

IRAQ HUMAN RIGHTS JURISDICTION

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Private Jason Smith had been in the Territorial Army for over ten years when the call came to go to Iraq. He arrived in June 2003 shortly after the invasion had been concluded, with his billet being an old athletics stadium in which during those summer months the temperature reached over 50 degrees centigrade in the shade (122 degrees Fahrenheit). Smith could not cope, quickly reporting sick on account of the heat. He was required nevertheless to continue with various duties out and about in the local area, and four days after his complaints about the conditions he collapsed and died, of heatstroke. Fighting for a full investigation into why her son died in the way that he had, Smith's mother argued that the death was within the jurisdiction of Britain's Human Rights Act and that therefore the all-embracing kind of inquest required by this Act in circumstances such as these could be rightly insisted upon.

After initial resistance the Ministry caved in and Mrs Smith got her inquest. But the case carried on regardless, focusing on an issue of principle which transcended the facts to which it had given rise: did British troops operating on foreign soil fall within the jurisdiction of the United Kingdom for the purposes of the operation of the Human Rights Act? Earlier rulings had extended the Act to the military bases themselves (and this is why the killing of Baha Mousa by British forces in Basra was found to be within the Act and is currently the subject of an extensive enquiry in London). But Smith's case raised the still open question of whether the Act went further than this, imposing its insistence on respect for human rights on squaddies on patrol in foreign lands, while also insisting that its protections extended to the soldiers themselves as well. By a majority of six to three, and in the process overturning three judges in the Court of Appeal, the Supreme Court last week answered that question in the negative.

The majority justices (as we must now learn to call them, not law lords) gave three reasons for their decision. First the reach of the Human Rights Act depended on the jurisdiction of the European Convention on Human Rights which had not been intended at its inception (in 1950) to stretch to military operations overseas and which had not been extended in this way in the decisions that have since flowed from the Convention's

specialist court, the European Court of Human Rights in Strasbourg. Second, while jurisdiction of the Convention was primarily territorial there were a few exceptions (such as related to embassies, consulates and (as we have seen) army bases, as well as a few other instances where common sense demanded such an outcome) but it was clear that these did not extend to cover the facts before the court. Third, the Convention on human rights should not be allowed to invade any more than it already had into this sphere: the conduct of the military in armed hostilities was not the kind of thing with which judges should be concerned, since it was (in the words of Lord Collins) an 'essentially non-justiciable' field. There was a concern on the part of some at least of the majority justices that the courts might be turned into a forum for campaigning zealots rather than legal argument, an anxiety that has been publicly ventilated by no less a figure than a former president of the European Court of Human Rights itself.

While the ruling might be thought to make a persuasive case in terms of legal logic, it nevertheless produced three strong dissents, arguing for the extension of the Convention in exactly the way the majority said was impossible (thereby demonstrating perhaps that the matter was one of choice rather than law). The majority's main weakness lies in the double standards that its logic forces it to embrace: despite their apparent universality, human rights do indeed seem to stop at the European border – soldiers required to show respect for the dignity of all at home are sanctioned to act like brutes abroad, just as long as they remember their manners if they choose to haul their prisoners back to HQ. The point is an even deeper one than this because of a series of inconsistent rulings by the Strasbourg court itself, one minute protecting NATO bombings in the former Yugoslavia by saying this is outside the reach of the Convention, but the next suggesting that Turkish forces may be within the Convention when going into northern Iraq or travelling to Africa to capture a leading Kurdish separatist. The Supreme Court justices did their best to show why these cases in fact all fitted together, but it is not only the Turks who have noticed that jurisdiction seems to expand whenever it is they (and not 'Old Europe') who are doing the killing and kidnapping. The truth is that the Strasbourg case law is in a mess, and whether it will be effectively reconfigured by any of the Iraq cases that are still streaming in its direction (most recently on killings off-base by British soldiers in Basra) remains to be seen.

The problem, as so often with human rights, lies in the mismatch between what the term promises and what – in a world of nation states, imperial ambition and authorised

brutality – it can actually deliver. Back in 1950 it was the Colonial Office that was most concerned by the rod that their idealist but unknowing colleagues in the rest of government might have been making for themselves, an anxiety that was borne out when Cyprus immediately surfaced as the key human rights issue of those early years. Later it was Northern Ireland, where the usual anti-insurgency techniques of the colonial era suddenly found themselves being described in a European Court no less as egregious breaches of human rights. What was unusual about Bloody Sunday, sensory deprivation, military curfews and the rest of what the army did in Northern Ireland between 1969 and 1972 was not the fact of its occurrence but rather its location – and the forces have paid a heavy price for failing to notice the difference between Northern Ireland and their other more obscure (because ‘foreign’) fields of operation. Our commitment to human rights remains – almost literally – skin-deep.