...]. It is also clearly established that where a person who is within the jurisdiction of a Convention state is killed by agents of the state or dies in state custody [...], the state had a duty to carry out an investigation. [...]

7. There are, however, two major areas of controversy about the scope of the duty to investigate [...]. The first is whether, and if so when, the Convention applied to the use of force against Iraqi civilians who were not in the custody of British forces. In particular, the Secretary of State does not accept that (save during the period when the UK was an occupying power) individuals who were killed during security operations carried out by British forces in Iraq were “within [the UK’s] jurisdiction” for the purpose of article 1 of the Convention such that the UK was bound to secure their right to life under article 2. If this is correct, it follows that the UK has no duty under the Convention to investigate the deaths of such individuals. [...]

[...]

II. THE BACKGROUND

Phases of British military involvement in Iraq

11. The British military involvement in Iraq can be divided into three periods [...] (i) the “invasion” period, (ii) the “occupation” period and (iii) the “post-occupation” period. [...]

The invasion period

12. On 20 March 2003 a coalition of armed forces led by the United States and including a large force from the UK invaded Iraq. By 5 April 2003 British troops had captured Basra and by 9 April 2003 US troops had gained control of Baghdad. Major combat operations in Iraq were formally declared complete on 1 May 2003.

The occupation period

13. Following the completion of major combat operations, the United States and the United Kingdom became occupying powers in Iraq within the meaning of article 42 of the Hague Regulations. With their coalition partners they created the Coalition Provisional Authority (“CPA”) in order to exercise powers of government in Iraq on a temporary basis until a new Iraqi government could be established.

The post-occupation period

14. On 28 June 2004 sovereign authority was transferred from the CPA to a new Iraqi government. British forces remained in Iraq as part of a Multi National Force (“MNF”) established pursuant to requests from the Iraqi government and resolutions of the UN Security Council to assist the Iraqi government in maintaining law and order. [...]

15. Successive resolutions of the UN Security Council authorised the MNF to “take all necessary measures to contribute to the maintenance of security and stability in Iraq” in accordance with this arrangement. The UN mandate for the MNF expired on 31 December 2008 though it was not until sometime in 2009 that British forces withdrew from Iraq.

The duty of the state to investigate deaths and ill-treatment

Article 2

16. Article 2 of the Convention states that “everyone’s right to life shall be protected by law” and that (with certain exceptions) “no one shall be deprived of his life intentionally”. The case law of the European Court on Human Rights has interpreted these provisions as imposing on contracting states two substantive obligations: an obligation not (through its agents) to take life without justification; and also, in certain circumstances, a positive obligation to take steps to protect the lives of those within the state’s jurisdiction.

17. The European Court has also interpreted article 2 as imposing on contracting states an obligation to hold an effective investigation into any death where it appears that one or other of the state’s substantive obligations has been, or may have been, violated and that agents of the state are, or may be, in some way implicated [...]. The duty to investigate applies even in difficult security conditions, including in the context of an armed conflict: *Al-Skeini v United Kingdom* at para 164.

[...]

III. ARTICLE I - JURISDICTION

32. The first preliminary issue is “whether article 1 of the Convention applies” in 19 test cases. In 10 of these

cases, involving individuals whose rights were allegedly violated while they were in British custody, the Secretary of State has now accepted that on the assumed facts the claimants were at the relevant time within the jurisdiction of the UK for the purpose of article 1. In the other 9 test cases, the Secretary of State disputes this.

[...]

Article 1

34. Article 1 of the Convention provides:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.”

Throughout the time that the British armed forces were present in Iraq, the leading decision of the European Court of Human Rights on the territorial scope of article 1 was *Banković v Belgium* [2001] 11 BHRC 435. [...] However, on 7 July 2011, [...] the European Court issued its judgment in *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 in which the Court restated the applicable principles and adopted a much more expansive interpretation of article 1. [...]

[...]

The Al-Skeini case

41. The Al-Skeini case involved claims brought by relatives of Iraqi civilians who were allegedly killed by UK armed forces in Basra during the occupation period. [...] The claimants argued that in each case the UK had an obligation to carry out an investigation of whether there had been a violation of article 2 of the Convention. [...]

[...]

44. [...] The Court took the opportunity in its judgment (at paras 130-142) to set out a comprehensive restatement of the general principles relevant to jurisdiction under article 1.

45. The Court began by repeating its earlier statements in *Banković* that a state’s jurisdictional competence under article 1 is “primarily territorial” and that extraterritorial acts will constitute an exercise of jurisdiction under article 1 “only in exceptional cases” (para 131). The Court went on, however, to set out principles on which, exceptionally, a state can exercise jurisdiction outside its own territory.

46. The Court followed *Banković* in holding, as one such principle, that article 1 applies where, “as a

consequence of lawful or unlawful military action”, a contracting state exercises “effective control over an area” outside its national territory (para 138). [...]

47. In addition, however, the Court identified circumstances in which article 1 may extend to acts which involve the exercise of authority and control over individuals outside the state’s own territory even though the state does not have effective control over the relevant area (para 133). [...]

[...]

51. [...] [T]he Court found that at the relevant time, which was during the occupation period, the UK (together with the United States) had assumed in Iraq the exercise of some of the public powers normally exercised by a sovereign government and, in particular, the UK had assumed authority and responsibility for the maintenance of security in South-East Iraq. [...] On this basis, the Court concluded that in all six cases the death of the applicant’s relative occurred within the jurisdiction of the UK for the purposes of article 1.

[...]

The application of the Al-Skeini principles

65. It is common ground between the parties that the principles which the court must apply in deciding which of the test cases fall within article 1 of the Convention are the principles articulated by the European Court in the Al-Skeini case. There is also some measure of agreement about the application of those principles. However, there are some significant points of disagreement. [...]

[...]

Exercise of physical power and control

89. The claimants also argue that, in any case of an individual shot by a British soldier, even if the soldier was not exercising authority and control by reason of exercising public powers, the shooting was an exercise of physical power and control which brought the individual within the jurisdiction of the UK. [...]

[...]

Position of the Secretary of State

93. The Secretary of State accepts in light of the decisions of the European Court in Al-Skeini [...] that jurisdiction exists where claimants were in the custody of agents of the United Kingdom. [...] The Secretary of State does not accept, however, that jurisdiction arises on the basis of the exercise of physical power and control over individuals in non-custody cases. In particular, he does not accept that the act of shooting an

individual who has not been detained is itself an exercise of physical power and control which is sufficient to bring the individual within the UK's jurisdiction for the purpose of article 1 of the Convention.

94. In support of this position, Mr Eadie QC pointed out that [...] the Court in Al-Skeini cannot have considered that jurisdiction arose simply from the fact the applicants' relatives were shot by British soldiers as the Court based its finding of authority and control on the "exceptional circumstances" that the UK was carrying out security operations having assumed in Iraq the exercise of some public powers normally exercised by a sovereign government. [...]

The position in principle

95. Whether the exercise of physical control over an individual outside a state's own territory should be sufficient to bring that individual within the scope of the Convention is far from obvious. However, once that principle is established, as it now is, I find it impossible to say that shooting someone dead does not involve the exercise of physical power and control over that person. Using force to kill is indeed the ultimate exercise of physical control over another human being. Nor as it seems to me can a principled system of human rights law draw a distinction between killing an individual after arresting him and simply shooting him without arresting him first, such that in the first case there is an obligation to respect the person's right to life yet in the second case there is not.

[...]

98. Once it is accepted, as it was in Al-Skeini, [...] that where the state through its agents acting outside its territory exercises control over an individual it has an obligation under article 1 to secure those rights that are relevant to the situation of that individual, then the fact that an individual is taken into custody can only be relevant, as it seems to me, to the extent of the rights which must be secured. Thus, where an individual is in the custody of state agents, the state may have not only a negative obligation under article 2 not to kill unlawfully but an obligation in certain circumstances to take positive measures to protect the person's life. [...] On the other hand, where an individual is not in the state's custody (and the state is not exercising any governmental powers in the territory), the only relevant obligation so far as I can see will be the negative one under article 2 to refrain from unlawful killing.

[...]

Jurisdiction and breach

108. Mr Eadie QC also submitted that treating the very act of shooting an individual as bringing them within the scope of article 1 collapses the distinction between jurisdiction and breach. I disagree. To the contrary, it seems to me to make it all the more essential to draw that distinction.

109. As the Secretary of State accepts, it is now established that the detention of an individual by British forces in Iraq brought that person within the UK's jurisdiction for the purpose of article 1 of the Convention. It does not follow, however, that either the act of detention itself or anything done to the individual during his detention involved a breach of any Convention right. It equally does not follow that, because shooting an individual involves an exercise of physical power which brings that person within the UK's jurisdiction, there is any breach of a Convention right if the individual is killed or wounded. Whether there is such a violation depends on whether the use of force was justified.

110. It is certainly an unattractive prospect that, if the UK becomes involved in a war or peacekeeping operation overseas, every enemy soldier or civilian who is killed or wounded by British forces is entitled to an investigation into whether the killing or wounding was lawful and, if it was unlawful, to claim compensation from the UK. The same may very well be said of the ability of enemy soldiers and civilians detained by British forces to complain that their detention violates article 5 of the Convention. In *Hassan v. United Kingdom* the European Court has gone some way towards addressing the latter concern. Although the Court held that, even in situations of international armed conflict, the Convention continues to apply and is not displaced by international humanitarian law, the Court also held that article 5 of the Convention must be interpreted and applied in a way which takes account of international humanitarian law. Thus, the Court read down article 5(1) by holding that detention is lawful where it is permitted by the rules of IHL, even though it does not fall within one of the cases set out in subparagraphs (a) to (f) of article 5(1).

111. It seems to me that the same approach must in principle apply to article 2. Thus, where the armed forces of a state kill someone in the course of an armed conflict the killing will be lawful provided it is consistent with IHL even if it results from use of force which is not absolutely necessary to achieve any of the purposes set out in sub-paragraphs (a) to (c) of article 2. In addition, I think it is important that courts should recognise their lack of institutional competence to judge actions or decisions taken on the battlefield or when seeking to maintain security in dangerous and hostile conditions. For similar reasons as apply in the context of combat immunity, the courts should afford a wide latitude or, to use the jargon of the Strasbourg case law, "margin of appreciation" when judging the legality of lethal force used in such circumstances [...].

[...]

Application to the test cases

[...]

118. [...] In each case I think it clear that on the assumed facts jurisdiction also arose through the exercise of physical power and control over the individual who was shot and killed.

[...]

VIII. Conclusions

294. For the reasons given, my answers to the questions raised by the preliminary issues are in summary as follows:

Article 1 jurisdiction

(1) Article 1 of the Convention applies, not only in cases where the individual concerned was in the custody of British forces in Iraq [...], but also in those test cases where the individual was shot by a British soldier both (a) because such shooting occurred in the course of security operations in which British forces were exercising public powers that would normally be exercised by the government of Iraq and (b) because shooting someone involves the exercise of physical power over that person. [...]

Discussion

I. Classification of the Conflict and Applicable Law

1. (*paras 11-15*)

a. How would you classify the situation in Iraq from 2003-2009? Which rules of IHL applied in each “period” referred to by the Court? (GC I-IV, Arts 2 and 3; HR, Art. 42)

II. The Right to Life under the ECHR

2. (*paras 16-17*)

- a. How is the right to life protected under article 2 of the ECHR? What obligations does it involve?
- b. In what cases is the intentional use of lethal force in compliance with article 2?

III. Extraterritorial Application of the ECHR:

3. (*paras 32-51*)

a. Does the ECHR apply outside of a State parties’ territory? If yes, in what conditions will the extraterritorial act of a State constitute an exercise of jurisdiction under article 1?

4. (*paras 89-98*)

- a. Does the exercise of physical power and control over an individual suffice for a State to have jurisdiction under the ECHR? Even when that person is not in the custody of the State, or the State is not exercising public powers?
- b. Does Mr Justice Leggatt’s conclusion contradict the position of the European Court of Human Rights in *Al-Skeini v. UK*? (see ECHR, *Al-Skeini et al. v. UK*)

IV. The Relationship between Article 2 of the ECHR and IHL

5. (*paras 108-111*)

- a. If the right to life applies to the killing of an enemy soldier or civilian abroad, how does it interact with the IHL rules on targeting?
- b. Do you find Mr Justice Leggatt’s analogy to the European Court’s judgment in *Hassan v. UK* convincing? Is the relationship between the right to life and the IHL rules on targeting the same as the relationship between the human right to liberty and the IHL rules on detention? (see ECHR, *Hassan v. UK*)
- c. Do you think States can comply with the right to life as interpreted under the ECHR in extraterritorial

military operations? Even when they have neither control over the person killed nor over the place where they are found? What aspects of the right to life could be particularly difficult to respect?

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