

# *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58

LISA-CLAIRE HUTCHINSON\*

## Abstract

In *R (on the application of Al-Jedda) v Secretary of State for Defence* (*‘Al-Jedda’*),<sup>1</sup> the House of Lords evaluated the legality of certain British acts in Iraq, performed while part of the multinational force (*‘MNF’*). Four Lords rejected the Secretary of State’s claim that the detention of the appellant was attributable to the United Nations (*‘UN’*), which authorised such measures in a series of Security Council Resolutions. The House went on to unanimously dismiss the appeal by Mr. Al-Jedda, upholding the decision by the Queen’s Bench Divisional Court<sup>2</sup> and Court of Appeal<sup>3</sup> that his indefinite detention by United Kingdom (*‘UK’*) forces in Iraq was not contrary to the right to liberty under article 5(1) of the *European Convention on Human Rights* (*‘the Convention’*), as scheduled to the *Human Rights Act 1998* (UK) (*‘HRA’*). It was held that the application of article 5(1) was qualified by virtue of articles 25 and 103 of the *United Nations Charter* (*‘the Charter’*).

## Introduction

Although ultimately turning on questions of domestic law, *Al-Jedda*<sup>4</sup> deals with pertinent themes of conflicting international, national and domestic constitutional norms. First, the judgment identifies – but fails to provide a definitive answer to – the question of what factors establish ‘effective control’ for the purposes of vesting international legal responsibility in jointly operated overseas military operations.

Further, the decision provides an answer to the question of whether, and to what extent, conflicting international law obligations and responsibilities can qualify or displace domestically guaranteed human rights. Security Council authorisation is found to absolve a member state from liability for actions which would otherwise violate its domestic and international human rights obligations.<sup>5</sup> Accompanying this finding was a rejection of the argument that human rights treaties enjoy a special character which

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\* Lisa-Claire Hutchinson, Bachelor of Economic and Social Sciences (BEcSocSci), final year Law Student at University of Sydney.

1 *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58 (*‘Al-Jedda’*).

2 *R (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v Secretary of State for Defence* [2005] EWHC 1809 (Admin) (Moses & Richards JJ) (*‘Al-Jedda No. 1’*).

3 *R (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327 (Brooke, May & Rix LJ) (*‘Al-Jedda No. 2’*).

4 *Al-Jedda* [2007] UKHL 58.

5 *Al-Jedda* [2007] UKHL 58 at [39].

prevents their being overridden by conflicting international obligations,<sup>6</sup> and a strong message that states party need not avail themselves of formal derogation from human rights obligations when conducting overseas military operations.<sup>7</sup>

These findings emerge from the House's recognition that international legal instruments impacted on and affected the UK Government's accountability for the actions of its forces overseas, an unusual occurrence, given the traditionally dualist approach to international law adopted in the UK.<sup>8</sup> This situation arose under the domestic HRA invoked in *Al-Jedda*, which required the legality of UK state action overseas to be judged with reference to international legal principles, resulting in the Law Lords interpreting a partly unincorporated Security Council Resolution and the unincorporated *United Nations Charter*.

This note is principally concerned with the discussion of attribution and the effect of the Security Council Resolutions on the appellant's domestic law rights, which represented the first and second issues on appeal. A basic outline of the facts and the history of the litigation are necessary to provide the context of the discussion of principle and the implications which follow.

## I. Facts

The Resolution at the heart of the appeal was issued after the occupation of Iraq formally ended, the interim constitution of Iraq was in effect and sovereignty had transferred to the Iraqi Interim Government. The Security Council, acting under Chapter VII of the *Charter*, passed Resolution 1546 on 8 June 2004, which authorised the MNF's continued presence in Iraq as a security force, as requested by the Iraqi government.<sup>9</sup> Paragraph 10 of Resolution 1546 authorised the MNF to 'take all necessary measures to contribute to the maintenance of security and stability in Iraq' in accordance with certain documents annexed to the resolution. One such document was a letter of the then United States ('US') Secretary of State Colin Powell, pledging the willingness of the MNF to undertake tasks including 'internment where this is necessary for imperative reasons of security'.

While visiting Baghdad in October 2004, US troops accompanied by Iraqi national guards arrested the appellant, a dual UK and Iraqi citizen, on suspicion of membership of a terrorist group involved in weapons smuggling and explosive attacks in Iraq. Specifically, Mr. Al-Jedda was suspected of being personally responsible for recruiting, transporting and conspiring with terrorists planning explosive attacks against the MNF in and around Fallujah and Baghdad.

Upon arrest, the appellant was then transferred to the Shaibah Divisional Temporary Detention Facility in Basrah, under the control of British forces serving as part of the MNF. Mr. Al-Jedda was detained there on a preventative basis, and periodic reviews of his detention carried out by the UK forces concluded that its continuation was necessary for imperative reasons of security in Iraq. He remains there to this day.

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6 *Al-Jedda* [2007] UKHL 58 at [35], [117]-[118].

7 *Al-Jedda* [2007] UKHL 58 at [38], [132], [150].

8 Gordon Anthony, *UK Public Law and European Law: The Dynamics of Integration* (2002) at 6; David Harris, *Cases and Materials on International Law* (1983) at 55-56.

9 UNSC Resolution 1546 (2004).

## 2. The First Issue

There were three issues on appeal. Preliminary to any claim by the appellant relating to his rights under the HRA was the question of whether the European Court of Human Rights ('ECtHR') would be competent to examine any acts of the MNF operating in Iraq.<sup>10</sup> In *R (Quark Fishing Ltd) v Foreign Secretary*,<sup>11</sup> the House had decided that any domestic remedy for breach of the HRA is limited to rights for which the UK would be accountable in Strasbourg. Essentially, absent liability before the European Court, no right existed in domestic law. The House thus had to be satisfied in *Al-Jedda* that State actions as part of the MNF would be within the jurisdictional competence of the ECtHR.

This issue had not been litigated in the courts below, as it was apparently pleaded by the UK in reaction to a decision of the ECtHR handed down subsequent to that of the Court of Appeal<sup>12</sup> ruling on *Al-Jedda* in March 2006. In the admissibility decision of *Behrami v France*,<sup>13</sup> claims of human rights abuse had been brought against States whose armed forces had made up the UN-established international security presence in Kosovo ('KFOR'). The Grand Chamber held that actions of French troops acting in Kosovo as part of KFOR were not the responsibility of France, but of the UN, leading to the case against France being dismissed.<sup>14</sup> The Chamber concluded that it was incompetent *ratione personae* to consider any application in respect of acts of the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective.<sup>15</sup>

In accord with this decision, the UK government argued that the appellant could not rely on his article 5(1) *Convention* rights, as his detention was attributable to the UN who authorised the detention, rather than British forces who carried it out. If correct, this contention would defeat any actionable claim in domestic courts under the HRA, because his detention would not be incompatible with his article 5(1) *Convention* rights.

It was held four Lords to one that the detention of the appellant in Iraq by British Armed Forces in Iraq was attributable to the UK rather than the UN.

Lord Bingham delivered the leading speech, with Baroness Hale<sup>16</sup> and Lord Carswell<sup>17</sup> concurring. His Lordship distinguished the situation from that of Kosovo on the grounds that the UN did not exercise effective command or control over the US and UK as part of the MNF.<sup>18</sup> The Council, his Lordship reasoned, had authorised the UK to carry out functions it could not perform itself, rather than delegating its own function; a distinction utilised by the Grand Chamber.<sup>19</sup> As the UK was never empowered to

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10 *Al-Jedda* [2007] UKHL 58 at [49].

11 *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529.

12 *Al-Jedda* No. 2 [2006] EWCA Civ 327.

13 *Behrami and Behrami v France and Saramati v France, Germany and Norway* (Application Nos 71412/01 and 78166/01) (2007) 45 EHRR SE 10 ('*Behrami v France*').

14 *Behrami v France* (2007) 45 EHRR SE 10 at [141].

15 *Behrami v France* (2007) 45 EHRR SE 10 at [149].

16 *Al-Jedda* [2007] UKHL 58 at [124].

17 *Al-Jedda* [2007] UKHL 58 at [131].

18 *Al-Jedda* [2007] UKHL 58 at [23].

19 *Behrami v France* (2007) 45 EHRR SE 10 at [43].

exercise the Council's function, the UN never retained effective command or control of the operation.<sup>20</sup>

Of particular persuasiveness to his Lordship in eschewing delegation was the dissimilarity between the circumstances of authorisation and mandate of KFOR and that of the MNF. While the civil and security presences in Kosovo were established at the express behest of the UN, the coalition States became occupying forces in Iraq of their own accord. Even when the Security Council authorised the taking of steps to promote security and stability in Iraq, there was no mandate to operate under UN auspices.<sup>21</sup> It was further observed that at no time did the US or UK disclaim responsibility for the conduct of their forces, nor did the UN accept it.<sup>22</sup> The MNF had in fact proclaimed responsibility for the prisoners of war and detainees in their custody in May 2004 to the Secretary General, an act partly influenced by the international reaction to the discovery of abuses perpetrated at Abu Ghraib prison.<sup>23</sup>

Lord Bingham further contrasted the UN-initiated civil and security presence in Kosovo with the limited humanitarian relief and reconstruction focused UN presence in Iraq. It was held that neither the reservation by the UN of its power to revoke authority nor the imposition of reporting requirements were determinative of a power amounting to effective control.<sup>24</sup> In light of his Lordship finding no delegation on the fact, he did not address the issues of whether the powers in question were legally delegable or whether the delegation was precisely stipulated, as did the Grand Chamber in *Behrami*.

Lord Brown differed in his analysis of the situation, disputing the majority's finding that the analogy with Kosovo fell down at every point.<sup>25</sup> While his Lordship ultimately agreed with the majority that the acts of the UK were attributable to the MNF under unified command, he found that only the circumstances of the original mandate relevantly distinguished Kosovo from Iraq.<sup>26</sup>

Lord Rodger dissented on the first issue, holding that there was no material distinction between the terms and effect of the Resolutions in Kosovo and Iraq.<sup>27</sup> In his Lordship's view, the fact that the initial occupation of Iraq was not authorised by the UN was legally irrelevant, given that the internment itself was expressly authorised. His Lordship dedicated significant discussion to the five-point delegation model adopted in *Behrami* to establish the legitimacy of the delegation of UN powers to the MNF in Iraq.

In a post script to their Lordship's speeches, Lord Brown cited Lord Rodger's analysis of the issue of attribution as so compelling as to sway his Lordship's own opinion on the matter.<sup>28</sup>

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20 *Al-Jedda* [2007] UKHL 58 at [23].

21 *Al-Jedda* [2007] UKHL 58 at [28].

22 *Al-Jedda* [2007] UKHL 58 at [28].

23 *Al-Jedda* [2007] UKHL 58 at [13].

24 *Al-Jedda* [2007] UKHL 58 at [24].

25 *Al-Jedda* [2007] UKHL 58 at [143].

26 *Al-Jedda* [2007] UKHL 58 at [145].

27 *Al-Jedda* [2007] UKHL 58 at [105].

28 *Al-Jedda* [2007] UKHL 58 at *postscript*.

The finding on the first issue fails to provide a definitive answer to the question of international legal responsibility for overseas military operations. The disagreement between the Lords over the application of the relevant facts to the test laid out by the Grand Chamber in *Bebrami* as regards effective control perhaps reflects underlying dissonance over the political legitimacy of UK actions in Iraq. Even so, this disagreement limits the certainty which such analysis may have provided in relation to a test for attribution in jointly operated overseas military efforts.

### 3. The Second Issue

The next issue was agreed to be whether the legal regime established pursuant to Resolution 1546, and the operation of articles 25 and 103 of the *Charter*, served to qualify the article 5(1) *Convention* right to liberty and security. This formed the focus of argument in the courts below and remained an issue of contention between the parties on appeal.

The appellant complained that continued detention without charge – even if it were accepted to be necessary for imperative reasons of security – violated his *Convention* right to liberty. The respondent argued that the appellant could not rely on his article 5(1) right because by virtue of SC Resolution 1546, and articles 25 and 103 of the *Charter*, the British forces were under an obligation to intern the appellant which superseded any obligation under article 5(1) of the *Convention*.<sup>29</sup>

In the lower courts, the Court of Appeal unanimously upheld the dismissal by the Queen's Bench Divisional Court of Mr. Al-Jedda's claims that his detention in Iraq infringed article 5(1).<sup>30</sup> It was held that the HRA's scope is subject to the UK's obligations under the *Charter* and Security Council resolutions, which prevail in the event of any inconsistency.<sup>31</sup> The 'obligation' arising under the legal regime established by Resolution 1546 to intern where necessary for imperative reasons of security displaced the right to liberty.<sup>32</sup>

Lord Bingham delivered the leading speech for the House on this issue, with all the Lords concurring with his Lordship's reasoning as to why the UK became subject to an obligation within the meaning of article 103, which displaced or qualified the appellant's rights under article 5(1) of the *Convention*.<sup>33</sup>

#### A. The UK Subject to an Obligation

As an occupying power, the UK was obliged to take necessary measures to protect the safety of the public in accordance with the law of occupation, as embodied in *The Hague Regulations 1907* and *Fourth Geneva Convention 1949*. The responsibility of an occupying power to ensure safety is so paramount that where a person is deemed to seriously threaten it, the occupying power is not simply permitted, but obliged to take the steps

29 *Al-Jedda* [2007] UKHL 58 at [50].

30 *Al-Jedda No. 1* [2005] EWHC 1809 (Admin); *Al-Jedda No. 2* [2006] EWCA Civ 327.

31 *Al-Jedda No. 2* [2006] EWCA Civ 327 at [77]-[79].

32 *Al-Jedda No. 2* [2006] EWCA Civ 327 at [55]-[87].

33 *Al-Jedda* [2007] UKHL 58 at [114], [125], [131], [152].

provided for within the relevant laws, such as internment.<sup>34</sup> His Lordship reasoned that while the appellant was detained after the period of occupation had ceased, the surrounding circumstances and language of the Resolutions governing the MNF post-hand over suggest that the intention was to continue the pre-existing security regime.<sup>35</sup> It was agreed by all the Lords that Resolution 1546, and not the law of occupation, represented the legal regime governing the UK forces at the time the appellant was detained.

In relation to the terms of the Resolution at issue, the appellant had contended that use of the term ‘authorises’ in paragraph 10 was permissive, and failed to create an obligation that use of mandatory language such as ‘decides’ or ‘calls upon’ might do under article 103 of the *Charter*.<sup>36</sup> Accordingly, the UK was not relieved from observing the terms of article 5(1) in detaining the appellant.

Lord Bingham outlined Chapter VII of the *Charter* and the purposes of the Security Council as maintaining international peace and security by way of binding measures. His Lordship observed that the UN and Security Council lacked standing forces at their own disposal, and had not concluded any past agreements under article 43 entitling the Council to call on member states to provide such forces.<sup>37</sup> Preferring a purposive interpretation of the *Charter* over a narrow, contract-based meaning, his Lordship drew on Security Council and State practice in support of the principle that authorisation of member states conducting military or security operations overseas creates a binding obligation.<sup>38</sup>

Utilising those principles to discern the relevant obligation incumbent on the UK, Lord Bingham made reference to the repeated determinations by the UN and Security Council that the situation in Iraq continued to constitute a threat to international peace and security.<sup>39</sup> Upon contributing to the security presence in Iraq, the UK became bound by virtue of articles 2 and 25 of the *Charter* to give effect to the decisions of the Security Council. While not specifically bound to detain the appellant, neglect to exercise the enumerated power to detain in the appropriate circumstances (that is, where it was deemed necessary for imperative reasons of security) would constitute a failure to carry out a decision of the Security Council.

## **B. The Displacement/Qualification of Rights**

Having established the existence of an obligation, the next point related to its effect. Both lower courts held that in so far as a member State’s human rights obligations were overridden by a binding Security Council resolution,<sup>40</sup> that there could be no liability before the ECtHR and no right in domestic law.

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34 *Al-Jedda* [2007] UKHL 58 at [32].

35 *Al-Jedda* [2007] UKHL 58 at [32].

36 *Al-Jedda* [2007] UKHL 58 at [30].

37 *Al-Jedda* [2007] UKHL 58 at [33].

38 *Al-Jedda* [2007] UKHL 58 at [33]-[34].

39 *Al-Jedda* [2007] UKHL 58 at [36].

40 *Al-Jedda* [2007] UKHL 58 at [39].

Lord Bingham agreed that binding Security Council Resolutions represent obligations for the purposes of article 103, thereby prevailing over all member states' obligations. Insofar as the Resolutions establishing the continued presence of the MNF in Iraq, they served to prevent the ECtHR articles from having effect in the UK, effectively displacing Mr. Al-Jedda's *Convention* rights as incorporated into English law through the HRA.<sup>41</sup>

Lady Hale was clearly uneasy with this outcome, although she did not dissent from it. Her Ladyship noted the futility on one hand of the Secretary of State affirming the commitment of the MNF to act consistently with their obligations under the law of armed conflict, and the fact that Mr. Al-Jedda was detained neither as a protected person nor under the law of occupation. The danger of the relevant Security Council Resolutions being interpreted as authorising 'some sort of post conflict, post occupation, analogous power to intern anyone where this is thought "necessary for imperative reasons of security"' was exacerbated in this instance by the uncertainty over the precise scope of the authorisation and the inattention as to why the appellant's prolonged detention was necessarily carried out in Iraq, as opposed to the UK.<sup>42</sup>

### C. *Independent or Special Nature of the Right at Issue*

The appellant had further argued in the courts below that his rights under the HRA were free-standing, with the effect that even if the international law obligation under article 5(1) had been superseded, only derogation in accordance with section 1(2) could change the UK's domestic law obligation to respect the appellant's article 5 *Convention* rights set out in HRA. The Divisional Court and Court of Appeal dismissed this argument by reference to *Quark*.<sup>43</sup>

Lord Bingham found that even if the appellant's right to freedom of liberty had survived, the UK was not required to lodge formal derogation for the purposes of its forces operating in Iraq. His Lordship reasoned that the stipulated conditions for derogation – that measures are taken only to the extent required by the exigencies of the situation and are not inconsistent with the State's other obligations under international law – could rarely be met in the circumstances of an overseas peacekeeping operation.

On this point, Lord Brown went even further, doubting whether a State would ever be obliged to derogate with regard to any action taken outside the member State's own territory.<sup>44</sup> Nonetheless, his Lordship agreed with Lord Bingham's reasoning – that the obligation arising by virtue of articles 25 and 103 of the *Charter* provided primary impetus for holding the article 5(1) proscription on internment to be qualified or displaced.<sup>45</sup>

Finally, Lord Bingham rejected the argument that human rights instruments enjoy the special status of an obligation, noting that 'the reference in article 103 to "any other

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41 *Al-Jedda* [2007] UKHL 58 at [34].

42 *Al-Jedda* [2007] UKHL 58 at [128]-[129].

43 R (*Quark Fishing Ltd*) v *Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529.

44 *Al-Jedda* [2007] UKHL 58 at [150].

45 *Al-Jedda* [2007] UKHL 58 at [151-152].

international agreement’ leaves no room for any excepted category’. His Lordship cited International Court of Justice authority for the principle that binding Security Council decisions under Chapter VII superseded all other treaty commitments, save for those of a *jus cogens* character.

Therefore, the clash between the obligation to detain and the right to liberty under article 5(1) of the *Convention* was reconciled by the ruling that where it is necessary for imperative reasons of security, the UK could lawfully detain the appellant, and lawfully infringe his rights under article 5 to the extent that is inherent in such detention.<sup>46</sup> Three Lords all stressed<sup>47</sup> that there must be safeguards to ensure that the power to intern is exercised in such a way as not to infringe the detainee’s rights under article 5 to any greater extent than was inherent in such detention.

#### 4. The Third Issue

The appellant also founded his challenge to the legality of his detention in English common law, a claim turning on the issue of whether English common law or Iraqi law applied to the appellant’s detention.

This third legal issue was quickly resolved. All the Lords agreed in upholding the Court of Appeal’s decision that the appellant could not claim damages in tort for false imprisonment under English law, as according to the *Private International Law (Miscellaneous Provisions) Act* 1995, the actions of UK forces in Iraq were governed by Iraqi civil law, not the English law of tort.

#### 5. Implications of the Case

*Al-Jedda* is authority for the proposition that the Security Council can, by the passing of Chapter VII Resolutions, effectively override international human rights law and member States’ domestic human rights law instruments – unless the right in question is *jus cogens*, such as the prohibition on torture.<sup>48</sup> The startling nature of this proposition was noted by Justice Moses in the Divisional Court:

The notion that so fundamental a right as that which is enshrined and protected in Article 5, namely the right to liberty, can, in an area within the jurisdictional scope of the 1998 Act, be removed, is startling; not least because it has been achieved without any announcement by the executive, still less without any opportunity for scrutiny by Parliament.<sup>49</sup>

Adding to this is the somewhat anomalous situation that in order to avoid liability for human rights abuses by their forces, member states might rely on the UN, a body designed to preserve peace, law and human rights.

46 *Al-Jedda* [2007] UKHL 58 at [39]

47 *Al-Jedda* [2007] UKHL 58 at [126], [130], [136].

48 *Ex parte Pinochet (No 3)* [2000] 1 AC 147 at 198; *Furundzija* [IT-95-17/1] (Trial Chamber) (10 December 1998) at [160]; Antonio Cassese, *International Criminal Law* (2003) at 117-119.

49 *Al-Jedda No. 1* [2005] EWHC 1809 (Admin) at [34].



In the 2005 *Torture Evidence* case,<sup>50</sup> the House of Lords made a significant contribution to the debate over the role of public international law in UK law. It was accepted that the 1984 *Convention Against Torture* ('CAT') was an unincorporated treaty binding on the UK in international law, and that subsequent UK legislation, including the *Anti-Terrorism Act* 2001 and certain rules of procedure would need to be interpreted consistently with the CAT. Lord Bingham there relied on established English authority to the effect that UK statutes 'passed after the date of a treaty and dealing with the same subject matter, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the treaty obligation and not to be inconsistent with it'.<sup>51</sup>

In that case Lord Bingham was heavily influenced by the *jus cogens erga omnes* nature of the prohibition of torture'. While four Lords in *Al-Jedda* dwelt on the paramount importance of the right to liberty and security of person,<sup>52</sup> the decision confirms that for the large volume of rights falling short of *jus cogens* status, their protection on a domestic level is less certain, as is the extent to which the courts are constrained in employing rules of international law in resolving domestic law disputes.

The objections and reservations expressed by their Lordships in their speeches reflect the two sides of the debate on the relationship between the fight against terrorism and human rights. The majority were prepared to put the need to restore peace and security ahead of the detainees' human right to freedom of liberty as laid down by article 5 of the HRA. The minority, however, chose to focus on the importance of effective action against terrorism in a manner consistent with international human rights standards.

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50 *A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department (Respondent)* (2004) *A and others (Appellants) (FC) and others v Secretary of State for the Home Department (Respondent) (Conjoined Appeals)* [2005] UKHL 71 at [52] ('*Torture Evidence Case*').

51 *Torture Evidence Case* [2005] UKHL 71 at [33], [34].

52 *Al-Jedda* [2007] UKHL 58 at [27], [122], [130], [138].