



19 June 2013

PRESS SUMMARY

Smith and others (Appellants) v The Ministry of Defence (Respondent)
Ellis (Respondent) v The Ministry of Defence (Appellant)
Allbutt and others (Respondents) v The Ministry of Defence (Appellant)
[2013] UKSC 41

On appeal from: [2011] EWHC 1676 (QB); [2012] EWCA Civ 1365

JUSTICES: Lord Hope (Deputy President), Lord Walker, Lady Hale, Lord Mance, Lord Kerr, Lord Wilson and Lord Carnwath

BACKGROUND TO THE APPEAL

These proceedings concern three sets of claims which arise out of the deaths of three young British servicemen and the serious injuries of two other young British servicemen in Iraq. The first set (“the Challenger claims”) arise from a “friendly fire” incident involving British tanks which caused the death of Cpl Stephen Allbutt and the serious injury of Lance Cpl Daniel Twiddy and Tpr Andrew Julien. They are brought in negligence and allege failures by the Ministry of Defence (“the MoD”) to properly equip the tanks involved and to give soldiers adequate recognition training. The second set (“the Snatch Land Rover claims”) arise from the deaths of Pte Phillip Hewett (son of the claimant Susan Smith) and Pte Lee Ellis (father of the claimant Courtney Ellis and brother of the claimant Karla Ellis) by the detonation of improvised explosive devices level with the Snatch Land Rovers in which the soldiers were travelling. The claimants all claim that the MoD breached the implied positive obligation in article 2 of the European Convention on Human Rights (“the Convention”) to take preventive measures to protect life in the light of the real and immediate risk to life of soldiers who were required to patrol in Snatch Land Rovers. The third (“the Ellis negligence claim”) is brought by Courtney Ellis in negligence and is based on various alleged failures on the part of the MoD [1 – 12].

The MoD argued that the Snatch Land Rover claims under article 2 of the Convention should be struck out because at the time of their deaths Pte Hewett and Pte Ellis were not within the jurisdiction of the UK for the purposes of the Convention, and because on the facts as pleaded the MoD did not owe a duty to them at the time of their deaths under article 2. It also argued that the Challenger claims and the Ellis negligence claim should all be struck out (1) on the principle of combat immunity (which operates to exclude liability for negligence in respect of the acts or omissions of those engaged in active operations against the enemy), and (2) because it would not be fair, just or reasonable to impose a duty of care on the MoD in the circumstances of those cases [13].

The High Court and Court of Appeal considered these arguments. The effect of the Court of Appeal’s judgment was that: (1) the Snatch Land Rover claims under article 2 of the Convention should be struck out because the deceased were outside the jurisdiction of the UK for the purposes of the Convention and there was no basis for extra-territorial jurisdiction; and (2) the Challenger claims and the Ellis negligence claim should proceed to trial [15].

The following issues were before the Supreme Court. (1) In relation to the Snatch Land Rover claims, whether at the time of their deaths Pte Hewett and Pte Ellis were within the jurisdiction of the UK for the purposes of the Convention. (2) If they were, whether – and if so, the extent to which – article 2 imposes positive obligations on the UK with a view to preventing the deaths of its own soldiers in active operations against the enemy. (3) In relation to the Challenger claims and the Ellis negligence claim, whether the allegations of negligence should be struck out because they fall within the scope of combat immunity or because it would not be fair, just or reasonable to impose a duty to take care to protect against death or injury in the circumstances [16].

JUDGMENT

The Supreme Court of the United Kingdom

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The Court unanimously holds that, in relation to the Snatch Land Rover claims, Pte Hewett and Pte Ellis were within the UK's jurisdiction for the purposes of the Convention at the time of their deaths. By a majority (Lords Mance, Wilson and Carnwath dissenting), the Court holds that: (i) the Snatch Land Rover claims should not be struck out on the ground that the claims are not within the scope of article 2 of the Convention; and (ii) the Challenger claims and Ellis negligence claim should not be struck out on the ground of combat immunity or on the ground that it would not be fair, just or reasonable to extend the MoD's duty of care to those cases [101]. The effect of the Court's decision is that all three sets of claims may proceed to trial.

REASONS FOR THE JUDGMENT

Issue 1: Convention jurisdiction: In its judgment of July 2011 in the *Al-Skeini* case, the European Court of Human Rights decided that six Iraqi civilians who had died as a result of the actions of British armed forces in Iraq were within the UK's jurisdiction for the purposes of the Convention. The judgment does not answer issue 1 directly, but elements can be extracted from it which point clearly to the conclusion that the Court reaches in this case. It formulates a relatively general principle that extra-territorial jurisdiction can exist whenever a state through its agents exercises authority and control over an individual. It also indicated that Convention rights can be "divided and tailored" to the particular circumstances of the extra-territorial act in question, as opposed to being an indivisible package. A state's extra-territorial jurisdiction over local inhabitants exists because of the authority and control that is exercised over them as a result of the authority and control that the state has over its own armed forces. They are all brought within the state's jurisdiction by the application of the same general principle [42 – 52].

Issue 2: Snatch Land Rover claims under article 2 of the Convention: In this area, the court must fully recognise the wide margin of appreciation to be given to the state and avoid imposing obligations which are unrealistic or disproportionate. But it must give effect to those obligations where it would be reasonable to expect the individual to be protected by article 2. Policy decisions made at a high level of command and things done on the battlefield will fall outside the scope of article 2. But whether claims which are between these two categories are within the scope of article 2 will require the exercise of judgment in the light of the facts of each case [76]. The present claims provide only brief outlines of the claimants' cases and they pre-date developments in relevant case law on article 2. The circumstances in which the various decisions were made need to be inquired into before it can be determined with complete confidence whether or not there was a breach of article 2. However, given the Court's guidance on the margin of appreciation to be given to the state, it is far from clear that the claimants will be able to demonstrate such a breach [78 – 81].

Issue 3: Challenger claims and Ellis negligence claim: The doctrine of combat immunity should be construed narrowly and should not be extended beyond its established scope to the planning of and preparation for active operations against the enemy. The Challenger claims are not within the scope of the doctrine because they relate to decisions which are sufficiently far removed from the pressures and risks of active operations against the enemy. The Ellis negligence claim is less obviously directed to things done away from the theatre of battle so it is arguably within the doctrine. It would be premature for these claims to be struck out and the issue should be open to further argument in the light of the evidence [89 – 96].

The circumstances in which active operations are undertaken by the UK's armed services today vary greatly and cannot all be grouped under a single umbrella as if they were all open to the same risk of judicialising warfare. However, considerations similar to those affecting the Snatch Land Rover claims under article 2 arise in relation to whether it would be fair, just and reasonable to impose a duty of care on the MoD in this area. The question whether the negligence claims in this case entail subjecting the MoD to duties that are unrealistic or excessively burdensome cannot properly be determined without hearing evidence [98 – 100].

Minority judgments: Lord Mance (with whom Lord Wilson agrees) would have struck out all three sets of claims in their entirety, essentially because they are not suitable for resolution by a court [125 – 137, 146, 150 – 152]. For the same reasons, Lord Carnwath would have struck out the Challenger claims. However, he considered that the Snatch Land Rover claims were not necessarily excluded, because major combat operations had ceased by the time of the relevant incidents [156, 186 – 188].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html