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OPINION

The Right to Life on the Battlefield

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Speaking at a Human Rights Day event on 10 December 1961, the English lawyer Peter Benenson, the founder of Amnesty International, said that it is 'better to light a candle than curse the darkness'. What he ignited has since conflagrated across the world. Amnesty now has over 2 million members and over 100 offices worldwide.

The development of human rights is a long and complex story whose longest roots can be traced to a variety of sources including, arguably, Hammurabi's Code in Babylon around 1780 BC. More modern developments can be found in the Magna Carta of 1215, the Bill of Rights in 1689, and Thomas Paine's Rights of Man in 1791. The story of the development of human rights is, like science, music and literature, a story of continuing organic development: it cannot be terminated. Whatever its detractors think, the human rights project will not cease abruptly if a particular piece of legislation or a code is repealed.

The story is not, though, always a story of advancement. A judicial decision can arrest the development of law. In holding that the Human Rights Act 1998 does not apply to armed forces on foreign soil, the Supreme Court has recently recoiled from an important opportunity to underline the true significance of human rights.¹

To accord to UK soldiers on foreign soil human rights would not entail anything preposterous such as keeping them out of harm's way or having health and safety inspectors on the battlefield. Soldiers, after all, consent occupationally to be exposed to mortal danger. According soldiers human rights would, though, prevent them being exposed to wanton and unnecessary lethal danger by, for example, unparadonably reckless decisions of senior officers.

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

* The views expressed in this article are those of the author and do not necessarily reflect the views of The Open University, 36 Bedford Row, or *The Journal of Criminal Law*.

1 *R (on the application of Smith) v Secretary of State for Defence* [2010] UKSC 29, [2010] 3 WLR 223, from which I take the facts directly.

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

The High Court held that Private Smith had been protected by the Human Rights Act 1998 at all times in Iraq and ordered a fresh inquest. Collins J gave a helpful example² when suggesting that human rights did have some application even in battle:

... the soldier does not lose all protection simply because he is in hostile territory carrying out dangerous operations. Thus, for example, to send a soldier out on patrol or, indeed, into battle with defective equipment could constitute a breach of Article 2. If I may take a historical illustration, the failures of the commissariat and the failures to provide any adequate medical attention in the Crimean War would whereas the Charge of the Light Brigade would not be regarded as a possible breach of Article 2.

On appeal, before the Court of Appeal, the Secretary of State agreed he would not submit to the new coroner that the requirements of Article 2 were inapplicable. Despite that concession, the case went to the Supreme Court as it raised issues of general importance and of practical concern.

One of the issues raised was whether on the true interpretation of Article 1 of the ECHR British troops operating on foreign soil fell within the jurisdiction of the UK.

Soldiers are human beings and they are entitled to the same protection in principle as other people. How that applies on a battlefield is clearly different from how it applies on a sports field but the principle remains the same. If a commanding officer has to take an urgent decision to send his men into mortal danger he would not, as some commentators wrongly suggested at the time of the High Court and Court of Appeal decisions, have to agonise over whether he or the Ministry of Defence would be sued for negligence or for a breach of human rights. The law does not require anyone in the clash of battle to make decisions in the way he would in an armchair and with limitless resources. The decision of the Court of Appeal did not in any way compromise national security. It did mean, however, that if a potential recruit in a school asked a recruiting officer, 'If I get dispatched into a war, are you obliged legally to ensure my equipment and supervision

² *R (on the application of Smith) v Oxfordshire Assistant Deputy Coroner* [2008] EWHC 694, [2008] 3 WLR 1284 at [20].

take account of my right to life?', the answer would have been 'yes'. Today, after the Supreme Court decision, the answer will be 'no'.

The Supreme Court allowed the appeal of the Secretary of State in part and in doing so unnecessarily retarded the development of human rights law.

Among other points, it ruled (Lady Hale, Lord Mance and Lord Kerr dissenting) that a member of the state's armed forces was not, simply by reason of his or her personal status 'within the jurisdiction of the state' for the purposes of Article 1 ECHR wherever he was in the world. It ruled Article 1 jurisdiction was essentially *territorial* in nature. A soldier in the UK or on a UK base abroad would be within the UK jurisdiction but abroad he would not enjoy human rights even when he was in fact acting as the arm of the UK state. In exceptional circumstances the UK territorial jurisdiction would extend to other scenarios, for example where the UK was exercising jurisdiction over the territory of another ECHR contracting state, but none of those exceptions applied to a case like that of Private Smith as Iraq was not a signatory to the ECHR.³ The court ruled that there were no policy grounds for extending the scope of the Convention to armed forces abroad.

Lord Mance, dissenting, considered that as an occupying power in Iraq, the UK had under international law an almost absolute power over the safety of its forces. The relationship was not territorial but depended on a 'reciprocal bond'⁴ of authority and control on the one hand and allegiance and obedience on the other. In his view the Strasbourg court would hold that the armed forces of a state *were* within the meaning of Article 1 and for the purposes of Article 2 wherever they might be. Lord Kerr agreed. He noted, referring to the state's control of its soldiers:⁵

If a state can 'export' its jurisdiction by taking control of an area abroad, why should it not equally be able to export the jurisdiction when it takes control of an individual?

The court ruled that it was unlikely that when states signed the European Convention on Human Rights in 1951 in the aftermath of the Second World War, they would have regarded it as desirable to extend the protection of the right to life to troop operations.

That reasoning is unhelpful for two reasons.

First, the human rights code is a 'living instrument' not an inert slate of rules. What human rights means in 2010 must be judged by today's standards and expectations not those of 1951. We do not today apply equal opportunities principles of the 1950s so why should we apply stale human rights standards now? The American Constitution and the US Bill of Rights cannot be judged today, for example, on their 1787 and 1789 meanings of political rights because when they were drafted they excluded everyone who was female or non-white. You cannot interpret what those old documents mean today by asking what the drafters would have thought because they were mostly racist and sexist. The

3 [2010] UKSC 29, [2010] 3 WLR 223 at [41], [42], [47], [60], [90] and [305].

4 *Ibid.* at [192].

5 *Ibid.* at [330].

human rights code is a living instrument because its provisions change organically as society develops—all human rights have changed their meanings and applications since 1951.

Secondly, had the idea of extending the 'right to life' to troops been debated by the ECHR signatory nations in 1951, it is quite possible that in the wake of the holocaust—the chamber might have thought that no one by their race, religion, or *occupation* should ever be placed outside of the category of those attracting human rights. The adjectival qualifier 'human' includes soldiers on foreign soil. Giving the right to life to soldiers does not mean they must be protected from danger—that would be risible nonsense—but it does mean they cannot be treated as sub-human like soldiers in the First World War.

The dissents in *Smith* are powerful and they will surely one day come to represent the law. In 1928,⁶ the American Supreme Court judge Chief Justice Hughes observed that 'A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day'. The lawyer Peter Beneson was appealing to a similar spirit when he founded Amnesty 50 years ago.

6 Charles Evans Hughes, *The Supreme Court of the United States: Its Foundation, Methods and Achievements—An Interpretation* (Columbia University Press: New York, 1928) 68.