



30 June 2010

PRESS SUMMARY

R (on the application of Smith) (Respondent) v The Secretary of State for Defence and another (Appellants) [2010] UKSC 29

On appeal from the Court of Appeal [2009] EWCA Civ 441

JUSTICES: Lord Phillips (President), Lord Hope (Deputy President), Lord Rodger, Lord Walker, Lady Hale, Lord Brown, Lord Mance, Lord Collins, Lord Kerr

BACKGROUND TO THE APPEAL

Private Jason Smith, a member of the Territorial Army since 1992, was mobilised for service in Iraq in June 2003. After acclimatising for a short period in Kuwait he was sent to a base in Iraq, from where he was billeted in an old athletics stadium. By August the daytime temperature in the shade was exceeding 50 degrees centigrade. On 9 August he reported sick, complaining of the heat. Over the next few days he was employed in various duties off the base. On the evening of 13 August he collapsed at the stadium and died of heat stroke.

An inquest found that Private Smith's death was caused by a serious failure to address the difficulty he had in adjusting to the climate. Private Smith's mother commenced proceedings to quash that verdict and for a new inquest to be held. She argued that the United Kingdom had owed her son a duty to respect his right to life which was protected by article 2 of the European Convention on Human Rights (ECHR) and that the inquest had to satisfy the procedural requirements of an investigation into an alleged breach of that right. The Secretary of State denied that a further inquest was required on the facts of the case. He also denied that a soldier on military service abroad was subject to the protection of the Human Rights Act 1998 when outside his base, while accepting that in this case Private Smith had died within the UK's jurisdiction on the base.

The High Court held that Private Smith had been protected by the Human Rights Act 1998 at all times in Iraq and ordered a fresh inquest. Before the Court of Appeal the Secretary of State agreed he would not submit to the new coroner that the requirements of article 2 were inapplicable.

Notwithstanding that concession, both the Court of Appeal and the Supreme Court considered that the appeal of the Secretary of State raised two issues of general importance and of practical concern:

- whether on the true interpretation of article 1 of the ECHR British troops operating on foreign soil fell within the jurisdiction of the United Kingdom ('the jurisdiction issue'); and
- whether the fresh inquest into the death of Private Smith must conform with the procedural requirements implied into article 2 ('the inquest issue').

The Court of Appeal answered both questions in the affirmative.

JUDGMENT

The Supreme Court allowed the appeal on the jurisdiction issue (Lady Hale, Lord Mance and Lord Kerr dissenting) and unanimously dismissed the appeal on the inquest issue.

It held that it was not necessary in every case of a death of a serviceman abroad to carry out an investigation which examined whether there was fault on the part of the state because (a) the Human Rights Act 1998 did not apply to armed forces on foreign soil and (b) in any event, there was no such automatic right. The type of investigation would depend on the circumstances of the case.

REASONS FOR THE JUDGMENT

The jurisdiction issue

Lord Phillips stated that the European Court of Human Rights in Strasbourg had held that ‘jurisdiction’ within the meaning of article 1 was essentially territorial but extended in exceptional circumstances requiring special justification to other bases of jurisdiction. The difficulty lay in defining those exceptions [para 11]. It was unlikely that the Contracting States, when they agreed the ECHR in 1951 in the aftermath of a global conflict in which millions of troops had been deployed, regarded it as desirable or practicable to extend the protection of article 2 to troop operations abroad [para 58]. It was a novel suggestion that a state’s armed forces by reason of their personal status fell within the jurisdiction of the state when on foreign soil and the proper tribunal to resolve the issue was the Strasbourg Court itself [para 60].

Lord Collins observed that in practice the exceptions recognised by the Strasbourg court had consisted of (i) territorial jurisdiction by a state over the territory of another contracting state; (ii) extensions of territorial jurisdiction by analogy and (iii) commonsense extensions of the notion of jurisdiction to fit cases which plainly should be within the scope of the ECHR [para 305]. This case came within none of them. Jurisdiction could not be established simply on the basis of the UK’s authority and control over them, nor were there policy grounds for extending the scope of the ECHR to armed forces abroad, which would ultimately involve the courts in issues relating to the conduct of armed hostilities which were essentially non-justiciable [para 308].

Lord Mance, dissenting, considered that as an occupying power in Iraq, the UK had under international law an almost absolute power over the safety of its forces. The relationship was not territorial but depended on a reciprocal bond of authority and control on the one hand and allegiance and obedience on the other [para 192]. In his view the Strasbourg court would hold that the armed forces of a state were within the meaning of article 1 and for the purposes of article 2 wherever they might be [para 199]. Lord Kerr agreed. If the state could ‘export’ its jurisdiction by taking control of an area abroad it could equally do so when it took control of an individual. In his view this had already been recognised albeit obliquely by the Strasbourg court [para 331].

The inquest issue

Lord Phillips stated that where there was reason to suspect a substantive breach by the state of the article 2 right to life, it was established that the state of its own motion should carry out an investigation into the death which had certain features: a sufficient element of public scrutiny, conducted by an independent tribunal, involving the relatives of the deceased and which was prompt and effective [para 64]. There was no automatic right to such an investigation whenever a member of the armed forces died on active service [para 84]. The UK had a staged system of investigation into deaths. Some form of internal investigation would always be held into military deaths in service [para 85] and a public inquest was required whenever a body was brought back to this country. This would satisfy many of the procedural requirements of article 2. If, in the course of the inquest, it became apparent that there might have been a breach by the state of its positive article 2 obligations, this should, insofar as possible, be investigated and the result reflected in the coroner’s verdict, so as to satisfy the procedural requirements of article 2 [para 86]. In Private Smith’s case, the courts below were correct to hold that the coroner should have found a possibility that there had been a failure of the system to protect soldiers in extreme temperatures. It followed that the new inquest should comply with the procedural requirements of article 2 [paras 87 and 88].

Lord Rodger considered that the Secretary of State had correctly conceded that an article 2 investigation was needed on the facts of this case but this was not always the position. The protection of the armed forces could never be complete; deaths and injuries were inevitable. It was for this very reason that the armed forces deserved and enjoyed the admiration of the community [para 122]. It was contrary to the very essence of active military service to expect the authorities to ensure that troops would not be killed or injured by opposing forces [para 125]. Furthermore, many issues of concern to the relatives of soldiers killed on active service raised questions of policy not legality, and would fall outside the scope of any investigation by a coroner [para 127].

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. Judgements are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html