

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

Al-Skeini and others (Respondents)

v.

Secretary of State for Defence (Appellant)

Al-Skeini and others (Appellants)

v.

Secretary of State for Defence (Respondent)

(Consolidated Appeals)

Appellate Committee

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Lord Rodger of Earlsferry

Baroness Hale of Richmond

Lord Carswell

Lord Brown of Eaton-under-Heywood

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HOUSE OF LORDS

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT
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(Appellant)**

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(Respondent)
(Consolidated Appeals)**

[2007] UKHL 26

LORD BINGHAM OF CORNHILL

My Lords,

1. These proceedings arise from the deaths of six Iraqi civilians, and the brutal maltreatment of one of them causing his death, in Basra. Each of the deceased was killed (or, in one case, is said to have been killed) and the maltreatment was inflicted by a member or members of the British armed forces. In each case a close relative of the deceased has applied in the High Court in London for an order of judicial review against the Secretary of State for Defence, seeking to challenge his refusal (by a letter of 26 March 2004) to order an independent enquiry into the circumstances of this maltreatment and these deaths, and his rejection of liability to afford the claimants redress for causing them. These six cases have been selected as test cases from a much larger number of claims in order, at this stage, to resolve certain important and far-reaching issues of legal principle.

2. The claimants found their claims in the English court on the Human Rights Act 1998 (“the HRA” or “the Act”). To succeed each claimant must show that a public authority has acted unlawfully, that is, incompatibly with a Convention right of the claimant or the deceased (section 6(1) of the Act). A Convention right means a right set out in one of the articles of the European Convention on Human Rights reproduced in Schedule 1 to the Act (sections 1(1), 1(3) and 21(1)). The claimant must also show that he or the deceased is a victim of the unlawful act (section 7(1), (3)), a requirement which gives rise to no

issue in this case and may be set on one side. For present purposes it may be said that a claimant seeking to establish a claim under the Act has three substantial conditions to meet.

3. First, the claimant must show that his complaint falls within the scope of the Convention. This is an essential step, since it is clear that a claim cannot fall within the HRA if it does not fall within the Convention. In the ordinary run of claims under the Act, this condition gives rise to no difficulty: the claim relates to conduct within the borders of a contracting state such as the United Kingdom, and the question is whether a claimant's Convention right has been violated and if so by whom. But here the substantial violations alleged did not take place within the borders of a contracting state. They took place in Iraq, which is not part of the UK and not a contracting state. This is an important fact, since the focus of the Convention is primarily on what is done or not done within the borders of contracting states and not outside. To this rule, however, there are certain limited exceptions, recognised in the jurisprudence of the European Court of Human Rights in Strasbourg, the court vested by the Convention with the duty of interpreting and applying it. The claimants say that in each of their cases, because of the special circumstances in which British troops were operating in Basra, the conduct complained of, although taking place outside the borders of the UK (and, for that matter, any other contracting state), falls within the exceptions recognised by the Strasbourg jurisprudence, which the English court must take into account (section 2(1) of the Act). The Secretary of State originally contended in these proceedings that none of the claimants' complaints fell within the limited extra-territorial exceptions recognised by the Strasbourg court. But the Queen's Bench Divisional Court (Rix LJ and Forbes J, [2004] EWHC 2911 (Admin), [2007] QB 140) held that although the first five of the present claims fell outside the scope of the Convention the sixth, that of Colonel Mousa, did not. That is a ruling which the Secretary of State now accepts. So the first major issue between the parties is whether, as the first five claimants (strongly supported by the Interveners) contend, and the Secretary of State denies, their claims (or, at the very least, some of them) fall within the scope of the Convention. If the Secretary of State is right, their claims must fail. The Court of Appeal (Brooke, Sedley and Richards LJJ, [2006] EWCA Civ 1609, [2007] QB 140) held, although on grounds somewhat differing from those of the Divisional Court, that the first five claims do fall outside the scope of the Convention, accepting that the sixth falls within it. The Secretary of State supports that conclusion, although criticising the basis upon which the Court of Appeal held the sixth case to fall within the Convention.

4. Even if the claimants succeed on that first issue, they must satisfy a second condition: of showing that their claims, although falling within the scope of the Convention, also fall within the scope of the HRA. This again is an essential condition, for while a claim cannot succeed under the Act unless it falls within the scope of the Convention the converse is not true: a claim may in some circumstances fall within the scope of the Convention but not within the scope of the Act. Here the parties are in radical disagreement. The Secretary of State contends that the HRA has no application to acts of public authorities outside the borders of the UK. The Act has, in legal parlance, no extra-territorial application. Therefore, he submits, the claim of Colonel Mousa in the sixth case, and those of the other five claimants, cannot succeed under the Act. The claimants say that the Act does extend to cover the conduct of the British forces in Basra, given the special circumstances in which they were operating and what they did. Neither of the courts below accepted the full breadth of either party's submissions. They both held that Colonel Mousa's claim falls within the scope of the Act, a conclusion which the Secretary of State challenges. They both held that the first five claims fall outside the scope of the Act, a conclusion which those claimants challenge. If the claimants are wholly correct on the first issue (paragraph 3 above) but the Secretary of State is wholly correct on this issue, the claimants may have a claim which would succeed against the UK at Strasbourg but they have none against the Secretary of State under the Act.

5. If, and to the extent that, the claimants can satisfy these first two conditions, the success of their claims depends on their satisfying a third condition: that a Convention right has, in each case, been violated. The violation alleged consists primarily of a failure to investigate a violent death caused, or allegedly caused, by agents of the state, as the Convention has been held to require. The Divisional Court found such a violation in the case of Mr Mousa and would have found violations in the other five cases had they fallen within the scope of the Convention and the Act. The Court of Appeal agreed with the latter conclusion. But in Mr Mousa's case there had been factual developments of potential significance since the date of the Divisional Court's judgment, and the Court of Appeal concluded that this question should, in his case, be remitted to the Divisional Court. It is common ground that that order should stand, if the first two issues are resolved in Colonel Mousa's favour. But the Secretary of State resists the finding of violation, provisional though it has so far been, in the first five cases. Thus claimants 1-5 appeal against the dismissal of their claims and the Secretary of State cross-appeals against the ruling that Mr Mousa's case falls within the scope of the HRA.

The cases

6. The facts of the six cases, so far as they are now known, are rehearsed at some length in the judgments of the Divisional Court (paragraphs 56-89) and the Court of Appeal (paragraphs 22-29), to which reference may be made. The barest summary will suffice for present purposes.

Case 1

Mr Hazim Jum'aa Gatteh Al-Skeini was shot dead on 4 August 2003 by a member of a British military patrol in Basra. The claimant is his brother. Very different accounts of the incident have been given by the claimant and his witnesses on one side and British military witnesses on the other.

Case 2

Mr Muhammad Abdul Ridha Salim was fatally wounded on 6 November 2003 when British troops raided a house in Basra where he was. He received medical attention but died on 7 November 2003. The claimant is his widow. There is again a radical divergence between the respective parties' accounts of this incident.

Case 3

Mrs Hannan Mahaibas Sadde Shmailawi was shot and fatally wounded on 10 November 2003 in the Institute of Education in Basra. On the British military account she was shot unintentionally during an exchange of fire between a British patrol and a number of gunmen. The claimant is the widower of the deceased, who accepts that the shooting of his wife was not intentional. It appears that she may have been a very unfortunate bystander, and the Secretary of State does not accept that the fatal shot was fired by a British soldier rather than a gunman.

Case 4

Mr Waleed Sayay Muzban was shot and fatally injured on the night of 24 August 2003 in Basra. He was driving a people-carrier when he was shot, and he died the next day. The shooting occurred when a British military patrol was, on its account, carrying out a perimeter check and the vehicle, having initially stopped, was driven away and appeared to present a threat. The claimant is the brother of the deceased.

Case 5

Mr Raid Hadi Sabir Al Musawi was shot and fatally wounded by a member of a British military patrol in Basra on 26 August 2003. He died nine weeks later, on 6 November 2003. The claimant is his mother. The parties' respective accounts of what happened, as in the first case (which, on the facts, it resembles), are radically divergent.

Case 6

Mr Baha Mousa was employed as a receptionist at a hotel in Basra and was working there on the morning of 14 September 2003 when British troops entered the hotel. He was seized and detained and taken to a British military base in Basra. At the base he was brutally beaten by British troops. He died of the injuries so inflicted during the night of 15 September 2003. The claimant is the father of the deceased, and is a colonel in the Basra police. This deceased, unlike the others, was killed by British troops when held as a prisoner in a British military detention unit. This is the limited basis upon which the Divisional Court held that this case falls within the scope of the Convention, and this is the basis upon which the Secretary of State accepts that finding.

7. It is convenient to consider first the second of the three issues outlined above, that summarised in paragraph 4.

A. *Does the HRA apply to acts done outside the territory of the UK?*

8. The HRA is a statute enacted by Parliament. Where an issue arises as to its meaning, it must be construed. This is a task which only

a UK court can perform. The court in Strasbourg is the ultimate authority on interpretation of the European Convention, but it cannot rule on the interpretation of a domestic statute. That is the task which the House is now called upon to perform.

9. In carrying out that task the House must employ the familiar tools of statutory interpretation. The starting point is the language of the Act, from which the court seeks to derive the meaning of what Parliament has enacted. Significance may be attached not only to what Parliament has said but also, on occasion, to what it has not said. Attention may be paid to presumptions applicable to the drafting of statutes, since these are rules which expert professional draftsmen may ordinarily be expected to follow in the absence of reason to conclude that they may not have done so or an indication in the statute that they have not done so. While the express terms of a statute are always crucial, the courts will eschew an overly literal construction, taking account of the purpose of the statute, the mischief sought to be remedied and other circumstances relevant to interpretation. It is of course very relevant that the HRA is directed to the protection of human rights, with particular reference to the European Convention, which the UK ratified on 8 March 1951 and which came into force on 3 September 1953 when Luxembourg became the tenth contracting state to ratify.

10. Since 3 September 1953 the UK has been bound in international law to comply with the obligations undertaken in the Convention, and in later protocols to the Convention which it has formally ratified. But for upwards of 40 years the UK took no step to give domestic legal effect to these international obligations. The object of the HRA was to do so. This object could have been achieved by a simple incorporation of the Convention (or some or all of its articles) into domestic law. But this is not what was done, as clearly explained by my noble and learned friends Lord Nicholls of Birkenhead and Lord Hoffmann in *In re McKerr* [2004] UKHL 12, [2004] 1 WLR 807, paragraphs 25 and 62-65, and by Lord Hoffmann in *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, paragraph 27. The technique adopted, briefly summarised in paragraph 2 above, was to provide in section 6(1) that “It is unlawful for a public authority to act in a way which is incompatible with a Convention right”. A “Convention right”, by section 1, meant a right or fundamental freedom set out in articles 2 to 12 and 14 of the Convention, articles 1 to 3 of the First Protocol and articles 1 and 2 of the Sixth Protocol, as read with articles 16 to 18 of the Convention, subject to any designated derogation or reservation. The listed articles were set out in Schedule 1 to the Act. “The Convention” was defined in section 21(1) of the Act to mean the Convention agreed by the Council

of Europe at Rome on 4 November 1950 “as it has effect for the time being in relation to the United Kingdom”. Thus, as Lord Nicholls pointed out in *McKerr*, above, paragraph 25, there is a distinction between (1) rights arising under the Convention and (2) rights created by the 1998 Act by reference to the Convention:

“These two sets of rights now exist side by side. But there are significant differences between them. The former existed before the enactment of the 1998 Act and they continue to exist. They are not as such part of this country’s law because the Convention does not form part of this country’s law. That is still the position. These rights, arising under the Convention, are to be contrasted with rights created by the 1998 Act. The latter came into existence for the first time on 2 October 2000. They are part of this country’s law. The extent of these rights, created as they were by the 1998 Act, depends upon the proper interpretation of that Act ...”

The focus of this opinion, at this stage of the enquiry, is on the extent of the rights arising under the Act, not those arising under the Convention. Hence the need for careful consideration, in the first instance, of the Act.

11. In resisting the interpretation, upheld by the courts below, that the HRA has extra-territorial application, the Secretary of State places heavy reliance on what he describes as “a general and well established principle of statutory construction”. This is (see Bennion, *Statutory Interpretation*, 4th ed (2002), p 282, section 106) that

“Unless the contrary intention appears, Parliament is taken to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom.”

In section 128 of the same work, p 306, the learned author adds:

“Unless the contrary intention appears ... an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters.”

In *Tomalin v S Pearson & Son Limited* [1909] 2 KB 61, Cozens-Hardy MR, with the concurrence of Fletcher Moulton and Farwell LJ, endorsed a statement to similar effect in *Maxwell on The Interpretation of Statutes*, p 213:

“In the absence of an intention clearly expressed or to be inferred from its language, or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom”.

Earlier authority for that proposition was to be found in cases such as *Ex p Blain* (1879) 12 Ch D 522, 526, per James LJ, and *R v Jameson* [1896] 2 QB 425, 430, per Lord Russell of Killowen CJ. Later authority is plentiful: see, for example, *Attorney-General for Alberta v Huggard Assets Limited* [1953] AC 420, 441, per Lord Asquith of Bishopstone for the Privy Council; *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 2 AC 130, 145, per Lord Scarman; *Al Sabah v Grupo Torras SA* [2005] UKPC 1, [2005] 2 AC 333, para 13, per Lord Walker of Gestingthorpe for the Privy Council; *Lawson v Serco Limited* [2006] UKHL 3, [2006] ICR 250, para 6, per Lord Hoffmann; *Agassi v Robinson (Inspector of Taxes)* [2006] UKHL 23, [2006] 1 WLR 1380, paras 16, 20, per Lord Scott of Foscote and Lord Walker of Gestingthorpe. That there is such a presumption is not, I think, in doubt. It appears (per Lord Walker in *Al Sabah*, above) to have become stronger over the years.

12. In argument before the courts below, the claimants relied on another presumption of statutory interpretation: that, as put by the Divisional Court in paragraph 301 of its judgment, “a domestic statute enacting international treaty obligations will be compatible with those obligations”. The Divisional Court appears to have given some weight to this presumption, and in the Court of Appeal Sedley LJ appears to have accepted (paragraph 186) that “absent some clear indication to the contrary, domestic legislation is to be taken to have been intended to cohere with the state’s international obligations”. The classic exposition of the presumption in question is, however, that given by Diplock LJ in *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143-144:

“Where, by a treaty, Her Majesty’s Government undertakes either to introduce domestic legislation to

achieve a specified result in the United Kingdom or to secure a specified result which can only be achieved by legislation, the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty's Government has taken steps by way of legislation to fulfil its treaty obligations. Once the Government has legislated, which it may do in anticipation of the coming into effect of the treaty, as it did in this case, the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties (see *Ellerman Lines v Murray*; *White Star Line and US Mail Steamers Oceanic Steam Navigation Co Ltd v Comerford*), and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts. But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred. Thus, in case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption."

In the present case, the Secretary of State contends that the meaning of the HRA is clear and that its terms are not reasonably capable of more than one meaning. But even if he is wrong, this presumption gives the claimants little if any help since the UK undertook no international law obligation to incorporate the Convention into domestic law. It was so held by the Strasbourg court in *James v United Kingdom* (1987) 8 EHRR 123, para 84, *Observer and The Guardian v United Kingdom* (1991) 14 EHRR 153, para 76, and *McCann v United Kingdom* (1995) 21 EHRR 97, para 153. It was also recognised by Brooke LJ in the Court of Appeal (paragraph 144) when he acknowledged that the UK was not obliged to incorporate the Convention into its national law, either in whole or in part. This is, I think, correct. The UK was not in breach of any obligation binding in international law when it omitted,

from 1953 to 1998, to give the Convention any direct effect in domestic law. In 1997-1998 it had a policy choice, whether to give effect to the Convention in domestic law at all, and if so to what extent. A decision to give no directly enforceable domestic right to persons claiming to be victims of violations of Convention rights by UK authorities outside the UK, leaving such persons to pursue any such claim against the UK in Strasbourg, would have involved no breach of any obligation binding on the UK in international law. In argument before the House, the claimants did not seek to attach great weight to this presumption.

13. The Secretary of State points, in support of his submission, to the absence from the HRA of any of the forms of words used where Parliament intends a provision to have extra-territorial application. Examples were given in argument: “who commits, in a foreign country” (Criminal Justice Act 1948, s 31(1)); “whether in the United Kingdom or elsewhere” (Army Act 1955, s 70(1)); “whether in or outside the United Kingdom” (Geneva Conventions Act 1957, s 1(1)); “acts committed ... outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction” (International Criminal Court Act 2001, s 51(2)). There is, I think, force in this point, unless a clear inference of extra-territorial application can otherwise be drawn from the terms of the Act. It cannot be doubted that, if Parliament had intended the Act to have extra-territorial application, words could very readily have been found to express that intention.

14. The Convention provides in article 1 that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention”. The Secretary of State points out that article 1 is not one of the articles to which domestic effect is given by section 1 of and Schedule 1 to the HRA. Therefore, he argues, the scope of the Act is to be found in construction of the Act and not construction of article 1 of the Convention. The claimants reject this argument, pointing out that article 1 confers and defines no right, like the other articles specified in section 1 of the Act and the Schedule. Article 1 of the Convention is omitted because, like article 13 (also omitted), it is provided for in the Act. I would for my part accept that Parliament intended the effect of the Act to be governed by its terms and not, save by reference, the Convention, consistently with the scheme described in paragraph 10 above. Thus there was no need to include article 1 in section 1 of the Act and the Schedule, nor article 13 since the Act contains its own provisions as to remedies in sections 4 and 8. But it is not strictly correct that only articles defining or conferring rights are included in section 1 and the Schedule, since articles 16 to 18 are

referred to and included, and they define and confer no right. Had article 1 been included in section 1 and the Schedule, this would have assisted the claimants, since by 1997-1998 the Strasbourg jurisprudence had recognised some limited exceptions to the territorial focus of the Convention, and it could have been said that Parliament intended the territorial scope of the Act to be subject to the same limited exceptions. As it is, the omission of any reference to article 1 is of some negative assistance to the Secretary of State.

15. The parties directed much detailed argument to the language of the Act, seeking to derive support for their competing interpretations.

(1) *Section 1(4)*. This subsection empowers the Secretary of State to make such amendments to the Act as he considers necessary “to reflect the effect, in relation to the United Kingdom, of a protocol”. The claimants submit, obviously correctly, that this is a reference to the UK as a contracting state and a juridical entity in international law, not as a territorial area. The same is true of section 1(5)(a) and (b). This, they argue, is significant, since the definition of “the Convention” in section 21(1) is to that instrument “as it has effect for the time being in relation to the United Kingdom”, and section 1(6) makes reference to a protocol in force “in relation to the United Kingdom”. These references should, according to accepted canons of draftsmanship, be read in the same way. This may be so, but I find the use of words such as “in relation to” to be a weak indication from which to draw an inference of extra-territorial application. It is perhaps noteworthy that Jersey, Guernsey and the Isle of Man, seeking to give domestic effect to the Convention, provided (following the language of the Act) that it should have effect “in relation to” “the Island” or “Guernsey”. In these instances the reference can only have been territorial since Jersey, Guernsey and the Isle of Man were not contracting states.

(2) *Section 3*. The claimants contended, and the Divisional Court accepted (in paragraphs 291 and 301 of its judgment), that the interpretative obligation in section 3 of the Act could be applied to interpretation of the Act itself. This is not an argument which the Court of Appeal expressly accepted. In my opinion it was right not to do so. Section 3 provides an important tool to be used where it is necessary and possible to modify domestic legislation to avoid incompatibility with the Convention rights protected by the Act, but it cannot be used to determine the content or extent of the rights which are to be protected. It is in my view plain that section 3 was not intended to be used in construing the Act itself.

- (3) *Section 6*. It is common ground that the public authorities referred to in section 6 are, and are only, UK public authorities (and the courts referred to in section 4(5) and section 7 are all UK courts). But these provisions assist neither party. The claimants only seek a remedy under the Act against the Secretary of State, who is of course a UK public authority, and they seek this remedy in a UK court. Section 11, authorising remedial action where domestic legislation has been found to be incompatible with a Convention right, does not advance the argument.
- (4) *Sections 21(5) and section 22(7)*. Section 21(5), anticipating article 1 of the Thirteenth Protocol to the Convention (to which the UK had not acceded when the Act was passed) provided that the death penalty, which could still be imposed under the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957, should be replaced by a liability to life imprisonment or any lesser punishment authorised by those Acts. This subsection, unlike most of the Act, was to take effect on royal assent to the Act being given. The three service Acts have extra-territorial effect in relation to those to whom they apply (see the reference to section 70 of the Army Act, briefly quoted in paragraph 13 above), and it might have been thought that the amendment effected by section 21(5) would similarly apply extra-territorially. Section 22(7) of the HRA, however, provides:

“Section 21(5), so far as it relates to any provision contained in the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957, extends to any place to which that provision extends”.

It may be questionable whether, as a question of drafting technique, section 22(7) is strictly necessary. But in my opinion it does point, as the Secretary of State contends, towards an assumption by the draftsman that the Act as a whole does not apply to acts committed outside the United Kingdom.

- (5) *Section 22(6)*. This subsection provides that the Act extends to Northern Ireland. This is the conventional means of indicating that the Act is to have effect throughout the United Kingdom (see Bennion, *op. cit.*, p 284), and the Divisional Court were wrong to suggest (judgment, para 301) that the Act does not apply to Scotland. But this provision is not significant for present purposes. It makes clear that the Act forms part of the domestic law of each of the three jurisdictions of the UK.

16. I do not, overall, find these textual indications very compelling in favour of one side or the other, although they give some slight support to the Secretary of State's contention. More compelling in his favour is the absence of any clear pointer in the claimants' favour, for it is on the Act itself that they must primarily rely to rebut the presumption of territoriality discussed in paragraph 11 above.

17. The claimants rely on two domestic decisions in support of their interpretation. The first of these is the decision of the Court of Appeal (Lord Phillips of Worth Matravers MR, Chadwick LJ and Lord Slynn of Hadley) in *R (B and others) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [2005] QB 643. The claimants in this case complained of breaches of articles 3 and 5 of the Convention, seeking permission to apply for judicial review. Their complaint was based on the conduct of British consular officials in Melbourne, for whom the Secretary of State was in principle responsible. The Court of Appeal granted permission to apply (which Moses J and Sullivan J had refused) but dismissed the claim. One of the issues which arose was whether a claim would lie against the Secretary of State under the Act for acts done or not done outside the UK: see paragraph 25 of the judgment. The claimants contended that jurisdiction under the Act was co-extensive with that under the Convention, the Secretary of State that the claimants could not rely on the Convention rights set out in the Act because they were not within the territory of the UK (see pp 646-648 of the report and paras 67-77 of the judgment). Having surveyed the Strasbourg jurisprudence as it then stood and a body of domestic material, the court resolved this issue in the claimants' favour, ruling in paragraphs 78 and 79:

“78. ... It seems to us that we are under a duty, if possible, to interpret the Human Rights Act 1998 in a way that is compatible with the Convention rights, as those rights have been identified by the Strasbourg court. This duty precludes the application of any presumption that the Human Rights Act 1998 applies within the territorial jurisdiction of the United Kingdom, rather than the somewhat wider jurisdiction of the United Kingdom that the Strasbourg court has held to govern the duties of the United Kingdom under the Convention.

79. For these reasons we have reached the conclusion that the Human Rights Act 1998 requires public authorities of the United Kingdom to secure those Convention rights defined in section 1 of the Act within the jurisdiction of the United Kingdom as that jurisdiction

has been identified by the Strasbourg court. It follows that the Human Rights Act 1998 was capable of applying to the actions of the diplomatic and consular officials in Melbourne. It remains to consider whether those actions infringed the Convention and the Act.”

These conclusions are plainly very helpful to the claimants. In reaching them, however, the court relied strongly on section 3 of the Act which is not in my opinion, as indicated above, a tool which can be used to determine the extent of the rights which are protected by the Act.

18. The second authority relied on is *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529. The claimant in this case sought judicial review of a decision refusing a licence to fish in the waters of South Georgia and the South Sandwich Islands (“SGSSI”). The refusal was said to violate article 1 of the First Protocol to the Convention. It was common ground that although Her Majesty’s Government had extended the Convention to SGSSI under article 63 (now 56) of the Convention it had not so extended article 1 of the First Protocol. It was also clear that the licence had been refused to the claimant on the instruction of the Secretary of State, although there was an issue whether, in issuing the instruction, he had acted in right of Her Majesty as Queen of the United Kingdom or of SGSSI.

19. The first issue agreed by the parties for decision by the House was whether (as the Court of Appeal, reversing the judge, had held) the instruction had been issued through the Secretary of State by Her Majesty in right of the United Kingdom, it being assumed that the claimant could not succeed if the instruction had been given in right of SGSSI. My own opinion, shared by Lord Hoffmann and Lord Hope of Craighead, was that it had been issued in right of SGSSI: paras 19, 63-64, 75-80. It was also held (in various opinions) that the claimant could not succeed in a claim under the Act unless he could succeed in Strasbourg, that he could not succeed under the Act since article 1 of the First Protocol had not been extended to SGSSI and that the Secretary of State, acting in right of Her Majesty as Queen of SGSSI was not a UK public authority: see my own opinion at paras 24-25; that of Lord Nicholls of Birkenhead at para 44; that of Lord Hoffmann at paras 56-64; that of Lord Hope at paras 86-92; and Baroness Hale of Richmond at paras 97-98.

20. In support of their argument on the extra-territorial scope of the Act, the claimants relied in particular on paragraph 34 of Lord Nicholls' opinion, a passage cited by the Court of Appeal in paragraphs 45 and 146 of the judgment under appeal. In paragraph 34 Lord Nicholls said:

“34. To this end the obligations of public authorities under sections 6 and 7 mirror in domestic law the treaty obligations of the United Kingdom in respect of corresponding articles of the Convention and its protocols. That was the object of these sections. As my noble and learned friend, Lord Hope of Craighead, has said, the ‘purpose of these sections is to provide a remedial structure in domestic law for the rights guaranteed by the Convention’: *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, 564, para 44. Thus, and this is the important point for present purposes, the territorial scope of the obligations and rights created by sections 6 and 7 of the Act was intended to be co-extensive with the territorial scope of the obligations of the United Kingdom and the rights of victims under the Convention. The Act was intended to provide a domestic remedy where a remedy would have been available in Strasbourg. Conversely, the Act was not intended to provide a domestic remedy where a remedy would not have been available in Strasbourg. Accordingly, in order to identify the territorial scope of a ‘Convention right’ in sections 6 and 7 it is necessary to turn to Strasbourg and consider what, under the Convention, is the territorial scope of the relevant Convention right.”

This clearly supports the claimants' contention that the territorial scope of the Act was intended to be co-extensive with that of the Convention. But Lord Nicholls went on to say, in paragraph 36:

“36. The Human Rights Act is a United Kingdom statute. The Act is expressed to apply to Northern Ireland: section 22(6). It is not expressed to apply elsewhere in any relevant respect. What, then, of Convention obligations assumed by the United Kingdom in respect of its overseas territories by making a declaration under article 56? In my view the rights brought home by the Act do not include Convention rights arising from these

extended obligations assumed by the United Kingdom in respect of its overseas territories. I can see no warrant for interpreting the Act as having such an extended territorial reach. If the United Kingdom notifies the Secretary General of the European Council that the Convention shall apply to one of its overseas territories, the United Kingdom thenceforth assumes in respect of that territory a treaty obligation in respect of the rights and freedoms set out in the Convention. But such a notification does not extend the reach of sections 6 and 7 of the Act. The position is the same in respect of protocols.”

It is not, I think, clear that these observations of Lord Nicholls commanded majority support. I myself observed (para 25) that “The territorial focus of the Act is clearly shown by the definition of ‘the Convention’ in section 21 to mean the European Convention ‘as it has effect for the time being in relation to the United Kingdom’”. Lord Hoffmann, in paragraph 57, stated: “The 1998 Act is United Kingdom legislation; it does not purport to have extraterritorial application”. The decision of the House in *Quark* was not directed to the present issue, and I do not think it can be treated as reliable authority on the point.

21. No assistance is in my opinion to be derived from *R (European Roma Rights Centre) v Immigration Office at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55, [2005] 2 AC 1 and *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173. In the first of these cases no argument on extra-territoriality was raised. The second concerned the application of regulations expressly providing for the payment of social security benefits to persons resident abroad.

22. Relying in particular on Lord Nicholls’ observations in *Quark*, the claimants submitted that the object of the Act was to give the specified Convention rights the same protection in domestic law as they enjoyed under the Convention, so that the two systems of protection should essentially correspond. That was borne out by the Act’s provisions relating to damages in section 8(3) and (4) of the Act. The Secretary of State responded that in some instances the Act clearly did not aim to achieve such correspondence. The decision of the House in *In re McKerr* [2004] 1 WLR 807, established that a claimant could not base his claim under the Act on a breach of Convention right where the act complained of took place before section 7 of the Act came into force, even though (irrespective of the date) a good claim might lie against the

UK at Strasbourg. The decision of the House in *McKerr* was, however, based on its construction of section 22(4) of the Act, which specifically addressed the issue of retrospectivity, and this greatly weakens the force of this response, there being no express provision of the Act directed to territorial scope. Some of the opinions in *Quark* (paras 25, 64) suggest that a claimant may have a good claim against the UK at Strasbourg without having a good claim under the Act, but that was a point which did not fall for decision in that case. I do not find these pointers very persuasive.

23. Attention was drawn by the Secretary of State in argument to statements in the White Paper *Rights Brought Home: The Human Rights Bill* (Cm 3782, October 1997) and to statements made during the passage of the Bill through Parliament. The claimants questioned the admissibility and value of this material. I see force in these objections. For domestic political reasons it was natural for those promoting the Bill to emphasise in the White Paper its value to the people of the UK. The claims of those who might wish to rely on it in foreign countries far away might not have had the same appeal. In any event, the issue of extra-territorial application was never squarely addressed. Nor was it, I think, in either House. Thus this material does not strengthen the Secretary of State's argument. But nor, perhaps more significantly, does it give any help to the claimants in seeking to rebut the presumption of territorial application.

24. In the course of its careful consideration of this question the Divisional Court observed (in paragraph 304 of its judgment): "It is intuitively difficult to think that Parliament intended to legislate for foreign lands". In similar vein, Brooke LJ in the Court of Appeal said (para 3): "It may seem surprising that an Act of the UK Parliament and a European Convention on Human Rights can arguably be said to confer rights upon citizens of Iraq which are enforceable against a UK governmental authority in the courts of England and Wales". I do not think this sense of surprise, which I share, is irrelevant to the court's task of interpretation. It cannot of course be supposed that in 1997-1998 Parliament foresaw the prospect of British forces being engaged in peacekeeping duties in Iraq. But there can be relatively few, if any, years between 1953 and 1997 in which British forces were not engaged in hostilities or peacekeeping activities in some part of the world, and it must have been appreciated that such involvement would recur. This makes it the more unlikely, in my opinion, that Parliament could, without any express provision to that effect, have intended to rebut the presumption of territorial application so as to authorise the bringing of claims, under the Act, based on the conduct of British forces outside the

UK and outside any other contracting state. Differing from the courts below, I regard the statutory presumption of territorial application as a strong one, which has not been rebutted.

25. The Divisional Court based its finding of extra-territorial application in part on its understanding of the modest extent to which the Strasbourg court had recognised the Convention itself as having extra-territorial application. In paragraph 301 of its judgment it said:

“Whatever may have been the position if our conclusion, or Strasbourg jurisprudence, had been that article 1 of the Convention was founded on some form of broad personal jurisdiction, nevertheless where on the contrary, for the reasons which we have described above, article 1 should be and has been given an essentially territorial effect, it is counter-intuitive to expect to find a parliamentary intention that there should be gaps between the scope of the Convention and an Act which was designed to bring rights home, that is to say as we understand that metaphor to enable at any rate domestic or British claimants to sue in the domestic courts rather than in Strasbourg.”

Thus the Divisional Court found the Act to have extra-territorial application (para 306) to “allow of the narrow exception which we have framed and applied in the case of the sixth claimant”. Brooke LJ similarly confined the extra-territorial effect of the Act by limiting it (para 147) to cases “where a public authority is found to have exercised extra-territorial jurisdiction on the application of [state agent authority] principles”. I think, with respect, that there is a certain danger in this line of reasoning. It is one thing to say (if there is ground for doing so) that Parliament intended the Act to have the same extra-territorial effect as the Convention. It is another to base that conclusion on the finding that the exceptions to the territoriality principle recognised by Strasbourg were minor, unless it could be assumed that the Strasbourg court would recognise no other or wider exceptions in future. In this connection it is pertinent to recall Resolution 1386, adopted by the Parliamentary Assembly of the Council of Europe on 24 June 2004, paragraph 18 of which, quoted by the Court of Appeal, said:

“The Assembly calls upon those of its member states that are engaged in the [Multi-National Force] to accept the full applicability of the European Convention on Human

Rights to the activities of their forces in Iraq, in so far as those forces exercised effective control over the areas in which they operated.”

26. I would accordingly hold that the HRA has no extra-territorial application. A claim under the Act will not lie against the Secretary of State based on acts or omissions of British forces outside the United Kingdom. This does not mean that members of the British armed forces serving abroad are free to murder, rape and pillage with impunity. They are triable and punishable for any crimes they commit under the three service discipline Acts already mentioned, no matter where the crime is committed or who the victim may be. They are triable for genocide, crimes against humanity and war crimes under the International Criminal Court Act 2001. The UK itself is bound, in a situation such as prevailed in Iraq, to comply with The Hague Convention of 1907 and the Regulations made under it. The Convention provides (in article 3) that a belligerent state is responsible for all acts committed by members of its armed forces, being obliged to pay compensation if it violates the provisions of the Regulations and if the case demands it. By article 1 of the Geneva IV Convention the UK is bound to ensure respect for that convention in all circumstances and (article 3) to prohibit (among other things) murder and cruel treatment of persons taking no active part in hostilities. Additional obligations are placed on contracting states by protocol 1 to Geneva IV. An action in tort may, on appropriate facts, be brought in this country against the Secretary of State: see *Bici v Ministry of Defence* [2004] EWHC 786 (QB). What cannot, it would seem, be obtained by persons such as the present claimants is the remedy they primarily seek: a full, open, independent enquiry into the facts giving rise to their complaints, such as articles 2 and 3 of the Convention have been held by the Strasbourg court to require. But there are real practical difficulties in mounting such an enquiry.

B. *The extra-territorial scope of the Convention*

27. Consistently with their conclusion that the extra-territorial scope of the HRA matched that of the Convention, it was necessary for the courts below to rule (following the Strasbourg jurisprudence) what the extra-territorial scope of the Convention was, in order to decide whether the six claims now in issue fall within it. Had I concluded that the extra-territorial scope of the Act and the Convention were co-extensive, I should similarly have felt constrained to follow that course. But I have reached a different conclusion. I think it not only unnecessary but unwise to express an opinion whether cases 1-5 fall within the

jurisdiction of the UK under article 1 of the Convention, or on what precise basis case 6 should be held to do so. I reach this conclusion with regret and a sense of ingratitude having regard to the extensive, erudite and interesting argument directed to the question, but for what I regard as important reasons.

28. The Grand Chamber of the Strasbourg court has described the scope of article 1, in *Bankovic v Belgium and others* (2001) 11 BHRC 435, p 449, para 65, as

“determinative of the very scope of the contracting parties’ positive obligations and, as such, of the scope and reach of the entire convention system of human rights’ protection...”.

There could scarcely be a more fundamental question, nor one more obviously suitable for resolution (in a doubtful case) by a supranational rather than a national court. While a national court can and must interpret its own legislation, it must be slow to rule on the scope of an international treaty when its ruling, if correct, would apply to contracting states other than itself, and when the treaty has established a court with authority to give such rulings.

29. The Strasbourg court held in *Bankovic*, p 448, para 61, that

“article 1 of the convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case ...”.

This is an important statement, since it is for the Strasbourg court to define the exceptions and evaluate the grounds for departing from the general rule. In paragraph 62 of its judgment, p 449, the court pertinently observed, with reference to state practice as a guide to interpretation:

“Although there have been a number of military missions involving contracting states acting extra-territorially since

their ratification of the convention (inter alia, in the Gulf, in Bosnia and Herzegovina and in the FRY), no state has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of article 1 of the convention by making a derogation pursuant to article 15 of the convention.”

So it does not appear that military action abroad has generally been regarded as giving rise to an exception.

30. The claimants advanced alternative bases on which, they submitted, cases 1-5 fell within the jurisdiction of the UK. One, their preferred basis, rested by analogy on an exception which (as described in *Bankovic*, p 451, para 73) included

“cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state”.

The other basis (*Bankovic*, p 450, para 70) was

“when as a consequence of military action (lawful or unlawful) [a contracting state] exercised effective control of an area outside its national territory”.

This exception was largely developed in relation to the occupation by one contracting state (Turkey) of the territory of another (Cyprus) in Europe. Neither of these bases of exception can be described as clear-cut, and the application of either of them to the situation of British troops operating in Iraq must, in my opinion, be regarded as problematical.

31. The Divisional Court held (para 287) that Mr Mousa’s case fell within article 1 because

“a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities, and containing arrested suspects, falls within even a narrowly limited

exception exemplified by embassies, consulates, vessels and aircraft, and in *Hess v United Kingdom* 2 DR 72, a prison”.

The Court of Appeal (para 108) upheld this decision but on the basis that

“Mr Mousa came within the control and authority of the UK from the time he was arrested at the hotel and thereby lost his freedom at the hands of British troops”.

The difference between these two formulations would not appear, on the facts here, to be significant, but in other cases it could be so.

32. If any of these claimants pursues an application against the UK at Strasbourg, as it is of course open to them to do, the court there will rule on the admissibility of the applications. I do not think that any useful purpose is served by seeking to predict what its decision will be or to suggest what it should be.

Conclusion

33. Since I conclude that no claim by any of the claimants will lie in this country under the Act, I do not think it useful to discuss the violation issue. For all these reasons I would dismiss the claimants’ appeal, allow the Secretary of State’s cross-appeal against the Court of Appeal’s ruling on the applicability of the HRA to Mr Mousa’s case and set aside the order for remission of Colonel Mousa’s claim, which must be dismissed. I would invite the parties to make written submissions on costs within 14 days.

LORD RODGER OF EARLSFERRY

My Lords,

34. The claimants in these six cases are all relatives of Iraqi citizens who were killed in southern Iraq between 4 August and 10 November

2003. Except in the case of the third appellant, the Secretary of State for Defence accepts that the relatives were killed by members of the British forces. In February 2004 the representative of the appellants wrote to the Secretary of State asking him to hold a public inquiry into their relatives' deaths. By letter dated 26 March 2004 the Secretary of State indicated that he would not hold such an inquiry. The claimants seek judicial review of that decision on the ground that it was unlawful in terms of section 6 of the Human Rights Act 1998 ("the 1998 Act") since it was incompatible with the claimants' article 2 "Convention right" as set out in the Schedule to the Act. For his part, the Secretary of State says that his decision was lawful since the 1998 Act does not apply in the circumstances of these cases. In particular, he argues, first, that the 1998 Act does not apply outside the territory of the United Kingdom and, secondly, that, in any event, with the exception of the relative of the sixth appellant, the deceased were not within the jurisdiction of the United Kingdom in terms of article 1 of the European Convention when they were killed.

35. It is obvious, but nevertheless worth mentioning, that, depending on the facts, the appellants may have various other rights, such as a right to damages in tort, under English law. The appellants accept that. What they really want, however, is a public inquiry into the circumstances of the deaths of their relatives. That is why they have brought these particular proceedings which focus on what they claim is their article 2 Convention right to such an inquiry under the domestic law of the United Kingdom.

36. As was explained in *In re McKerr* [2004] 1 WLR 807, the Convention right of a relative under article 2 to insist on an inquiry being held where a death has been caused by agents of the state is procedural or adjectival. In domestic law it arises only where the killing itself could be unlawful under section 6 of the 1998 Act by reason of being incompatible with article 2 as set out in the Schedule. For that reason, the key question in these appeals is whether the killing of these individuals by British forces in Iraq could be unlawful under section 6 of the Act.

37. Section 6(1) provides:

"It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

The words are quite general and, on its face, the provision contains no geographical limitation – hence the issue between the parties about its proper scope. The Secretary of State points out that Parliament has not chosen to use the kind of specific wording that would show that it was intended to apply outside the United Kingdom. That comment is, of course, correct, but it does not really go anywhere since the Secretary of State is merely drawing attention to a defining feature of any case where the issue is whether a statute is to be construed as applying, by implication, to conduct outside the United Kingdom.

38. The Secretary of State submits that, when interpreting sections 6 and 7 of the Act, courts must bear in mind the rule of construction which Bennion, *Statutory Interpretation* (4th edition, 2002), p 282, formulates in these terms:

“Unless the contrary intention appears, Parliament is taken to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom.”

As the heading, “Presumption of United Kingdom extent”, shows, however, this statement is simply concerned with the extent of legislation. In the case of the 1998 Act, in accordance with the usual, slightly puzzling, practice, section 22(6) provides specifically that it extends to Northern Ireland. On the accepted rule of interpretation which Bennion states in this passage, the Act therefore extends to the United Kingdom as a whole. In itself, this merely means that the Act forms part of the law of the United Kingdom and does not form part of the law of any other territory for which Parliament could have legislated: *Lawson v Serco Ltd* [2006] ICR 250, 253, para 1, per Lord Hoffmann.

39. Section 22(7) is also concerned with extent:

“Section 21(5), so far as it relates to any provision contained in the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957, extends to any place to which that provision extends.”

Section 21(5) provides that any liability under the three statutes to suffer death for an offence is replaced by a liability to imprisonment for life or any lesser punishment authorised by those Acts. The Acts are to have effect with the necessary modifications.

40. On behalf of the Secretary of State, Mr Sales QC placed considerable emphasis on his submission that, since section 22(7) contained an express provision extending section 21(5) to places outside the United Kingdom, this showed that the other provisions in the Act did not apply outside the United Kingdom. That submission mixes up two matters which must be kept distinct.

41. As section 22(6) makes clear, the 1998 Act forms part of the law of the United Kingdom but only of the United Kingdom. So, if section 22(7) had not been included, section 21(5) would have formed part of the law of the United Kingdom only. But the three Acts mentioned in section 21(5), including the provisions making offenders liable to the death penalty, extend beyond the United Kingdom. Take the Air Force Act 1955, for example: by virtue of section 214, for instance, it extends to the Channel Islands and to the Isle of Man. In other words it forms part of the laws of the Channel Islands and of the Isle of Man. Section 22(7) was therefore necessary in order to make section 21(5) a part of those laws too and so to give effect to the change in penalty in the relevant provisions of the Air Force Act, as they form part of the laws of the Channel Islands and of the Isle of Man. *Mutatis mutandis*, the same applies to the other two Acts and to all three Acts as they extend to other territories.

42. No such provision is necessary, however, to permit a provision in a statute to have extra-territorial effect. An Act which extends, say, to England and Wales only may contain a provision that quite specifically applies to conduct outside the United Kingdom. That is the case, for instance, with section 72 of the Sexual Offences Act 2003, an Act which, in terms of section 142(1), extends to England and Wales only. Similarly, section 11 of the Criminal Procedure (Scotland) Act 1995 applies to offences committed outside the United Kingdom, even though section 309(3) shows that, with the exception of a few provisions, the Act extends to Scotland only. So, here, the fact that the 1998 Act extends to the United Kingdom only, and forms part of the law of the United Kingdom only, is neutral. It is entirely consistent with section 6 applying to an act of a public authority outside the territory of the United Kingdom. If section 6 did apply in that way, the effect would simply be that an act of the public authority outside the United Kingdom

would give rise to consequences under the law of the United Kingdom. Putting section 22(6) and (7) on one side, therefore, the House has to decide whether section 6 is intended to apply in that way.

43. In turning to that question, I am, of course, aware that, before the 1998 Act was passed, Government rhetoric referred to “bringing rights home” and to the advantages that would result for “the British people”. In reality, the Act also applies to anyone who lives here and, indeed, to anyone who is within the territory of the United Kingdom. Immigrants and asylum-seekers, for whom the United Kingdom has never been “home”, can invoke the provisions of the 1998 Act. The Government rhetoric was not an accurate guide to the application of the Act within the United Kingdom. In these circumstances, in deciding the geographical reach of section 6, I attach no importance to the language of the White Paper (“Rights Brought Home: The Human Rights Bill”, (October 1997, Cm 3782)). The passages from Hansard to which we were referred also contained nothing on which it would be safe to rely. Nor did I find anything in the minutiae of the language of the Act which told in favour of any particular view of its geographical reach.

44. So far as the application of statutes is concerned, there is a general rule that legislation does not apply to persons and matters outside the territory to which it extends: Bennion, *Statutory Interpretation*, p 306. But the cases show that the concept of the territoriality of legislation is quite subtle - “slippery” is how Lord Nicholls of Birkenhead described it in *R (Quark Fishing Ltd) v Secretary of State for Foreign Affairs* [2006] 1 AC 529, 545, para 32.

45. Behind the various rules of construction, a number of different policies can be seen at work. For example, every statute is interpreted, “so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law”: *Maxwell on The Interpretation of Statutes* (12th edition, 1969), p 183. It would usually be both objectionable in terms of international comity and futile in practice for Parliament to assert its authority over the subjects of another sovereign who are not within the United Kingdom. So, in the absence of any indication to the contrary, a court will interpret legislation as not being intended to affect such people. They do not fall within “the legislative grasp, or intendment,” of Parliament’s legislation, to use Lord Wilberforce’s expression in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 152C-D. In *Ex p Blain* (1879) 12 Ch D 522 the question was whether the court had jurisdiction, by virtue of the Bankruptcy Act 1869, to make an adjudication of bankruptcy against a

foreigner, domiciled and resident abroad, who had never been in England. James LJ said, at p 526:

“But, if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English legislature could have ever intended to make such a man subject to particular English legislation.”

On this general approach, for instance, there can be no doubt that, despite the lack of any qualifying words, section 6(1) of the 1998 applies only to United Kingdom public authorities and not to the public authorities of any other state.

46. Subjects of the Crown, British citizens, are in a different boat. International law does not prevent a state from exercising jurisdiction over its nationals travelling or residing abroad, since they remain under its personal authority: *Oppenheim’s International Law* (ninth edition, 1992), vol 1, para 138. So there can be no objection in principle to Parliament legislating for British citizens outside the United Kingdom, provided that the particular legislation does not offend against the sovereignty of other states. In *Ex p Blain* (1879) 12 Ch D 522, 531-532, Cotton LJ explained the position in this way:

“All we have to do is to interpret an Act of Parliament which uses a general word, and we have to say how that word is to be limited, when of necessity there must be some limitation. I take it the limitation is this, that all laws of the English Parliament must be territorial – territorial in this sense, that they apply to and bind all subjects of the Crown who come within the fair interpretation of them, and also all aliens who come to this country, and who, during the time they are here, do any act which, on a fair interpretation of the statute as regards them, comes within its provision.... As regards an Englishman, a subject of the British Crown, it is not necessary that he should be here, if he has done that which the Act of Parliament says shall give jurisdiction, because he is bound by the Act by reason of his being a British subject, though, of course, in the case of a British subject not resident here, it may be a question on the construction of the Act of Parliament whether that which, if he had been resident here, would

have brought him within the Act, has that effect when he is not resident here.”

Restating the position in the language of the 1980s, in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 145D-E, Lord Scarman said that the general principle is simply that:

“unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction.”

47. The cases indicate, therefore, that British individuals or firms or companies or other organisations readily fall within the legislative grasp of statutes passed by Parliament. So far as they are concerned, the question is whether, on a fair interpretation, the statute in question is intended to apply to them only in the United Kingdom or also, to some extent at least, beyond the territorial limits of the United Kingdom. Here, there is no doubt that section 6 applies to public authorities such as the armed forces within the United Kingdom: the only question is whether, on a fair interpretation, it is confined to the United Kingdom.

48. Even in the case of British citizens, a court may readily infer that legislation is not intended to apply to them outside the United Kingdom. See *Maxwell on The Interpretation of Statutes*, p 171:

“In the absence of an intention clearly expressed or to be inferred either from its language, or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate on its subjects beyond the territorial limits of the United Kingdom.”

In *Tomalin v S Pearson & Son Ltd* [1909] 2 KB 61, 64, Cozens-Hardy MR approved an earlier version of this statement, without the words “on its subjects”. The court held that the Workmen’s Compensation Act 1906 did not apply where a workman, employed by a British company, had been killed in the course of his employment in Malta. Leaving aside

the rule of construction, various provisions of the Act indicated that it was only intended to apply in certain specific circumstances outside the United Kingdom.

49. Again, this rule of construction has to be seen against the background of international law. One state is bound to respect the territorial sovereignty of another state. So, usually, Parliament will not mean to interfere by legislating to regulate the conduct of its citizens in another state. Such legislation would usually be unnecessary and would often be, in any event, ineffective. But sometimes Parliament has a legitimate interest in regulating their conduct and so does indeed intend its legislation to affect the position of British citizens in other states. For example, section 72 of the Sexual Offences Act 2003 makes certain nasty sexual conduct in other countries an offence under English law. So, if the words of a statute are open to more than one interpretation, whether or not it binds British citizens abroad “seems to depend ... entirely on the nature of the statute”: *Maxwell on The Interpretation of Statutes*, p 169.

50. The books therefore contain examples of cases where, because of its nature, legislation has been held to apply to British subjects outside the United Kingdom. In *Howgate v Bagnall* [1951] 1 KB 265, for instance, in 1944 a passenger had died due to asphyxiation in a fire which occurred when an aircraft belonging to His Majesty tried to land on an airfield at Karachi, then in India. His executor sued the captain and second pilot of the aircraft for damages. They defended the action on the basis that the deceased’s injuries were “war injuries” and so, under section 3(1) of the Personal Injuries (Emergency Provisions) Act 1939, no damages were payable at common law. While excluding the right to damages for such injuries, the Act made provision for a pension to be paid to victims. Barry J held that, in the circumstances, the deceased’s injuries did not fall within the definition of “war injuries” in the Act and the plaintiff was, accordingly, entitled to recover damages. But he would have resolved the prior question of the applicability of the United Kingdom statute to the events in India in favour of the defendants.

51. Referring to *Tomalin v S Pearson & Son Ltd* and other cases on the Workmen’s Compensation legislation, Barry J pointed out, at p 274, that they had no direct bearing on the construction of the 1939 Act, and continued:

“Were it material to the decision of the present case, I should have felt bound to accede to the submission of counsel for the defendants that the general scheme of the Act of 1939 and the conditions of universal war which existed, or seemed likely to exist, at the time when it was passed, all tend to show that its application is not to be confined to the narrow territorial limits of the United Kingdom. I think that the Act applies to all British subjects who suffer ‘war injuries’ within the meaning of the definition, in any part of the globe. Counsel for the plaintiff pointed out that this construction of the Act might enable a British subject resident in the United States of America to recover compensation if he were injured by the impact of an American aircraft. If this were so, it would perhaps throw some doubt on the construction that I have indicated; but in my judgment Parliament provided against such absurdities by enabling the Minister to specify in his scheme the classes of persons entitled to benefit under it.”

52. The defendants were relying on section 3 of the 1939 Act as a defence. But, in considering the territorial scope of the Act – in other words, who were within the legislative grasp of the legislation – the court had regard to its overall purpose of giving people who suffered “war injuries” the right to a pension in lieu of damages. In the same way, when considering the application of the 1998 Act, it is necessary to have regard to its overall nature and purpose.

53. In the first place, the burden of the legislation falls on public authorities, rather than on private individuals or companies. Most of the functions of United Kingdom public authorities relate to this country and will therefore be carried out here. Moreover, exercising their functions abroad would often mean that the public authorities were encroaching on the sovereignty of another state. Nevertheless, where a public authority has power to operate outside of the United Kingdom and does so legitimately - for example, with the consent of the other state – in the absence of any indication to the contrary, when construing any relevant legislation, it would only be sensible to treat the public authority, so far as possible, in the same way as when it operates at home.

54. The purpose of the 1998 Act is to provide remedies in our domestic law to those whose human rights are violated by a United

Kingdom public authority. Making such remedies available for acts of a United Kingdom authority on the territory of another state would not be offensive to the sovereignty of the other state. There is therefore nothing in the wider context of international law which points to the need to confine sections 6 and 7 of the 1998 Act to the territory of the United Kingdom.

55. One possible reason for confining their application in that way would, however, be if their scope would otherwise be unlimited and they would, potentially at least, confer rights on people all over the world with little or no real connexion with the United Kingdom. There is, however, no such danger in this case since the 1998 Act has a built-in limitation. By section 7(1) and (7), only those who would be victims for the purposes of article 34 of the Convention in proceedings in the Strasbourg Court can take proceedings under the 1998 Act. Before they could sue, claimants would therefore have to be “within the jurisdiction” of the United Kingdom in terms of article 1 of the Convention. Whatever the precise boundaries of that limitation, it blunts the objection that a narrow construction of the territorial application of the Act is the only way to prevent it having extravagant effects which could never have been intended. The requirement for a claimant to be within the jurisdiction of the United Kingdom is a further assurance that, if the Act were interpreted and applied in that way, the courts in this country would not be interfering with the sovereignty or integrity of another state.

56. By this somewhat circuitous route, I arrive at what is surely the crucial argument in favour of the wider interpretation of section 6. The Secretary of State accepts that “the central purpose” of Parliament in enacting sections 6 and 7 was “to provide a remedial structure in domestic law for the rights guaranteed by the Convention”: *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, 564, para 44, per Lord Hope of Craighead. In other words, claimants were to be able to obtain remedies in United Kingdom courts, rather than having to go to Strasbourg. The Secretary of State also accepts that, while the jurisdiction of states for the purposes of article 1 of the Convention is essentially territorial, in exceptional cases, “acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of article 1 of the convention”: *Bankovic v Belgium* (2001) 11 BHRC 435, 450, para 67. Nevertheless, the Secretary of State says that sections 6 and 7 are to be interpreted in such a way that, in these exceptional cases, a victim is left remediless in the British courts.

Contrary to the central policy of the Act, the victim must resort to Strasbourg.

57. My Lords, I am unable to accept that submission. It involves reading into sections 6 and 7 a qualification which the words do not contain and which runs counter to the central purpose of the Act. That would be to offend against the most elementary canons of statutory construction which indicate that, in case of doubt, the Act should be read so as to promote, not so as to defeat or impair, its central purpose. If anything, this approach is even more desirable in interpreting human rights legislation. As Lord Brown of Eaton-under-Heywood points out, this interpretation also ensures that, in these exceptional cases, the United Kingdom is not in breach of its article 13 obligation to afford an effective remedy before its courts to anyone whose human rights have been violated within its jurisdiction.

58. The speech of Lord Nicholls of Birkenhead in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, 546, para 34, provides powerful support for that approach:

“To this end the obligations of public authorities under sections 6 and 7 mirror in domestic law the treaty obligations of the United Kingdom in respect of corresponding articles of the Convention and its protocols. That was the object of these sections. As my noble and learned friend, Lord Hope of Craighead, has said, the ‘purpose of these sections is to provide a remedial structure in domestic law for the rights guaranteed by the Convention’: *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, 564, para 44. Thus, and this is the important point for present purposes, the territorial scope of the obligations and rights created by sections 6 and 7 of the Act was intended to be co-extensive with the territorial scope of the obligations of the United Kingdom and the rights of victims under the Convention. The Act was intended to provide a domestic remedy where a remedy would have been available in Strasbourg. Conversely, the Act was not intended to provide a domestic remedy where a remedy would not have been available in Strasbourg. Accordingly, in order to identify the territorial scope of a ‘Convention right’ in sections 6 and 7 it is necessary to turn to Strasbourg and consider what, under the

Convention, is the territorial scope of the relevant Convention right.”

Lord Nicholls confirms that, in interpreting the rights in the Schedule, courts must take account of the territorial scope of the relevant right under the Convention. In the present case, that means having regard to those exceptional situations where article 2 would apply outside the territory of the United Kingdom. In other words, on a fair interpretation, article 2 in the Schedule to the Act must be read as applying wherever the United Kingdom has jurisdiction in terms of article 1 of the Convention. The corollary is that section 6 must also be interpreted as applying in the same circumstances.

59. For these reasons, section 6 should be interpreted as applying not only when a public authority acts within the United Kingdom but also when it acts within the jurisdiction of the United Kingdom for purposes of article 1 of the Convention, but outside the territory of the United Kingdom.

60. The Secretary of State’s cross appeal must therefore be dismissed. I go on to consider whether, on the known facts, the appellants’ relatives could have been within the jurisdiction of the United Kingdom when they were killed.

61. In the case of the sixth appellant, the deceased, Mr Baha Mousa, was taken to a detention unit in a British military base in Basra where, it is said, he was so brutally beaten by British troops that he died of his injuries. The Secretary of State accepts that, since the events occurred in the British detention unit, Mr Mousa met his death “within the jurisdiction” of the United Kingdom for purposes of article 1 of the Convention. In these circumstances the parties are agreed that, because of certain factual developments since the decision of the Court of Appeal, the sixth appellant’s case should be remitted to the Divisional Court.

62. So far as the other appellants are concerned, the relevant facts are carefully described in the judgment of the Divisional Court, [2007] QB 140, 160-165, paras 55-80. I gratefully adopt that account. I have also had the privilege of considering what Lord Brown is going to say about the question of jurisdiction under the Convention. In all essentials I agree with him. In these circumstances, especially where the issues

have also been exhaustively analysed in the Divisional Court and Court of Appeal, nothing would be gained by me going over all of the same ground. I therefore add only some additional observations on the issues raised.

63. The European Convention is a treaty under international law. Somewhat unusually, it confers rights on individuals against the contracting parties. While the Geneva Conventions on the Protection of War Victims 1949 apply “in all circumstances”, the geographical scope of the rights under the European Convention is more limited: under article 1, the States Parties are bound to “secure to everyone within their jurisdiction the rights and freedoms defined in Section 1” of the Convention.

64. It is important therefore to recognise that, when considering the question of jurisdiction under the Convention, the focus has shifted to the victim or, more precisely, to the link between the victim and the contracting state. For the purposes of the extra-territorial effects of section 6 of the 1998 Act, the key question was whether a public authority – in this case the Army in Iraq - was within Parliament’s legislative grasp when acting outside the United Kingdom. By contrast, for the purposes of deciding whether the Convention applies outside the territory of the United Kingdom, the key question is whether the deceased were linked to the United Kingdom when they were killed. However reprehensible, however contrary to any common understanding of respect for “human rights”, the alleged conduct of the British forces might have been, it had no legal consequences under the Convention, unless there was that link and the deceased were within the jurisdiction of the United Kingdom at the time. For, only then would the United Kingdom have owed them any obligation in international law to secure their rights under article 2 of the Convention and only then would their relatives have had any rights under the 1998 Act.

65. What is meant by “within their jurisdiction” in article 1 is a question of law and the body whose function it is to answer that question definitively is the European Court of Human Rights. The judges of that court are independent, not least of the Parliamentary Assembly of the Council of Europe. So Resolution 1386 of that Assembly, calling on the relevant States Parties to accept the full applicability of the Convention to the activities of their forces in Iraq, is, and must be, irrelevant to any decision of the European Court, or indeed of this House, on the proper interpretation of article 1. In any event, nothing said or done by the contracting states could make the

Convention apply to the activities of their forces in Iraq if, on a proper judicial construction and application of article 1, it did not apply to those activities.

66. Under section 2(1)(a) of the 1998 Act, when determining any question in connexion with a “Convention right”, a court in this country must take into account any judgment or decision of the European Court. While article 1 is not itself included in the Schedule, it affects the scope of article 2 in the Schedule, and that article embodies a “Convention right” as defined in section 1(1). It follows that, when interpreting that article 2 right, courts must take account of any relevant judgment or decision of the European Court on article 1.

67. The problem which the House has to face, quite squarely, is that the judgments and decisions of the European Court do not speak with one voice. If the differences were merely in emphasis, they could be shrugged off as being of no great significance. In reality, however, some of them appear much more serious and so present considerable difficulties for national courts which have to try to follow the jurisprudence of the European Court.

68. Faced with these conflicting elements in the case law, national courts are justified in giving pre-eminence to the decision of the Grand Chamber in *Bankovic v Belgium* (2001) 11 BHRC 435. The proceedings were brought by the relatives of people who had been killed in a missile attack from a NATO aircraft on the RTS building in Belgrade. The allegation was that there had been a violation of, inter alia, article 2. The respondents were the NATO powers concerned. The case was immediately referred to the Grand Chamber for a definitive ruling on jurisdiction. The parties were represented by distinguished counsel and the judgment of the court is carefully reasoned in the light of their arguments. The decision is unanimous. Everything about it suggests that it is intended to be an authoritative exposition of the concept of “jurisdiction” under article 1.

69. With its emphasis on the centrality of territorial jurisdiction, on the regional nature of the Convention, and on the indivisibility of the package of rights in the Convention, the decision has not lacked for critics who advocate a more inclusive approach to jurisdiction. Whatever the merits of giving the Convention a wider reach might be *de lege ferenda*, however, the House is only concerned with its reach *de lege lata*. In considering the European Court’s approach to jurisdiction

in *Bankovic* it may, moreover, be relevant to recall that in *Bankovic* the court rejected the argument that the “living instrument” approach to interpretation of the Convention should be applied to article 1: 11 BHRC 435, 449-450, paras 64 and 65. It is therefore not easy to resolve apparent differences of approach in the case law after *Bankovic* by saying that the court’s idea of the scope of jurisdiction for the purposes of article 1 has simply evolved. Of course, it would be open to the European Court to depart expressly from *Bankovic* and to explain why it was doing so. Nothing like that has happened, however.

70. In *Bankovic* the principal submission for the applicants was that the victims of the attack had been brought within the jurisdiction of the respondent states by the air strike itself. In other words, their ability to strike the building showed that the respondents had sufficient control over the deceased to mean that they were within the respondents’ jurisdiction. The European Court identified the essential question as being whether, as a result of the extra-territorial act, the deceased were capable of falling within the jurisdiction of the respondent states: 11 BHRC 435, 447, para 54. The court held that there was no jurisdictional link between the victims and the respondent states. So the victims could not come within the jurisdiction of those states: 11 BHRC 435, 454, para 82.

71. Plainly, other things being equal, a similar attack launched by one of the respondent states which killed people in a building on its own territory would engage article 2 of the Convention because the victims would be within the jurisdiction of the state concerned. The decision in *Bankovic* shows, accordingly, that an act which would engage the Convention if committed on the territory of a contracting state does not ipso facto engage the Convention if carried out by that contracting state on the territory of another state outside the Council of Europe. The necessary jurisdictional link is present in the one case, but not in the other.

72. All this would be quite straightforward if it were not for the reasoning of the European Court in *Issa v Turkey* (2004) 41 EHRR 567. The case concerned the deaths of a number of shepherds in a particular area of Northern Iraq. The applicants contended that the shepherds had been killed by Turkish troops operating in that area. Turkey denied that the shepherds had ever been within its jurisdiction. At para 71 of its decision, the European Court said this:

“Moreover, a state may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another state but who are found to be under the former state’s authority and control through its agents operating – whether lawfully or unlawfully in the latter state.... Accountability in such situations stems from the fact that article 1 of the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory.”

The Court went on, at para 72, to say that it must ascertain whether the deceased “were under the authority and/or effective control, and therefore within the jurisdiction, of the respondent state” as a result of its extra-territorial acts. The Court did not exclude the possibility, at para 74, that, as a consequence of military operations over a six-week period, Turkey could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. The Court concluded:

“Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a contracting state and clearly does not fall within the legal space (*espace juridique*) of the contracting states....)”

Having examined the available evidence, however, the court held that the applicants had failed to prove that the troops had been in the area in question. On that basis, it was not satisfied that the shepherds had been within the jurisdiction of Turkey in terms of article 1.

73. The actual decision in *Issa* is therefore of no assistance to the appellants, but they can and do point to the very broad proposition in the last sentence of the passage from para 71 of the court’s decision which I have quoted in the previous paragraph. In reproducing the passage I have omitted the citations, but, as authority for its approach in the final sentence, the European Court cited the views of the United Nations Human Rights Committee in *López v Uruguay* (29 July 1981) 68 ILR 29 and in *Celiberti de Casariego v Uruguay* (29 July 1981) 68 ILR 41. In

each of these cases the allegation was that a citizen of Uruguay had been seized on the territory of another State with the co-operation or connivance of officials of that other state, taken back to Uruguay and detained there. For purposes of the European Convention, cases of that kind would fit easily into the same category as the decisions of the Commission in *Freda v Italy* (1980) 21 DR 250 and *Sánchez Ramirez v France* (1996) 86-A DR 155. These both involved officers of the respondent state, with the co-operation of officials of the state where the applicant was, removing him and taking him back to the respondent state for trial. *Öcalan v Turkey* (2005) 41 EHRR 985 seems to fall into the same category. The applicant, who thought that a Kenyan official was driving him to Nairobi airport to fly to the Netherlands, was actually taken by a special route to the international transit area of the airport where he was handed over to Turkish officials, taken on board a Turkish aircraft and arrested. The court did not have to rule on jurisdiction, since it was common ground that the applicant was within the jurisdiction of Turkey in terms of article 1 from the moment he was handed over to the Turkish officials: 41 EHRR 985, 1018, para 91.

74. What causes the difficulty, therefore, is not the idea that the Convention would apply extra-territorially in cases which resembled *López v Uruguay* and *Celiberti de Casariego v Uruguay*. Rather, it is the weight which the European Court appears to have attached to the particular basis on which the Human Rights Committee considered that it had jurisdiction. Article 2 of the International Covenant on Civil and Political Rights refers to “individuals subject to [the] jurisdiction” of the state concerned. Referring to article 5 of the Covenant, which is broadly similar to article 17 of the European Convention, the Human Rights Committee held, at paras 12.3 and 10.3 respectively of its two decisions, that:

“In line with this, it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”

In each case Mr Christian Tomuschat entered an individual opinion, rejecting that reasoning on the ground that article 5 could not be used to extend the jurisdiction of the Covenant: it was simply designed to prevent any rules of the Covenant being used to justify actions which ran counter to its purposes and general spirit.

75. Although in *Issa* the European Court cited the proposition from the Human Rights Committee, it did not explain how that proposition fitted into its own existing jurisprudence, especially as analysed in *Bankovic*. Notably - and surely correctly - the court did not justify its approach by reference to article 17. Moreover, the proposition appears to focus on the activity of the contracting state, rather than on the requirement that the victim should be within its jurisdiction. Without further guidance from the European Court, I am unable to reconcile this approach with the reasoning in *Bankovic*. In these circumstances, although *Issa* concerned Turkish troops in Iraq, I do not consider that this aspect of the decision provides reasoned guidance on which the House can rely when resolving the question of jurisdiction in the present case.

76. Another major unresolved difficulty with the decision in *Issa* is that it is hard to reconcile with the European Court's description of the vocation of the Convention as being "essentially regional" and of the Convention operating "in an essentially regional context and notably in the legal space (espace juridique) of the contracting states": *Bankovic*, 11 BHRC 435, 453, para 80. The Convention, the Court continued, was not designed to be applied throughout the world, even in respect of the conduct of contracting states. In *Issa*, as the court records in paras 56 and 57 of its judgment, the Turkish government had advanced an argument based on precisely this aspect of the decision in *Bankovic*.

77. The European Court rejected that argument in the short passage in para 74 of its decision which I have quoted in paragraph 72 above. There is, of course, no difficulty in seeing that Iraq does not fall within the legal space of the contracting states. It follows that application of the Convention in any area of Iraq controlled by Turkey could not be justified by the need to avoid a gap or vacuum ("lacunas or solutions of continuity" in the French text) in the protection of human rights in a territory which, but for the specific circumstances, would normally be covered by the Convention: *Bankovic*, 11 BHRC 435, 453-454, para 80. But in *Issa* the European Court did not say that it was taking that protection a stage further. The difficulty therefore is in seeing how the deceased would have fallen within the legal space of the contracting states if, as was certainly indicated in *Bankovic*, the Convention was meant to operate in an essentially regional context and not throughout the world, "even in respect of the conduct of contracting states."

78. The essentially regional nature of the Convention is relevant to the way that the court operates. It has judges elected from all the

contracting states, not from anywhere else. The judges purport to interpret and apply the various rights in the Convention in accordance with what they conceive to be developments in prevailing attitudes in the contracting states. This is obvious from the court's jurisprudence on such matters as the death penalty, sex discrimination, homosexuality and transsexuals. The result is a body of law which may reflect the values of the contracting states, but which most certainly does not reflect those in many other parts of the world. So the idea that the United Kingdom was obliged to secure observance of all the rights and freedoms as interpreted by the European Court in the utterly different society of southern Iraq is manifestly absurd. Hence, as noted in *Bankovic*, 11 BHRC 435, 453-454, para 80, the court had "so far" recognised jurisdiction based on effective control only in the case of territory which would normally be covered by the Convention. If it went further, the court would run the risk not only of colliding with the jurisdiction of other human rights bodies but of being accused of human rights imperialism.

79. The essentially regional nature of the Convention has a bearing on another aspect of the decision in *Bankovic*. In the circumstances of that case the respondent states were plainly in no position to secure to everyone in the RTS station or even in Belgrade all the rights and freedoms defined in Section 1 of the Convention. So the applicants had to argue that it was enough that the respondents were in a position to secure the victims' rights under articles 2, 10 and 13 of the Convention. In effect, the applicants were arguing that it was not an answer to say that, because a state was unable to guarantee everything, it was required to guarantee nothing – to adopt the words of Sedley LJ, [2007] QB 140, 301, para 197. The European Court quite specifically rejected that line of argument. The court held, 11 BHRC 435, 452, para 75, that the obligation in article 1 could not be "divided and tailored in accordance with the particular circumstances of the extra-territorial act in question." In other words, the whole package of rights applies and must be secured where a contracting state has jurisdiction. This merely reflects the normal understanding that a contracting state cannot pick and choose among the rights in the Convention: it must secure them all to everyone within its jurisdiction. If that is so, then it suggests that the obligation under article 1 can arise only where the contracting state has such effective control of the territory of another state that it could secure to everyone in the territory all the rights and freedoms in Section 1 of the Convention.

80. The short passage in para 74 of the decision in *Issa* where the European Court refers to the possibility of temporary effective overall

control of an area of Iraq giving rise to jurisdiction for the purposes of article 1 of the Convention does not address any of these questions. For that reason, it does not provide workable guidance for the House.

81. Accordingly, I am not persuaded that it would be proper for the House to proceed beyond the jurisprudence of the European Court on jurisdiction as it is analysed and declared in *Bankovic*. On that basis I am satisfied that the relatives of the first five appellants were not within the jurisdiction of the United Kingdom when they were killed.

82. I should add, however, that, even if the approach in paras 71 and 74 of *Issa* fell to be applied, the facts would not justify the conclusion that the deceased were, in any real sense, under the control of the particular British soldiers who were, or may have been, responsible for their deaths. I respectfully adopt what Brooke LJ says on this matter, [2007] QB 140, 279, paras 109 and 110.

83. The Divisional Court gave an account of the government and administration of Iraq and the position of the United Kingdom armed forces during the relevant period in 2003: [2007] QB 140, 152-158, paras 14-46. The evidence of senior British officers indicates that, on the ground, the available British troops faced formidable difficulties due to terrorist activity, the volatile situation and the lack of any effective Iraqi security forces. In these circumstances, in respectful agreement with Brooke and Richards LJJ, [2007] QB 140, 281-284,304, paras 120-128, 209 even applying the approach in *Issa*, I would not consider that the United Kingdom was in effective control of Basra and the surrounding area for purposes of jurisdiction under article 1 of the Convention at the relevant time. Leaving the other rights and freedoms on one side, with all its troops doing their best, the United Kingdom did not even have the kind of control of Basra and the surrounding area which would have allowed it to discharge the obligations, including the positive obligations, of a contracting state under article 2, as described, for instance in *Osman v United Kingdom* (1998) 29 EHRR 245, 305, paras 115-116.

84. In all the circumstances I would dismiss the Secretary of State's cross-appeal, dismiss the appeals of the first five appellants and remit the sixth appellant's case to the Divisional Court.

BARONESS HALE OF RICHMOND

My Lords,

85. I am grateful to my noble and learned friend, Lord Rodger of Earlsferry, who has so clearly identified the key question in this case: whether the killing of these individuals by members of the British forces in Iraq could be unlawful under section 6 of the Human Rights Act 1998. That question has two components: first, is section 6 capable of applying to the acts of a United Kingdom public authority outside the territory of the United Kingdom; and secondly, if so, are the acts complained of acts to which that section applies, in the sense that the victims were ‘within the jurisdiction’ of the United Kingdom for the purposes of article 1 of the European Convention on Human Rights when they met their deaths?

86. I cannot improve upon the clear and comprehensive answer which Lord Rodger has given to the first part of the question. In particular, there is an important difference between *the legal system* to which any Act of Parliament extends and the *people and conduct* to which it applies. The question in *Lawson v Serco Ltd* [2006] UKHL 3; [2006] ICR 250 was whether the right not to be unfairly dismissed, contained in section 94(1) of the Employment Rights Act 1996, applied to certain people whose work was wholly or mainly outside the territory of the United Kingdom. As Lord Hoffmann pointed out, in para 1:

“It is true that section 244(1) [of the 1996 Act] says that the Act ‘extends’ to England and Wales and Scotland (‘Great Britain’). But that means only that it forms part of the law of Great Britain and does not form part of the law of any other territory (like Northern Ireland or the Channel Islands) for which Parliament could have legislated. It tells us nothing about the connection, if any, which an employee or his employment must have with Great Britain.”

87. The Human Rights Act extends to England and Wales, Scotland and Northern Ireland: see s 22(6). But by itself this tells us nothing about the public authorities to which section 6(1) applies, or about the acts to which it applies, or about the people for whose benefit it applies.

88. For the reasons given by Lord Rodger, section 6 must be taken to apply only to the acts of United Kingdom public authorities. But there is nothing to prevent Parliament legislating for the acts of United Kingdom individuals or entities abroad. In common with Lord Rodger, I can find nothing in the Act which indicates that section 6 should not apply to Mr Mousa's case and several good reasons why it should. In particular, it has many times been said that the object of the Human Rights Act was to give people who would be entitled to a remedy against the United Kingdom in the European Court of Human Rights in Strasbourg a remedy against the relevant public authority in the courts of this country. The United Kingdom now accepts that it would be answerable in Strasbourg for the conduct of the British army while Mr Mousa was detained in a British detention unit in Basra. It would be consistent with the purpose of the Act to give his father a remedy against the army in the courts of this country.

89. But that of course would depend upon establishing a breach of section 6. Section 6(1) makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. The Convention rights are those set out in the listed articles and protocols of the Convention: 1998 Act, s 1(1). The Convention "means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 as it has effect for the time being in relation to the United Kingdom": 1998 Act, s 21(1). Thus, for example, it will not include a protocol to which the United Kingdom has not (as yet) become a party. But inherent in the text of the Convention itself is another limitation: article 1 only requires that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention". The second question, therefore, is whether any of the individuals involved were "within the jurisdiction" of the United Kingdom at the time of their deaths.

90. My Lords, I cannot usefully add anything to the exposition of the Strasbourg case law in the opinion of my noble and learned friend, Lord Brown of Eaton-under-Heywood, or to the reasons which both Lord Rodger and he give for concluding that none of the deceased, apart from Mr Mousa, were within the jurisdiction of the United Kingdom when they met their deaths. While it is our task to interpret the Human Rights Act 1998, it is Strasbourg's task to interpret the Convention. It has often been said that our role in interpreting the Convention is to keep in step with Strasbourg, neither lagging behind nor leaping ahead: no more, as Lord Bingham said in *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, para 20, but certainly no less: no less, as Lord

Brown says at para 106, but certainly no more. If Parliament wishes to go further, or if the courts find it appropriate to develop the common law further, of course they may. But that is because they choose to do so, not because the Convention requires it of them.

91. The Strasbourg case law is quite plain that liability for acts taking effect or taking place outside the territory of a member state is exceptional and requires special justification. This court should not extend the liability of one member state, thus necessarily expecting that other member states would do the same, unless it is quite clear that Strasbourg would require this of us. I agree with my noble and learned friends that there is more to be learned from the decision of the Grand Chamber in *Bankovic v Belgium* (2001) 11 BHRC 435 than there is from the observations of the Chamber in *Issa v Turkey* (2004) 41 EHRR 567. *Bankovic* does not lead me to the conclusion that Strasbourg would inevitably hold that the deceased, other than Mr Mousa, were within the jurisdiction of the United Kingdom when they met their deaths.

92. None of this is, of course, to diminish the tragedy of those deaths or to belittle the suffering of their relatives. The question is not whether they are entitled to our sympathy and our respect but whether they are entitled to a remedy before the courts of the United Kingdom. For the reasons given by Lord Rodger and Lord Brown, upon which I cannot improve, I would hold that, except in the case of Mr Mousa, they are not.

LORD CARSWELL

My Lords,

93. It is a sad but inescapable consequence of armed conflict that lives will be lost. Unhappily, some of the persons killed will be peaceable civilians caught in cross-fire. Others will have been shot by members of the armed forces involved, and the extent of the justification for shooting them which may be advanced will vary enormously with the circumstances. One of the appeals before the House concerned such an innocent civilian, and it cannot even be determined on the evidence presently available which group fired the shot which killed her. In four of the appeals the victims were shot by members of the British armed forces. As is very commonly the case in such situations, the versions of

the facts retailed by witnesses differ markedly. The soldiers maintain that they were or reasonably thought themselves to be under attack, and so were within the rules of engagement. Civilian witnesses aver, however, that the victims were harmless and uninvolved citizens and that the shootings were unjustified. The sixth case is wholly different: Mr Abu Mousa died as a result of appalling maltreatment in a prison occupied and run by British military personnel. His treatment cannot for a moment be defended, but due to a regrettable paucity of evidence it has not proved possible to bring to justice those responsible for his death.

94. The families of the deceased persons understandably want a full and effective investigation carried out into each death. Certain investigations were done by the Army authorities, but the relatives claim that they were insufficiently thorough and seek to have the government put in train more extensive inquiries at which evidence and opinions on all sides can be advanced.

95. The government has been unwilling to commit itself to conduct further inquiries, but the appellants, who are relatives of the deceased persons, claim that it is bound to do so by the terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) as applied in domestic law by the Human Rights Act 1998. It is not in dispute that under article 2, as interpreted by Strasbourg jurisprudence, an obligation to conduct a proper investigation into a death caused by agents of the state is imposed upon a contracting state (though it is not admitted by the Secretary of State that the investigations carried out were insufficient to discharge such an obligation). The anterior question before the House, however, is whether the Convention obligation applied at all in respect of deaths caused in Iraq. That involves two issues (a) whether the Human Rights Act 1998 applies to acts or omissions of the state agencies of the United Kingdom outside the territorial boundaries of the UK (b) if so, whether the deceased persons were within the jurisdiction of the United Kingdom, within the meaning of article 1 of the Convention, when they were killed in Iraq.

96. These two issues are closely interlinked, for the conclusion which one reaches on the extent of the UK’s jurisdiction within article 1 has a considerable bearing on the intention which one imputes to Parliament in respect of the territorial extent of the Human Rights Act. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends, Lord Rodger of Earlsferry and Lord Brown of Eaton-

under-Heywood, with which I am in entire agreement. For the reasons set out by Lord Rodger, I respectfully agree that section 6 of the Human Rights Act 1998 is to be interpreted as applying both when a public authority acts within the boundaries of the United Kingdom and when it acts outside those boundaries but within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention.

97. I also respectfully agree with Lord Rodger and Lord Brown on the extent of that jurisdiction. I would only observe that any extra-territorial jurisdiction of one state is *pro tanto* a diminution or invasion of the territorial jurisdiction of another, which must lead one to the conclusion that such extra-territorial jurisdiction should be closely confined. It clearly exists by international customary law in respect of embassies and consulates. It has been conceded by the Secretary of State that it extends to a military prison in Iraq occupied and controlled by agents of the United Kingdom. Once one goes past these categories, it would in my opinion require a high degree of control by the agents of the state of an area in another state before it could be said that that area was within the jurisdiction of the former. The test for establishing that is and should be stringent, and in my judgment the British presence in Iraq falls well short of that degree of control.

98. The stringency of the test for establishing jurisdiction makes it the more likely that Parliament intended the Human Rights Act to operate extra-territorially within the jurisdiction of the United Kingdom, as Lord Brown points out in paragraph 150 of his opinion. This assists one to accommodate the intention of Parliament, as it has to be ascertained by the courts, with the statements made inside and outside Parliament at the time when it was passed. Although those statements may be to some extent rhetorical rather than definitive, they point very clearly to a general intention to equate the scope of the Act with the scope of the Convention.

99. In the result I would dismiss the appeals of the first five appellants, dismiss the Secretary of State's cross-appeal and make the order proposed by Lord Rodger to remit the sixth appellant's case to the Divisional Court.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

100. These appeals arise out of the deaths of six Iraqi civilians caused by the actions of British soldiers in southern Iraq in the latter part of 2003 (between the cessation of major combat operations and the handover of sovereignty to the Iraqi interim government). Five of the deceased were shot in the course of security operations (one in crossfire); the sixth died following gross ill-treatment whilst in custody in a UK military detention facility. The appellants are their relatives who in each case seek principally Convention-compliant investigations into the respective killings and, in the long run, damages.

101. It need hardly be said that all these deaths (and the thirty or so more leading to further claims now stayed pending the outcome of these proceedings) are greatly to be regretted, and the sixth utterly deplored. The issues now arising, however, have to be decided by reference to legal principle, not out of sympathy.

102. Your Lordships are here called on to decide two very important questions which arise by way of preliminary issue. One concerns the reach of the European Convention on Human Rights: Who, within the meaning of article 1 of the Convention, is to be regarded as “within [a contracting party’s] jurisdiction” so as to require that state to “secure to [them] the rights and freedoms” defined in the Convention? The other concerns the reach of the Human Rights Act 1998 (the Act), the only basis on which the domestic courts have jurisdiction to hear human rights claims: Does the Act apply extra-territorially and, if so, in what way?

103. These might be thought to be discrete questions, wholly unrelated to each other. But I question this. Suppose that article 1 of the Convention applies only to the extent contended for here by the respondent Secretary of State, with just a limited extra-territorial reach in certain closely defined circumstances. To conclude that Parliament intended the Act to apply to these few additional cases as well as to the great majority of cases where the Convention is breached within the UK’s own borders would be one thing. To reach that conclusion, however, were the Convention found to extend as widely as the appellants (supported by the interveners) contend, encompassing not

merely all the present claims but, it may be, others still more contentious, might be regarded as another thing entirely. I propose, therefore, to consider first the reach of the Convention.

104. I shall take as read the detailed facts of each case. So too much of the copious jurisprudence and academic writings—domestic, Strasbourg-based and international—surrounding the issues arising. A great deal of all this is to be found in the lengthy and impressive judgments given by each of the courts below—the Divisional Court’s judgment of 14 December 2004 and the Court of Appeal’s judgments of 21 December 2005 are reported successively at [2007] QB 140 (to p305). I want to concentrate on what seem to me to be the core points.

Article 1 - the reach of the Convention

105. The ultimate decision upon this question, of course, must necessarily be for the European Court of Human Rights. As Lord Bingham of Cornhill observed in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, 350 (para 20), “the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court.” In the same paragraph Lord Bingham made two further points: first, that a national court “should not without strong reason dilute or weaken the effect of the Strasbourg case law”; secondly that, whilst member States can of course legislate so as to provide for rights more generous than those guaranteed by the Convention, national courts should not interpret the Convention to achieve this: the Convention must bear the same meaning for all states party to it. Para 20 ends:

“The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”

106. I would respectfully suggest that last sentence could as well have ended: “no less, but certainly no more.” There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual *can* have the decision corrected in

Strasbourg. *Ullah*, of course, was concerned with the particular scope of individual Convention rights, there article 9, in the context of removing non-nationals from a member state. Lord Bingham's cautionary words must surely apply with greater force still to a case like the present. As the Grand Chamber observed in *Bankovic v Belgium* (2001) 11 BHRC 435, 449 (para 65): "the scope of article 1 . . . is determinative of the very scope of the contracting parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights' protection."

107. Your Lordships accordingly ought not to construe article 1 as reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach. How far is that and, more particularly, (a) does article 1 encompass the first five appellants and (b) on what basis does it encompass the sixth appellant (as, following the Divisional Court's judgment, the respondent concedes it does); is this on the narrow basis (found by the Divisional Court) that detention in a British military facility, operated with the consent of the Iraqi sovereign authorities, falls within the same exceptional category as embassies and consulates, or on the wider basis (found by the Court of Appeal) that Mr Mousa, from the moment of his arrest, "came within the control and authority of the UK", or on a wider basis still (as the appellants contend and as would be necessary were it to avail the other appellants too)?

108. In considering how far Strasbourg has gone in extending article 1 jurisprudence extra-territorially, I propose to take as my starting point the decision of the Grand Chamber in *Bankovic*. This I have no doubt the Divisional Court was right to describe (at para 268) as "a watershed authority in the light of which the Strasbourg jurisprudence as a whole has to be re-evaluated". The case was referred to the Grand Chamber specifically for a definitive judgment on this fundamental issue. It was fully argued, and the judgment, which was unanimous, was fully reasoned. The travaux préparatoires, the entire previous case law of the Commission and the Court, the Vienna Convention on the Law of Treaties (1969), the practice of the contracting states with regard to derogating for extra-territorial military operations (none had ever done so), comparative case law and the international law background were for the first time all considered in a single judgment.

109. Lengthy extracts from *Bankovic* have already been set out in the judgments of the courts below and I shall not repeat them. Rather I shall at once set out certain central propositions for which in my judgment *Bankovic* stands:

- (1) Article 1 reflects an “essentially territorial notion of jurisdiction” (a phrase repeated several times in the Court’s judgment), “other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case” (para 61). The Convention operates, subject to article 56, “in an essentially regional context and notably in the legal space (*espace juridique*) of the contracting states” (para 80) (ie within the area of the Council of Europe countries).
- (2) The Court recognises article 1 jurisdiction to avoid a “vacuum in human rights’ protection” when the territory “would normally be covered by the Convention” (para 80) (ie in a Council of Europe country) where otherwise (as in Northern Cyprus) the inhabitants “would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed” (para 80).
- (3) The rights and freedoms defined in the Convention cannot be “divided and tailored” (para 75).
- (4) The circumstances in which the Court has exceptionally recognised the extra-territorial exercise of jurisdiction by a state include:
 - (i) Where the state “through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by [the government of that territory]” (para 71) (ie when otherwise there would be a vacuum within a Council of Europe country, the government of that country itself being unable “to fulfil the obligations it had undertaken under the Convention” (para 80) (as in Northern Cyprus).
 - (ii) “Cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state [where] customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction” (para 73).
 - (iii) Certain other cases where a state’s responsibility “could, in principle, be engaged because of acts ... which produced effects or were performed outside their own territory” (para 69). *Drozd v France* (1992) 14 EHRR 745 (at para 91) is the only authority specifically referred to in *Bankovic* as exemplifying this class of exception to the general rule. *Drozd*, however, contemplated no more than that, if a French judge exercised jurisdiction extra-territorially in Andorra in his capacity as a French judge, then anyone complaining of a violation of his Convention rights by that judge would be regarded as being within France’s jurisdiction.

- (iv) The *Soering v United Kingdom* (1989) 11 EHRR 439 line of cases, the Court pointed out, involves action by the state whilst the person concerned is “on its territory, clearly within its jurisdiction” (para 68) and not, therefore, the exercise of the state’s jurisdiction abroad.

There is, on the face of it, nothing in *Bankovic* which gives the least support to the appellants’ arguments.

110. Before turning to examine whether subsequent Strasbourg jurisprudence has weakened these principles, it is, I think, instructive first to consider the implications of article 56 of the Convention, an article mentioned in *Bankovic* merely as a provision which “enables a contracting state to declare that the Convention shall extend to all or any of the territories for whose international relations that state is responsible” (para 80).

Article 56

111. When under article 56 a state chooses to extend the Convention to a dependent territory (ex hypothesi not within the Council of Europe area—see, for example, *Tyrer v United Kingdom* (1978) 2 EHRR 1, at para 38), the Convention is applied “with due regard . . . to local requirements” (article 56(3)). *Py v France* (2005) 42 EHRR 548, where voting restrictions in New Caledonia were found justified, provides an up to date illustration of this.

112. Save under article 56, the Convention cannot apply to dependent territories. In particular, as the Court recently explained in *Quark v United Kingdom* (2006) 44 EHRR SE 70, the “effective control principle” does not apply to them.

113. How then could that principle logically apply to any other territory outside the area of the Council of Europe? As the respondent submits, it would be a remarkable thing if, by the exercise of effective control, for however short a time, over non-Council of Europe territory, a state could be fixed with the article 1 obligation to secure within that territory, without regard to local requirements, all Convention rights and freedoms whereas, despite its exercise of effective control over a dependent territory, perhaps for centuries past, the state will not be

obliged to secure any Convention rights there unless it has made an article 56 declaration and even then it would be able to rely on local requirements.

114. It may be noted that thirty years ago Turkey unsuccessfully sought to rely (directly or by analogy) on article 56 (then article 63) to contest its liability to secure Convention rights for the inhabitants of Northern Cyprus unless it chose to do so—*Cyprus v Turkey* (1978) 21 Yearbook of the ECHR 100. The argument failed: Northern Cyprus being part of a Council of Europe country, whichever member state has effective control must secure all Convention rights. True it is that thirty years ago the reasoning of the Commission (by reference to the acts of state agents abroad) was different from that of the Strasbourg Court today: it was not until *Loizidou v Turkey* (Preliminary Objections) (1995) 20 EHRR 99, another Northern Cyprus case, that the Court for the first time articulated the effective control of an area principle. The logic, however, remains clear: subject only to a few narrow exceptions the Convention applies solely within the Council of Europe area and must then apply in full measure. The same point was more recently made in *Ilascu v Moldova* (Admissibility) (Application No 48787/99) (unreported) 4 July 2001 where the Court, rejecting Moldova's assertion that the Convention did not extend to Transdniestria, expressly distinguished a state's right not to extend the Convention to non-Council of Europe territories under article 56.

The post-Bankovic cases

115. The Grand Chamber has considered the reach of article 1 of the Convention four times since *Bankovic*, on each occasion expressly following the *Bankovic* analysis. *Assanidze v Georgia* (2004) 39 EHRR 653 concerned the Ajarian Autonomous Republic in Georgia over which both parties accepted that Georgia exercised jurisdiction. The Grand Chamber emphasised the exceptional nature of extra-territorial jurisdiction and confirmed the indivisible nature of article 1 jurisdiction:

“The general duty imposed on the state by article 1 of the Convention entails and requires the implementation of a national system capable of securing compliance with the Convention throughout the territory of the state for everyone” (para 147).

116. *Ilascu v Moldova and Russia* (2004) 40 EHRR 1030, concerned human rights in Transdniestria, an area of Moldova subject to a separatist regime supported by Russia. The Grand Chamber held by a majority of 16 to 1 that Russia exercised jurisdiction and by 11 votes to 6 that Moldova did too. Because, however, Moldova lacked effective control within its own territory it could not be held responsible for violations save to the extent that they arose out of failures by Moldova to comply with its positive obligations “to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention” (para 331). Judge Bratza, speaking for five of the six judges dissenting on whether Moldova exercised jurisdiction, expressed

“difficulty in accepting the proposition that those within a part of the territory of a state over which, as a result of its unlawful occupation by a separatist administration, the state is prevented from exercising any authority or control, may nevertheless be said to be within the ‘jurisdiction’ of the state according to the autonomous meaning of that term in article 1 of the Convention, which term presupposes that the state has the power ‘to secure to everyone . . . the rights and freedoms’ defined therein.”

Whatever view one takes of the majority’s approach, however, it cannot avail the appellants here: there was simply no question of Moldova exercising any form of extra-territorial jurisdiction.

117. Article 1 was only briefly touched on by the Grand Chamber in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2005) 42 EHRR 1. *Bankovic*, *Assanidze* and *Ilascu* were all cited in footnotes to para 136.

118. *Öcalan v Turkey* (2005) 41 EHRR 985 concerned (in part) the applicant’s arrest by members of the Turkish Security Forces inside a Turkish registered aircraft in the international zone of Nairobi Airport. The Grand Chamber stated (at para 91) the basis upon which it accepted that Turkey had at that early stage exercised jurisdiction over the applicant:

“It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the ‘jurisdiction’ of that state for the purposes of article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey (see, in this respect, the aforementioned decisions in the cases of [*Sánchez*] *Ramirez v France* and *Freda v Italy*; and, by converse implication, *Bankovic v Belgium*).”

119. Both *Sánchez Ramirez v France* (1996) 86-A DR 155 and *Freda v Italy* (1980) 21 DR 250 (the authorities there referred to) also concerned irregular extradition, one a revolutionary known as Carlos (the Jackal), the other an Italian. Each was taken into custody abroad, respectively by French police in Khartoum and by Italian police in Costa Rica, and flown respectively in a French military airplane to France and in an Italian Air- force plane to Italy. In each case, as in *Öcalan*, the forcible removal was effected with the full cooperation of the foreign authorities and with a view to the applicant’s criminal trial in the respondent state. Unsurprisingly in these circumstances the Grand Chamber in *Öcalan* had felt able to distinguish *Bankovic* “by converse implication”.

120. This line of cases clearly constitutes one category of “exceptional” cases expressly contemplated by *Bankovic* as having “special justification” for extraterritorial jurisdiction under article 1.

121. Another category, similarly recognised in *Bankovic*, was *Drozd* (see para 109(4)(iii) above) into which category can also be put cases like *X and Y v Switzerland* (1977) 9 DR 57 and *Gentilhomme v France* (Application No 48205/99) (unreported) 14 May 2002. In *X and Y v Switzerland*, Switzerland was held to be exercising jurisdiction where, pursuant to treaty provisions with Liechtenstein, it legislated for immigration matters in both states, prohibiting *X* from entering either. In *Gentilhomme*, France operated French state schools in Algeria, again pursuant to a treaty arrangement.

122. The cases involving the activities of embassies and consulates (see para 109(4)(ii) above) themselves subdivide into essentially two sub-categories, those concerning nationals of the respondent state and those concerning foreign nationals. The former includes cases like *X v Federal Republic of Germany* (1965) 8 Yearbook of the ECHR 158 and *X v UK* (1977) 12 DR 73; the latter cases like *M v Denmark* (1992) 73 DR 193 and *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643. It is unnecessary for present purposes to consider the facts of any of them.

123. None of the cases in any of these categories appear to me in any way helpful to the first five appellants.

124. I turn, therefore, to the one post-*Bankovic* Strasbourg judgment upon which the appellants seek to place particular reliance: *Issa v Turkey (Merits)* (2004) 41 EHRR 567. *Issa* was not, be it noted, a judgment of the Grand Chamber (although three of its seven judges had been members of the Grand Chamber in *Bankovic*); nor in the event did the application succeed. It had, moreover, been found admissible in a decision (Application No 31821/96) (unreported) 30 May 2000 which pre-dated *Bankovic* when (as noted in the *Bankovic* judgment at para 81) no issue of jurisdiction had been raised.

125. The complaint in *Issa* concerned the activities of Turkish forces during a military campaign in northern Iraq. It was dismissed because the applicants had failed to establish that Turkish troops had “conducted operations in the area in question.” The Court, however, “[did] not exclude the possibility that, as a consequence of this military action, the respondent state could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey . . .” (para 74). Earlier in its judgment, moreover, the Court had referred to the principle of effective control of the territory established in *Loizidou* and reiterated in *Bankovic*, *Assanidze* and *Ilascu* and added (at para 71):

“Moreover, a state may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another state but who are found to be under the former state’s authority and control

through its agents operating—whether lawfully or unlawfully—in the latter state (see ... *M v Denmark*, ... *Sánchez Ramirez v France* ... *Coard et al v United States* ... and the views adopted by the Human Rights Committee ... in the cases of *López Burgos v Uruguay* and *Celiberti de Casariego v Uruguay* ...). Accountability in such situations stems from the fact that article 1 of the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory *ibid*.”

126. This, plainly, represents the high watermark of the appellant’s case. For my part, however, I find it unconvincing. Much, of course, depends upon how precisely para 71 of *Issa* is to be understood. Insofar as it supports the view that article 1 jurisdiction extends to encompass cases like *M v Denmark* (an embassy case—see para 122 above) and *Sánchez Ramirez v France* (an irregular extradition case—see para 119 above) (two of the authorities cited in paragraph 71), it is plainly unexceptionable. The two cited cases involving Uruguay (*López* 68 ILR 29 and *Celiberti de Casariego* 68 ILR 41) were also concerned with irregular extraditions—of citizens of Uruguay kidnapped in respectively Argentina and Brasil by Uruguayan security forces working with their Argentine and Brazilian counterparts—and it was in these two cases that the Human Rights Commission said that “it would be unconscionable to so interpret the responsibility under article 2 of the [ICCPR] as to permit a state party to perpetrate violations of the covenant on the territory of another state, which violations it could not perpetrate on its own territory,” a comment applied without more by the Court to the ECHR itself. *Coard et al v US* (1999) 9 BHRC 150, the final case cited in support of para 71, had been specifically considered in *Bankovic* (at paras 23, 48 and 78), the Grand Chamber there noting that article 2 of the American Declaration on the Rights and Duties of Man 1948 contained no explicit limitation of jurisdiction whatever. Overall, the Grand Chamber in *Bankovic* (para 78) derived no assistance from “the allegedly similar jurisdiction provisions in the international instruments” (including article 2 of the ICCPR).

127. If and insofar as *Issa* is said to support the altogether wider notions of article 1 jurisdiction contended for by the appellants on this appeal, I cannot accept it. In the first place, the statements relied upon must be regarded as obiter dicta. Secondly, as just explained, such wider assertions of jurisdiction are not supported by the authorities cited (at any rate, those authorities accepted as relevant by the Grand

Chamber in *Bankovic*). Thirdly, such wider view of jurisdiction would clearly be inconsistent both with the reasoning in *Bankovic* and, indeed, with its result. Either it would extend the effective control principle beyond the Council of Europe area (where alone it had previously been applied, as has been seen, to Northern Cyprus, to the Ajarian Autonomous Republic in Georgia and to Transdniestria) to Iraq, an area (like the FRY considered in *Bankovic*) outside the Council of Europe—and, indeed, would do so contrary to the inescapable logic of the Court’s case law on article 56. Alternatively it would stretch to breaking point the concept of jurisdiction extending extra-territorially to those subject to a state’s “authority and control”. It is one thing to recognise as exceptional the specific narrow categories of cases I have sought to summarise above; it would be quite another to accept that whenever a contracting state acts (militarily or otherwise) through its agents abroad, those affected by such activities fall within its article 1 jurisdiction. Such a contention would prove altogether too much. It would make a nonsense of much that was said in *Bankovic*, not least as to the Convention being “a constitutional instrument of European public order”, operating “in an essentially regional context”, “not designed to be applied throughout the world, even in respect of the conduct of contracting states” (para 80). It would, indeed, make redundant the principle of effective control of an area: what need for that if jurisdiction arises in any event under a general principle of “authority and control” irrespective of whether the area is (a) effectively controlled or (b) within the Council of Europe?

128. There is one other central objection to the creation of the wide basis of jurisdiction here contended for by the appellants under the rubric “control and authority”, going beyond that arising in any of the narrowly recognised categories already discussed and yet short of that arising from the effective control of territory within the Council of Europe area. *Bankovic* (and later *Assanidze*) stands, as stated, for the indivisible nature of article 1 jurisdiction: it cannot be “divided and tailored”. As *Bankovic* had earlier pointed out (at para 40) “the applicant’s interpretation of jurisdiction would invert and divide the positive obligation on contracting states to secure the substantive rights in a manner never contemplated by article 1 of the Convention.” When, moreover, the Convention applies, it operates as “a living instrument.” *Öcalan* provides an example of this, a recognition that the interpretation of article 2 has been modified consequent on “the territories encompassed by the member states of the Council of Europe [having] become a zone free of capital punishment” (para 163). (Paragraphs 64 and 65 of *Bankovic*, I may note, contrast on the one hand “the Convention’s substantive provisions” and “the competence of the Convention organs”, to both of which the “living instrument” approach

applies and, on the other hand, the scope of article 1—“the scope and reach of the entire Convention”—to which it does not.) Bear in mind too the rigour with which the Court applies the Convention, well exemplified by the series of cases from the conflict zone of south eastern Turkey in which, the state’s difficulties notwithstanding, no dilution has been permitted of the investigative obligations arising under articles 2 and 3.

129. The point is this: except where a state really does have effective control of territory, it cannot hope to secure Convention rights within that territory and, unless it is within the area of the Council of Europe, it is unlikely in any event to find certain of the Convention rights it is bound to secure reconcilable with the customs of the resident population. Indeed it goes further than that. During the period in question here it is common ground that the UK was an occupying power in Southern Iraq and bound as such by Geneva IV and by the Hague Regulations. Article 43 of the Hague Regulations provides that the occupant “shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” The appellants argue that occupation within the meaning of the Hague Regulations necessarily involves the occupant having effective control of the area and so being responsible for securing there all Convention rights and freedoms. So far as this being the case, however, the occupants’ obligation is to respect “the laws in force”, not to introduce laws and the means to enforce them (for example, courts and a justice system) such as to satisfy the requirements of the Convention. Often (for example where Sharia law is in force) Convention rights would clearly be incompatible with the laws of the territory occupied.

130. Realistically the concept of the indivisibility of the Convention presents no problem in the categories of cases discussed in paras 119–126 above: these concern highly specific situations raising only a limited range of Convention rights.

131. In my judgment *Issa* should not be read as detracting in any way from the clear—and clearly restrictive—approach to article 1 jurisdiction adopted in *Bankovic*. I recognise that in two later decisions other chambers of the Court have, as so commonly occurs in Strasbourg judgments, repeated the substance of para 71 of *Issa*. But in neither of them does there appear to have been any relevant argument on the reach of article 1. *Isaak v Turkey* (Application No 44587) (unreported) 28 September 2006 concerned the death of a demonstrator through the

actions of Turkish protesters and police in the UN buffer zone separating northern Cyprus from the south. The Court held (at page 20) that “Turkey’s jurisdiction must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional protocols which she has ratified, and that violations of those rights are imputable to Turkey.” *Ben El Mahi v Denmark* (Application No 5853/06) (unreported) 11 December 2006 concerned the publication in Denmark of cartoons allegedly breaching the Moroccan applicants’ article 9 rights. The application was unsurprisingly ruled inadmissible on the ground that there was no “jurisdictional link” between the respondent state and the applicants.

132. Taken as a whole, therefore, and according particular weight to Grand Chamber judgments, so far from weakening the principles established in *Bankovic*, subsequent Strasbourg case law to my mind reinforces them. Certainly, whatever else may be said of the Strasbourg jurisprudence, it cannot be said to establish clearly that any of the first five appellants come within the UK’s article 1 jurisdiction. As for the sixth case, I for my part would recognise the UK’s jurisdiction over Mr Mousa only on the narrow basis found established by the Divisional Court, essentially by analogy with the extra-territorial exception made for embassies (an analogy recognised too in *Hess v United Kingdom* (1975) 2 DR 72, a Commission decision in the context of a foreign prison which had itself referred to the embassy case of *X v Federal Republic of Germany*). In the light of those conclusions as to the reach of the Convention I come now to the Human Rights Act 1998.

The reach of the Human Rights Act

133. Although I respectfully disagree with the conclusion reached by my noble and learned friend Lord Bingham of Cornhill on this issue, I am in agreement with much of what he says in the course of his consideration of it.

134. I agree, of course, that there is a distinction between rights arising under the Convention and rights created by the Act by reference to the Convention. A plain illustration of this arises from the temporal limitations imposed by the Act: its non-retrospectivity as established in *In re McKerr* [2004] 1 WLR 807. Another illustration is the Act’s non-applicability in article 56 cases. Consider *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, discussed by Lord Bingham at paras 18-20. Even had the UK

extended article 1 of the First Protocol to “SGSSI”, no claim would have been available against the Secretary of State under the Act although the UK would clearly have been liable internationally for any breach. It is for the dependent territory’s own legislation to give effect to Convention rights, just as for Jersey, Guernsey and the Isle of Man.

135. I agree too with Lord Bingham’s main conclusion upon the many detailed arguments addressed to the House on the language of the Act: that none of the suggested textual indications compellingly favour either side. For my part, indeed, I find no real force in any of them.

136. I also share Lord Bingham’s view about the limited relevance of *Quark* in the present context: it cannot be treated as reliable authority on the particular point here at issue, although undoubtedly there are dicta in the case favouring the appellants. Nor is any real assistance to be derived from *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2005] 2 AC 1 or from *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 (the cases mentioned at para 21 of Lord Bingham’s opinion). Nor is either party assisted by the statements in the White Paper or by the Bill’s promoters during its passage through Parliament. Nor is there any comparability between the Crown’s case in *McKerr* based on the presumption against retrospectivity and that advanced by the Crown here based on the presumption against extra-territoriality: as Lord Bingham points out at para 22, the decision in *McKerr* was centred on section 22(4) of the Act and there is no corresponding provision dealing with the Act’s territorial scope.

137. How, then, should the presumption against extra-territoriality—the presumption that, unless the contrary intention appears from the “language”, “object”, “subject-matter” or “history” of the enactment (see *Maxwell on The Interpretation of Statutes* quoted by Lord Bingham at para 11 of his opinion), Parliament does not intend a statute to operate beyond the territorial limits of the UK—apply in the case of the Human Rights Act?

138. The object, subject-matter and history of this Act all seem to me highly relevant to this question. It cannot simply be treated as just another domestic statute. Rather it is focused upon the Convention (although not, of course, incorporating it), its very purpose being to ensure that, from the date it took effect, it would no longer be necessary for victims to complain about alleged violations of the Convention

internationally in Strasbourg instead of domestically in the UK. It is less than obvious that Parliament would have wanted to confine its effect rigidly within the borders of the UK rather than allow it to extend also to the handful of cases where Strasbourg recognises an extra-territorial reach for the Convention itself.

139. Section 6 of the Human Rights Act makes it unlawful for a “public authority” to “act” in a way incompatible with “a Convention right”. There can be no doubt that a “public authority” means a public authority of Great Britain and Northern Ireland, just as the “legislation” referred to in sections 3 and 6 of the Act means legislation enacted in Great Britain and Northern Ireland. It is not, however, suggested that the claimant (the alleged victim) need be present in the UK (let alone a British citizen) nor that the decision complained of need have been taken in the United Kingdom (consider, for example, a decision taken by a minister travelling abroad).

140. What object would be served by construing and applying the Act so that Convention rights only take effect within the territory of the UK i.e. only where the result of the violation is actually felt within the UK? Suppose British police were responsible for a forcible extradition (as in the *Ocalan* line of cases), or that British Embassy officials were wrongly to refuse diplomatic asylum (as was asserted but not substantiated in *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643), or that British judges were to sit as such overseas (as asserted in respect of French judges in *Droz* and as Scottish judges in fact did sit in Holland on the *Lockerbie* case). Or suppose that Corporal Payne, who pleaded guilty to ill-treating Mr Mousa and has recently been sentenced to a year’s imprisonment, had instead been court-martialled in Iraq. What good reason could there be for requiring any human rights complaints arising in any of these situations (article 6 complaints, for example, in the last two cases) to be taken to Strasbourg rather than brought under the Act? Similarly, surely, in the case of the sixth appellant.

141. The essential rationale underlying the presumption against extra-territoriality is that ordinarily it is inappropriate for one sovereign legislature to intrude upon the preserve of another. As Lord Hoffmann recently observed in *Lawson v Serco Ltd* [2006] ICR 250, 254:

“The United Kingdom rarely purports to legislate for the whole world. . . . [U]sually such an exorbitant exercise of

legislative power would be both ineffectual and contrary to the comity of nations.”

It was accordingly there decided that section 94(1) of the Employment Rights Act 1996—which provides that: “An employee has the right not to be unfairly dismissed by his employer”—“must have implied territorial limits”. Recognising the difficulty of saying exactly what those limits are and that “the question of territorial scope is not straightforward”, Lord Hoffmann said that in principle the question is always one of construction. As to this he cited Lord Wilberforce’s speech in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 152, saying that the question “requires an inquiry to be made as to the person with respect to whom Parliament is presumed, in the particular case, to be legislating. Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration?”

142. In that case section 94(1)’s “legislative grasp” was held to extend to an employee summarily dismissed from his employment at an MoD military establishment in Germany. Why then should the Human Rights Act’s legislative grasp not extend to encompass a human rights complaint arising out of such employment abroad and, indeed, such other few categories of claimants as the Strasbourg jurisprudence suggests to be within the UK’s article 1 jurisdiction?

143. I have already acknowledged that the House’s decision in *Quark* cannot be regarded as reliable authority on the present question given that it was not directly in issue there. It is nonetheless noteworthy that in Lord Nicholls’ view (at para 34) “the territorial scope of the obligations and rights created by sections 6 and 7 of the Act was intended to be co-extensive with the territorial scope of the obligations of the United Kingdom and the rights of victims under the Convention.” In *Quark*, moreover, no adverse comment was made about the Court of Appeal’s decision in *B* which had been cited to the House.

144. As to *B* itself, the decision of a strong Court of Appeal which is directly in point, again it seems to me noteworthy that the Court “reached the conclusion that the Human Rights Act 1998 requires public authorities of the United Kingdom to secure those Convention rights defined in section 1 of the Act within the jurisdiction of the United Kingdom as that jurisdiction has been identified by the Strasbourg Court.” (para 79).

145. True it is, as Lord Bingham points out at para 17, that in reaching that conclusion the Court relied strongly on section 3 of the Act which (and again I agree with Lord Bingham) cannot properly be used to determine the reach of the Act—see in this regard the House’s recent decision in *R (Hurst) v London Northern District Coroner* [2007] 2 WLR 726, 741 at paras 43 and 44.

146. I would, however, be hesitant about accepting Lord Bingham’s wider statement at para 15 (2) that section 3 was not intended to be used (implicitly, in any circumstances) in construing the Act itself. Take the case of *Cream Holdings Ltd v Banerjee*, concerning the correct interpretation of section 12(3) of the 1998 Act. Certainly each of the judgments in the Court of Appeal proceeded on the basis that section 3 could be invoked to arrive at a construction compatible with Convention rights ([2003] Ch 650, at paras 55, 83 and 129). And in the only reasoned speech in the House of Lords Lord Nicholls too, albeit without express mention of section 3, concluded his discussion of the correct approach to section 12(3) with the comment that “this interpretation of section 12(3) is Convention-compliant” ([2005] 1 AC 253, 262, para 23).

147. Whilst, however, I agree with Lord Bingham that section 3 is not available to the Court as an interpretative tool to secure compliance with the UK’s obligations under international law (as opposed to its obligations under domestic law—which depend upon the true construction of the Act without reference to section 3), I respectfully take a different view as to the application here of the presumption considered by Lord Bingham at para 12. Diplock LJ in *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 144 referred to this as “a *prima facie* presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations”. Certainly the UK undertook no *specific treaty obligation* to incorporate the Convention into domestic law; the Strasbourg Court has said that many times. Article 13 does, however, impose upon the UK an international law obligation to afford “everyone whose rights and freedoms as set forth in [the] Convention are violated . . . an effective remedy before a national authority”. As the Court explained in *James v United Kingdom* (1986) 8 EHRR 123, 158-159:

“Although there is thus no obligation to incorporate the Convention into domestic law, by virtue of article 1 of the Convention the substance of the rights and freedoms set forth must be secured under the domestic legal order, in

some form or another, to everyone within the jurisdiction of the contracting states. Subject to the qualification explained in the following paragraph [the qualification that article 13 does not go so far as to guarantee a remedy allowing a contracting state's laws as such to be challenged before a national authority on the ground of being contrary to the Convention, the qualification which defeated the applicant in the *James* case itself], article 13 guarantees the availability within the national legal order of an effective remedy to enforce the Convention rights and freedoms in whatever form they may happen to be secured.”

148. In the *Observer* case and in *McCann* (both cited by my Lord at para 12) article 13 presented no problem: it had not been breached. In the *Observer* case domestic common law, and in *McCann* the Gibraltar Constitution, enabled the respective complaints to be considered on their merits. The position, however, was different in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. There article 13 was held to be violated: “the threshold at which [the domestic courts] could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants’ rights answered a pressing social need or was proportionate to the national security and public order aims pursued . . . ” So too article 13 would be found violated here if the Act were held not to apply to Mr Mousa’s case: his complaints could not then be considered on their merits under domestic law.

149. If, therefore, it were necessary to resort to a countervailing presumption to justify construing the Act so as to apply extra-territorially to the limited extent necessary to correspond with the Strasbourg case law on the reach of article 1, I would conclude that the *Salomon* presumption is indeed available to the appellants here.

150. Not only, of course, did *B* conclude that the Act has extra-territorial application but so too, in fully and carefully reasoned judgments, did both courts below. In para 301 of its judgment, cited by Lord Bingham at para 25, the Divisional Court found it “counter-intuitive [where article 1 has been given an essentially territorial effect] to expect to find a parliamentary intention that there should be gaps between the scope of the Convention and an Act which was designed to bring rights home”. True, at para 304, the Divisional Court also found it

“intuitively difficult to think that Parliament intended to legislate in foreign lands”. But that was in the context of the “effective control of an area” exception. As foreshadowed in para 4 above, I, like the Divisional Court, am readier to conclude that Parliament intended the Act to operate extra-territorially in a case where article 1 jurisdiction falls within one of the narrow categories of exception established under the Strasbourg case law (as in the sixth appellant’s case), than I might be were Strasbourg to construe the reach of the Convention substantially more widely. Even then I would probably still feel bound to conclude that Parliament intended the Act to have the same extra-territorial effect as the Convention. Indeed, having now had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Rodger of Earlsferry, I think that likely. But I would certainly feel less surprised by a suggestion to the contrary. I do not, however, expect to be faced with this difficulty. Rather I am confident, the Parliamentary Assembly’s exhortation of 24 June 2004 notwithstanding, that the Strasbourg court will continue to maintain the *Bankovic* approach which seems to me only logical.

151. In the final result I would dismiss the appeals of each of the first five appellants and dismiss too the cross-appeal by the respondent as to the applicability of the Human Rights Act to the sixth appellant’s case. That being so it is agreed between the parties that, in the light of factual developments since the Court of Appeal’s order, the sixth appellant’s case should be remitted to the Divisional Court to join the other cases which have been stayed for the substantive issues to be decided in the light of up to date evidence and amended pleadings.