

## Overseas military operations



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## Topics to be covered

- The background to human rights and extraterritorial armed forces activities
- The mischief: *Al-Skeini v UK*; *Smith v MoD*
- The Government's intentions
- The provisions of the Bill
- The challenges and risks

## Background

- The general position: ECHR does not apply beyond the territorial boundaries of the High Contracting Parties
- E.g. *Soering v UK* (1989) 11 EHRR 439: States have no general obligation to seek to impose ECHR standards on non-party states.
- Extraterritorial acts are within a State's "jurisdiction" for ECHR purposes only in exceptional circumstances: *Bankovic v Belgium* (2001) 11 BHRC 435

# Military operations overseas – the evolution of the jurisprudence

- *Al-Skeini v UK* (2011) 53 EHRR 18
- Claim brought against UK by relatives of Iraqi citizens shot by British soldiers
- ECtHR held that extraterritorial actions could be within jurisdiction where:
  - A State's agents exert authority and control over others
  - The State, by acquiescence, consent or invitation of a non-contracting state, exercises public functions in the non-contracting state
  - The State exercises effective control over a territory via military action

## *Al-Skeini v UK*

- Result – actions of UK soldiers established a jurisdictional link to the UK for ECHR Art 1 purposes

## The current position

- *Smith v MoD* [2004] AC 52
- Concerned deaths of UK soldiers in Iraq – Art 2 claim on basis of unsuitable armoured vehicles
- Held (UKSC):
  - *Al-Skeini* establishes that the bar for “exceptional circumstances” is not especially high (para 30)
  - The ECtHR’s jurisprudence had moved on since *Bankovic* (para 48)
  - Art 2 ECHR extends to members of the armed forces serving abroad (para 55)

## Background: the Government's concerns

- “Human Rights Act Reform: A Modern Bill of Rights” consultation (CP588, Dec 21), p. 43:
  - Extension of HR law to armed conflict has created legal and operational uncertainty
  - *Travaux* make clear the ECHR was not designed to regulate conflict situations, and is ill-adapted for that purpose
  - ECHR application is applied on top of existing armed forces obligations (e.g. the Geneva Convention) which are designed specifically for the circumstances of warfare
  - Cost and morale implications of HR litigation against members of the armed forces

## The BoRB's provisions: clause 14

- Disapplies the s. 13 right to bring proceedings in respect of an act or proposed act done or proposed to be done outside the UK by a public authority in the course of overseas military operations (cl 14(1))
  - E.g. tactical or operational decisions taken in-theatre
- Disapplies s. 13 in relation to acts done in the UK but wholly for the purposes of overseas military operations, and where the affected person is outside the UK (cl 14(2))
  - E.g. decision taken in London to launch a drone strike overseas

## The BoRB's provisions: clause 14 (continued)

- Prevents related persons from bringing claims disappplied under cl 14(1) and (2) (cl 14(3))
  - e.g. family members of deceased soldiers
- Disapplies s. 13 for investigations and inquiries into cl 14(1) or (2) matters (cl 14(4))
  - Intended to limit ECHR art 2 and 3 investigative obligations in this context (ENs para 126)

## The BoRB's provisions

- Cl. 14 does not prevent a person from relying on Convention rights in criminal proceedings (14(5))
- “overseas military operations” includes:
  - Peacekeeping operations
  - Counterterrorism
  - Operations dealing with civil unrest or serious public disorder where armed forces personnel come under, or face threat of, attack or violent resistance (cl. 14(6))
- Term “military” not strictly appropriate ...

## CI 14's effect

- CI 14 obviously and deliberately removes Convention rights established by the ECtHR
- How is it consistent with the ECHR, as per the Lord Chancellor's declaration?
- Answer: cl 39(3):

## CI 39(2) and (3)

*(2) The other provisions of this Act come into force on such day as the Secretary of State may by regulations appoint.*

*(3) The Secretary of State may exercise the power in subsection (2) in relation to ... section 14 (overseas military operations) only if the Secretary of State is satisfied (whether on the basis of provision contained in an Act passed after this Act or otherwise) that doing so is consistent with the United Kingdom's obligations under the Convention.*

## The intended trigger for cl 39(3)

- Per the MoJ's ECHR Memorandum for the Bill (para 22):
  - Government intends to *“introduce alternative remedies to cover such circumstances”*

- ENs to the Bill, para 262:

*“For the Secretary of State to be satisfied, it may require either the introduction of alternative domestic remedies within subsequent legislation, or the revision of extraterritorial jurisdiction under the Convention.”*

## Issues to watch ...

- Success or failure of this legislation, and the underlying policy, will turn on the nature and extent of the “alternative remedies”
- Tricky balancing act – how to satisfy Strasbourg that ECHR is complied with, while avoiding creating a regime that re-introduces the mischiefs the Govt has identified under the *Al-Skeini* jurisprudence?
- Risks of Ombudsman-type solution (clinical decisions, local government planning decisions etc) ...

# Thank you for listening

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