By Victoria Dawson

The Military Covenant, traditionally sealed by the payment of a shilling to a soldier, between the Nation, the British Army and the Soldier, has as its core principles from the 'Army Doctrine', which holds that; 'soldiers will be called upon to make personal sacrifices – including the ultimate sacrifice – in the service of the Nation. In putting the needs of the Nation and the British Army before their own, soldiers forego some of the rights enjoyed by those outside the Armed Forces. In return, soldiers must always be able to expect fair treatment, to be valued and respected as individuals. In the same way the unique nature of military operations means that the British Army differs from any other State institution, and must be sustained and provided for by the Nation'.

To understand the impact of the Supreme Court ruling it is necessary to be clear on what obligations Article 2 of the European Convention on Human Rights 1950 (ECHR) provides in relation to the British Army. Article 2(1) ECHR provides that 'Everyone's right to life shall be protected by law. No-one shall be deprived of his life intentionally....' The ECHR and those Conventions relating to international armed conflict impose a positive obligation on the State to protect the life of its citizens, however the purpose and nature of the British Army is at odds with these obligations, as sending a soldier to 'keep order' or to 'fight' by necessity exposes them to an increased risk of death. Although the United Kingdom (UK) as a State is not under an 'absolute obligation' to protect the lives of its citizens, neither is it discharged of all of its responsibilities towards its citizens or soldiers during times of conflict or national emergency. During such periods Article 2 ECHR imposes a duty of care upon the State to take appropriate steps to safeguard and protect the lives of those within its jurisdiction, including soldiers of the British Army. The ruling of the Supreme Court, with a majority of six to three, is one of clarification regarding the boundaries of UK jurisdiction and holds that it is incorrect to extend the reach of the Human Rights legislation outside the perimeter fence of an overseas military base where British Army soldiers reside. The judiciary commented in its closing statements that to reach a decision other than they did would have made the job of commanders on the battlefield more difficult.

In practical terms the ruling is unlikely to make any immediate or tangible difference to British Army soldiers currently deployed in Afghanistan or elsewhere on active duties. They will continue to be afforded the protections contained within the Human Rights Act 1998 (HRA) however it has been clarified that this will only be the case whilst they remain inside the perimeters of the base at which they are deployed as only then are they within the legal jurisdiction of the UK.

The HRA implemented the ECHR into UK domestic law and was intended to provide expedient domestic remedies, in the form of a compensation claim, for individuals whose human rights have been breached by a public body without the need to go through the costly and time consuming route of taking their case to the European Court of Human Rights (ECtHR). In

relation to a breach of Article 2 the difficulty of making a claim against the State lays within the process of making a claim as it is the claimant who had their right to life violated who must make a claim. Where a soldier has lost their life due to a breach of Article 2 they are not in a position to make a claim and the immediate family of the deceased may bring a claim, but they must show, on the balance of probabilities, that the Ministry of Defence had failed in its duty of care to protect the deceased's 'right to life'. The family of a soldier or a soldier of the British Army must show the Ministry of Defence failed in its duty to protect a soldier's life and it places an obligation upon the Ministry to take 'reasonable steps' to protect soldiers in the future and where there has been a death which may be the fault of the Ministry there must be a full and open inquest.

The difficulties involved with the armed forces and the 'right to life' has been the subject of a number of court cases since the current conflict began. Two cases, R (on the application of Gentle)[1] and R (on the application of Smith)[2] are of particular importance and were decided within two days of each other. The first, R (on the application of Gentle)[3], concerned the application of Article 2 as a basis upon which to impose a duty on the government to satisfy itself of the legality of military action in Iraq and established the boundaries of UK jurisdiction to lay at the perimeter fence of the military base. However, more significantly for soldiers and their families is R (on the application of Smith)[4], which concerned the decision of a coroner to quash an inquest into the death of the claimant's son (a soldier) and discussed in great detail, albeit during obiter statements, the correct application of Article 2 to soldiers' lives and the specific duty of care owed by the Ministry of Defence to members of the British Army. In the judgement of R (on the application of Smith)[5], Justice Collins stated British Army soldiers were entitled to some measure of legal protection under the HRA 'wherever they may be', even though previously cases decided by the Court of Appeal had ruled that it would be impossible to impose such a duty of care in battle conditions.

The Ministry of Defence argued that even if the soldiers had been properly equipped they could not be held legally responsible. However, Justice Collins said that although a duty of care could not be expected in combat, a "soldier does not lose all protection simply because he is in hostile territory carrying out dangerous operations"[6] and "thus, to send a soldier out on patrol or, indeed, into battle with defective equipment could constitute a breach of Article 2"[7] the right to life.

Following the judgement in R (on the application of Smith)[8] defence ministers made application to appeal against the decision and it is the judgement of this appeal that was given yesterday by the Supreme Court. It is worth noting that during the time which has elapsed between the judgement in R (on the application of Smith)[9] and the judgement given yesterday by the Supreme Court, the ECtHR has ruled in cases it has heard that in certain well defined circumstances, Article 2[10] does impose a positive obligation on a State. This obligation on the State is not only to refrain from the intentional and unlawful taking of life, but also to take preventive operational measures to protect an individual whose life is at risk from acts of other individuals. The judgement from the Supreme Court yesterday is of great significance as it is a striking departure from the EctHR precedence, a manoeuvre rarely seen by domestic courts within Europe. The ruling holds that once a soldier steps outside the perimeter of the base they no longer benefit from the protections afforded by the UK human rights legislation as they are

exiting UK jurisdiction. Families will no longer have the automatic right to a full inquest into the death of a soldier which occurred outside the base perimeter as the "duty of care" upon the Ministry of Defence for the soldier ceases to exist sufficiently for Article 2 to be used as a basis for a case.

For a state to breach this positive obligation to protect life, it must now be shown that the relevant authorities failed to do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge and were within UK jurisdiction. Therefore if the Ministry of Defence fails to take reasonable measures to either rectify known equipment deficiencies or to provide the necessary equipment to protect British Army soldiers then it is reasonable to assume that if any deaths arise as a result of those failures the State is responsible. However, the Court also stated that in determining the obligations on the State under Article 2, operational considerations in terms of priorities and resources must be made. Therefore, the positive obligation to protect life must be interpreted so that the safeguards are practical and effective without imposing an impossible or disproportionate burden on the State. Having regard to this expanded criteria the families of soldiers who died in lightly armoured snatch Land Rover vehicles may now re-consider taking legal action against the Ministry of Defence over their death as they are now likely to find it a significant challenge to argue a successful case regarding the death of their loved ones.

So what is the likely impact of the recent cases and yesterdays Supreme Court ruling to a soldier relying on a breach of Article 2 on the British Army, the Ministry of Defence, the United Kingdom as a State, the industry which supplies them, and a British Army soldier?

The prospect of the Ministry of Defence having to prove at a coroner's inquest that a British Army soldier was suitably equipped still remains where jurisdiction is proven and probably means the Ministry of Defence, through the Defence Equipment and Support Agency, will conduct a detailed review of its current and future procurement programmes to ensure they are not 'defective'.

Such a review would extend the already protracted procurement process for military equipment, which will have a consequential impact on the defence industry and more importantly soldiers serving in theatre. In the short term, contractors are likely to be tasked with correcting shortfalls in effective capability of existing military equipment to supply soldiers in theatre with sufficient equipment. In the longer term, equipment contracts could involve lower amounts of technical risk or payment milestones dependent on equipment being adjudged as 'fit for purpose' and subsequently there would be a delay in effective military equipment reaching the soldier in theatre and therefore the capability of the British Army. Additionally, although the Ministry of Defence is obliged to have military equipment independently tested before it enters service, it is likely that future military equipment will need robust testing so it is 'fit for purpose' rather than merely 'safe to operate' or meeting 'contractual specifications'.

Under European law, a company cannot seek to limit or exclude liability for death or personal injury caused by its negligence. In a standard contract, such a clause could only operate in exceptional circumstances. In the context of supplying military equipment, with its use being during life threatening operations in theatre, the effects of a clause of this type should be

carefully considered. The position for Ministry of Defence contracts is that contractors will not be allowed 'limited liability' under contract or general law without good defence and value for money reasons, and as such the Ministry of Defence will not limit a contractor's liability or loss or damage to property caused by negligence. Consequently, if a soldier was killed due to defective equipment caused by negligence of the contractor, the company could be held responsible with an unlimited liability for both property damage and for death or personal injury. Further to that under DEFCON 637, the Ministry of Defence requires a contractor bear the cost of investigating, repairing or rectifying the defect and can terminate the supply agreement whilst suing the company for its costs in replacing the defective equipment. Although bad news for the contractor and potentially a costly legal wrangle for the Ministry of Defence whilst it enforces DEFCON 67, the State may be able to off-set the cost of litigation by soldiers whose rights have been breached by ensuring the contractor complies with DEFCON 637 whilst also ensuring replacement equipment is effective.

The Supreme Courts decision on Wednesday 30th June 2010 that British soldiers are not protected by the HRA whilst on the battlefield and quashing previous rulings may still have a significant effect on the British Army, the Ministry of Defence and the defence industry, but the greatest impact is on the British Army soldier and the families who lose the right to a 'full and open inquest' into the death of those who died outside the base perimeter. It is too early to see from cases or industry press what obligations, restrictions or liability responsibilities the Ministry of Defence will impose on contractors as a result of the decision.

However, it can be said for certain that at the present time, that British Army soldiers lose their Article 2 right to life when they accept the Queen's shilling. They discharge their human rights in a military context and can lawfully be deprived of their life by acts of war carried out by enemy nationals. Yesterday's ruling confirmed that the Queen's shilling remains the price at which a soldier is prepared to sacrifice their life for their country. Yet now it is done with the knowledge that, where risk to life is too high, the Ministry of Defence will provide soldiers with effective and adequate equipment to minimise that risk, even though it is unlikely it would face successful litigation by soldiers and their families if they failed to do so. The future does hold some positive light for families of soldiers wishing to bring action against the Ministry of Defence under Article 2 as even though the ruling was a majority decision, room for interpretation still exists and ultimately the scope of the Human Rights Act can be further decided by the European Court of Human Rights in their favour.

About the author:

Victoria Dawson was a member of the Group Business Development team at a FTSE250 Defence support services company, specialising in providing a range of services to the UK Ministry of Defence.

Victoria is currently occupying herself renovating her Surrey home and planning her forthcoming wedding, having graduated in June 2010 following the successful completion of an LLB Hons degree.

[1] R (on the application of Gentle) v Prime Minister [2008] UKHL 20, [2008] 1 AC 1356, [2008]

3 All ER 1, (2008) Times, 10 April, 27 BHRC 1, [2008] All ER (D) 111 (Apr)

[2] R (on the application of Smith) v Oxfordshire Assistant Deputy Coroner; Secretary of State for Defence v Oxfordshire Deputy Assistant Coroner [2008] EWHC 694 (Admin)

[3] R (on the application of Gentle) v Prime Minister [2008] UKHL 20, [2008] 1 AC 1356, [2008] 3 All ER 1, (2008) Times, 10 April, 27 BHRC 1, [2008] All ER (D) 111 (Apr)

[4] R (on the application of Smith) v Oxfordshire Assistant Deputy Coroner; Secretary of State for Defence v Oxfordshire Deputy Assistant Coroner [2008] EWHC 694 (Admin)

[5] R (on the application of Smith) v Oxfordshire Assistant Deputy Coroner; Secretary of State for Defence v Oxfordshire Deputy Assistant Coroner [2008] EWHC 694 (Admin)

[6] R (on the application of Smith) v Oxfordshire Assistant Deputy Coroner; Secretary of State for Defence v Oxfordshire Deputy Assistant Coroner [2008] EWHC 694 (Admin)

[7] R (on the application of Smith) v Oxfordshire Assistant Deputy Coroner; Secretary of State for Defence v Oxfordshire Deputy Assistant Coroner [2008] EWHC 694 (Admin)

[8] R (on the application of Smith) v Oxfordshire Assistant Deputy Coroner; Secretary of State for Defence v Oxfordshire Deputy Assistant Coroner [2008] EWHC 694 (Admin)

[9] R (on the application of Smith) v Oxfordshire Assistant Deputy Coroner; Secretary of State for Defence v Oxfordshire Deputy Assistant Coroner [2008] EWHC 694 (Admin)

[10] European Convention on Human Rights 1950