

EHRAC

Bulletin



ECtHR extends application of Convention beyond Council of Europe borders

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On 7 July 2011, the Grand Chamber (GC) of the European Court of Human Rights (ECtHR) published two judgments on the application of the European Convention on Human Rights (ECHR) to the UK's activities in Iraq: *Al-Skeini & Others v United Kingdom* (No. 55721/07) GC 7.7.11 and *Al-Jedda v United Kingdom* (No. 27021/08) GC 7.7.11.

In landmark judgments, the GC held that both cases fell within the jurisdiction of the UK under Art. 1 (obligation to respect human rights) in respect of civilians killed or detained during its military operations in southern Iraq. These cases represent a significant development in the recognition of the extra-territorial application of the Convention.

Al-Skeini & Others concerned the deaths of six Iraqi civilians in Basra in 2003, when it was under UK military occupation. The applicants argued there had been a breach of the procedural aspect of Art. 2 (right to life) as a result of the UK's failure to carry out investi-

gations into the deaths. The GC rejected the UK's argument that the ECHR did not apply because the deaths had occurred outside UK territory and found in five cases that there had been a procedural violation of Art. 2. In the sixth case, that of Baha Mousa, the GC found no violation as his death was the subject of a public inquiry.

In its judgment, the GC reiterated that a state is normally required to apply the Convention only within its own territory. An extra-territorial act would fall within the state's jurisdiction under the Convention only in exceptional circumstances. Referring to previous case law, the GC defined the three categories of exceptions as follows.

First, where a state agent exercises 'authority and control'. This exception applies: a) to diplomatic and consular agents on foreign territory; b) where, with a government's consent, a Contracting State exercises all or some of the public powers normally to be exercised by that government; c) where a state's agents bring an individual under the control of a state's authorities and therefore into its

jurisdiction, normally when individuals are detained in facilities controlled by a Contracting State.¹

Significantly, the Court elaborated that para.(c) does not simply come into effect because of a Contracting State's control of premises: "What is decisive in such cases is the exercise of physical power and control over the person in question." Furthermore, where the state exercises such control, it is under an obligation to secure the rights that are "relevant to the situation of that individual." This is a departure from the ECtHR's earlier decision in *Banković & Others v Belgium & Others* (No. 522/07/99) GC dec. 12.12.01, which found that Convention rights could not be "divided

continued on page 2

Contents

ECtHR extends application of Convention
beyond Council of Europe borders

1

continued from page 1
**ECtHR extends application of
Convention beyond Council of Europe
borders**

and tailored". However, the Court stopped short of stating that *Banković & Others* had been overturned.

The second exception is where, as a consequence of lawful or unlawful military action, a Contracting State exercises 'effective control of an area'. The obligation to secure Convention rights derives from the fact of such control, whether exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration. The GC stated that 'effective control' will be a question of fact, determined mainly with reference to the strength of a state's military presence in the area, although other indicators may also be relevant, such as the extent to which its military, economic and political support for the local administration provides it with influence and control over the region.

The final exception is where the 'territory of one Contracting State is occupied by the armed forces of another'. The occupying state is accountable under the ECHR for breaches of human rights within the occupied territory because to hold otherwise would be to deprive the population of that territory of their ECHR rights resulting in a 'vacuum' of protection within the 'Convention legal space'.

The GC held that following the removal from power of the Ba'ath regime and until the accession of the Iraqi Interim Government, the UK (and US) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the UK assumed authority and responsibility for the maintenance of security in south-east Iraq. In those exceptional circumstances, the GC considered that, between May 2003 and June 2004, UK soldiers exercised authority and control over individuals killed during security operations, thereby establishing a jurisdictional link between the UK and the deceased.

Despite the progress that this judgment represents, it is perhaps not as clear as it could be. In its conclusion, the GC appears to conflate the categories it identifies. The reference to the UK's "exercise of some of the public powers normally to be exercised by a sovereign government" adopts the language of para.(b) of the first exception of 'state agent authority and control'; yet the consensual aspect of this exception is absent. The GC also relies on the UK's "assumed authority for the maintenance of security in South East Iraq" which appears

to fall within the second exception. The GC references the first exception again, this time para.(c), in terms of the 'authority and control' the soldiers had over the individuals concerned. Ultimately, the GC did not identify the specific category of exception it relied upon. Perhaps this is not unduly problematic given that the GC emphasised: "In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra-territorially must be determined with reference to the particular facts."

In his concurring opinion, Judge Bonello criticised the GC for elaborating on the existing tests of extra-territoriality which are tailored to specific facts. He proposed a functional test of more universal application: "did it depend on the agents of the State whether the alleged violation would be committed or would not be committed? Was it within the power of the State to punish the perpetrators and to compensate the victims? If the answer is yes, self-evidently the facts fall squarely within the jurisdiction of the State."

This judgment is a welcome move away from the limited 'Convention legal space' definition of jurisdiction in *Banković & Others*, and expands the application of the existing extra-territorial exceptions, thereby extending the reach of the Convention.

In *Al-Jedda*, the UK relied on a different argument to deny jurisdiction under Art. 1. The

applicant was interned in a detention centre in Basra between 2004 and 2007 on suspicion of facilitating acts of terrorism. The applicant denied all allegations and no criminal charges were brought against him. The UK government argued that the actions of its forces were authorised by the UN Security Council (UNSC) and were therefore attributable to the UN and not to the UK. Further, the UK argued that if the acts were attributable to its forces, its use of internment was authorised by a number of UNSC resolutions and this authorisation superseded all other treaty commitments. The GC accepted neither of these arguments and found that the applicant's internment violated Art. 5(1) (right to liberty and security).

In finding that the case fell within the jurisdiction of the UK, the GC distinguished the case from the joint decision made in the earlier cases of *Behrami & Behrami v France* (No. 71412/01) and *Saravati v France, Germany and Norway* (No. 78166/01) GC dec. 2.5.07, which found that the actions of multinational forces in Kosovo were under the effective control of the UN and were therefore not attributable to the individual Contracting States. The UN's role as regards security in

Kosovo in 1999 was quite different to its role in Iraq in 2004. The UN Mission in Kosovo was a subsidiary organ of the UN created under Chapter VII of the UN Charter and the Kosovo Force was exercising powers lawfully delegated under Chapter VII by the UNSC. By contrast, the UNSC had neither effective control nor ultimate authority over the acts and omissions of troops in Iraq. The applicant's detention was not, therefore, attributable to the UN.

In dismissing the UK's argument that the relevant UNSC resolutions conflicted with and took precedence over its international treaty obligations, the Court made three fundamental points.

Firstly, in interpreting UNSC resolutions, "there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights", on the basis that Art. 24(2) of the UN Charter requires the UNSC, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles" of the UN, one of which is to achieve international cooperation in promoting and encouraging respect for human rights. Secondly, in the event of any ambiguity in the terms of a UNSC Resolution, the ECtHR will choose the interpretation "which is most in

harmony with the requirements of the [ECHR] and which avoids any conflict of obligations." Thirdly, in light of the UN's important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used if the UNSC ever intended states to take particular measures which would conflict with their obligations under international human rights law.

The Court found that although UNSC Resolution 1546 authorised the UK to take measures to contribute to the maintenance of security and stability in Iraq, it did not specifically require preventative internment. There was, therefore, no conflict between the UK's obligations under the UN Charter and its obligations under Art. 5(1). The UK had therefore violated Art. 5.

The GC thereby made it clear that Contracting States cannot seek to rely on UNSC resolutions to escape liability for breaches of human rights obligations.

1 See *Ocalan v Turkey* (No. 46221/99) GC 12.5.05, *Issa & Others v Turkey* (No. 31821/96) 16.11.04, *Al-Saadoon & Mufilbi v United Kingdom* (No. 61498/08) dec. 30.6.09 and *Medvedyev & Others v France* (No. 3394/03) GC 29.3.10.

