The International Dimension of Judicial Review

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If judicial review has penetrated the popular consciousness at all, I suspect that the government minister most closely associated with it is the Home Secretary. Whether the hot topic is the detention of suspected terrorists or the removal of failed asylum seekers or of released foreign prisoners, it is the Home Secretary who seems constantly to be in the frame. I would not be surprised if his department were at the receiving end of more judicial review cases than all other government departments combined. But the point is better illustrated by reference to television than to court statistics. Regular viewers of Judge John Deed will be well aware that it is the fictional Home Secretary who is repeatedly at the receiving end of embarrassing litigation and who resorts in consequence to flagrant, but happily unsuccessful, attempts to manipulate the judicial process and promote the interests of the Government over those of the individual. For today's lecture I have chosen a topic that takes the spotlight off the Home Secretary and moves us away from home affairs into foreign affairs and military conflict. What I have to say falls primarily within the provinces of the Foreign Secretary and the Secretary of State for Defence. Twenty years ago this was an area on which there was very little to say. In recent times, however, our courts have been called upon to grapple increasingly with problems arising outside the United Kingdom and with the effect of international treaties and principles of public international law. What I have to say on the subject is intended for a general audience. It comprises a survey of cases which are interesting for their factual background as well as the legal analysis to which they give rise.

Matters such as the conduct of foreign affairs and the armed forces are traditionally, and very properly, areas in relation to which the courts exercise great judicial restraint. The position used to be very simple indeed. The powers of the executive in such areas are generally what are described as "prerogative" powers. They are best thought of as the common law or non-statutory powers of government, as distinct from powers derived from Parliamentary enactments. It was long considered that, whereas there could be judicial control over the exercise of statutory powers, prerogative powers were beyond the scope of judicial review. That view met its end in a case in 1984, arising out of a battle between the government and the civil service unions over a decision to change the terms and conditions of staff at GCHQ without prior consultation with the unions: CCSU v Minister for Civil Service[1985] 1 AC 374. The House of Lords held that it is not the source but the subject-matter of a power that determines whether it is susceptible to judicial review. Thus the fact that a minister is exercising a prerogative power rather than a statutory power is not itself a decisive factor. Whether the courts can control the exercise of the power depends on the particular subject-matter. That principle is one of great importance, as we shall see, but their Lordships also made clear in their judgments that, among the powers considered not to be susceptible to judicial review by reason of their subject-matter were prerogative powers such as those relating to the conduct of foreign affairs, the making of treaties or the defence of the realm. Areas of high policy of this kind were regarded as non-justiciable. At much the same period, in a case between British Airways and Laker Airways arising out of the collapse of Laker's transatlantic Skytrain operation, the Master of the Rolls said that the foreign policy adopted by Her Majesty acting on the advice of Her Government is in reality that of the nation and that "accordingly it would be strange if in this field the courts and the executive spoke with different voices and they should not do so ….": British Airways Board v Laker Airways Ltd [1984] 1 QB 142, 193B-D. In the same judgment, he made some observations about the effect of international treaties. He said that as a matter of English law a treaty is an agreement between sovereign states which does not of itself give rise to rights or obligations between individuals; consistently with this approach the court has no jurisdiction to determine the meaning or effect of any treaty to which the Government of the United Kingdom is a party and indeed is not equipped to do so, that being a matter of public international law. That principle has long

been subject to a number of specific exceptions, but as a more general point it is clear from recent cases that the courts no longer have the same inhibitions about addressing public international law. Similarly, recent cases show that the forbidden areas of foreign policy and the like are much narrower than one might have thought, and that the CCSU case has opened up very considerable scope for judicial review in these fields. But let me consider first a case that illustrates the forbidden areas in a classic form. Before the invasion of Iraq in 2003 a lot of attention was devoted to the question whether it would be lawful for HMG to use armed force without a further UN Security Council Resolution expressly authorising the use of such force. UNSCR 1441 gave Iraq "a final opportunity to comply with its disarmament obligations" and recalled that the Security Council had repeatedly warned Iraq that it would face serious consequences as a result of its continued violations of its obligations. The issue debated across the world was whether that resolution together with earlier resolutions authorised states to take military action in the event of non-compliance by Iraq with its terms, or whether it would require a further and more specific resolution for that purpose. Eventually, as Parliament was told, the Attorney General advised HMG that a further resolution was not required. Only a few months beforehand, in a case which I can confidently say would have achieved greater publicity had it been decided the other way, the Campaign for Nuclear Disarmament sought to persuade the High Court to declare that HMG would be acting in breach of customary international law were it to take military action against Iraq without a further Security Council resolution: R (Campaign for Nuclear Disarmament) v Prime Minister & Others[2002] EWHC 2777 (Admin). CND took the precaution of joining as defendants the Prime Minister as well as the Foreign Secretary and the Secretary of State for Defence. Because there was at that time no specific decision to challenge, the CND invited the court to give an advisory opinion. The argument run was that the case did not require the court to delve into areas that could properly be regarded as solely within the province of the executive, for example questions of policy or the substantive merits of factual decisions in sensitive fields; it simply required a ruling on a point of law and was appropriate for decision by the court in the exercise of its conventional supervisory jurisdiction. The court declined the invitation extended to it. It held that the application necessarily required it to rule on issues of international treaty law – in particular, the meaning and effect of the existing UNSCR 1441 – and that the case fell within the principle that the court has no jurisdiction to declare the true interpretation of an international instrument which has not been incorporated into English domestic law and which it is unnecessary to interpret for the purposes of determining a person's rights and duties under domestic law. A second reason was that that a ruling would tie HMG's hands in its negotiations with other countries and would thereby be damaging to its conduct of international relations; and the court will decline to embark upon the determination of an issue if to do so would be damaging to the public interest in the field of international relations, national security or defence. Thirdly, there was no demonstrably good reason why the court should take the exceptional course of making an advisory declaration. As Simon Brown LJ expressed it in the leading judgment (para 47(iii)): "There is no sound basis for believing the government to have been wrongly advised as to the true position in international law". I was the junior member of the three-judge court and expressed the view that no doubt the Government had access to expert legal advice and was able to form a reasoned judgment on the legal issue. In the light of subsequent events I still prefer to express the point in terms of the availability of expert advice rather than in terms that refer to the correctness or otherwise of the advice received. In another passage in my judgment I said it was "unthinkable that the national courts would entertain a challenge to a Government decision to declare war or to authorise the use of armed force against a third country". That view still represents established orthodoxy, but I must confess to a strange sense of unease to find it being relied on by the Attorney General in a recent speech on "Government and the rule of law in the modern age". The Attorney General referred in the same context to a series of cases in which protestors against the Iraq war were charged with various criminal offences but argued in their defence that they had been acting to prevent the commission of the crime of aggression. The House of Lords has recently given judgment in those cases (R v Jones and Others [2006] UKHL 16), holding that the crime of aggression is indeed recognised as a crime in customary international law but that, in the absence of a domestic statute to give effect to it, it is not a crime in our domestic law; so that the protestors could not therefore rely on it as a defence to a charge under domestic law. One of the factors taken into account in the decision was that consideration of the crime of aggression would take the national courts into areas where, under well established rules, they would be very slow to embark on a review of powers or to adjudicate on rights arising from transactions between sovereign nations on the plane of international law. CCSU and CND were two of the cases cited in support of this point (para 30). I am going to come back to Iraq, but first I must step back to a prior conflict, that in Afghanistan, and its legal fall-out. In 2002 the English courts were faced with an application on behalf of one of the detainees at Guantanamo Bay, that "legal black hole" as it was described by Lord Steyn extra-judicially in 2003 and has since been described by many others. Mr

Abbasi was a British national captured by US forces in Afghanistan and moved to Guantanamo. He had been held there at that time without access to a court or even to a lawyer. His mother brought a judicial review claim on his behalf against the Foreign Secretary, contending that one of his fundamental human rights, the right not to be arbitrarily detained, was being violated and that the Foreign Secretary owed him a duty under English public law to take positive steps to redress the position. The Court of Appeal (in R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs [2003] UKHRR 76) held that HMG could not itself be said to have violated Mr Abbasi's human rights, because it had no control or authority over his treatment at Guantanamo. Further, it could not be said that there was an enforceable duty to intervene by diplomatic or other means to protect a citizen who was suffering or threatened with injury in a foreign State. Nevertheless there was a legitimate expectation that HMG would act in accordance with its statements of policy in this area, and those statements were to the effect that it would consider making direct representations to third governments on behalf of British citizens where those governments were believed to be in breach of international obligations. But the legitimate expectation established by the relevant policy statements was very limited in nature – that in certain circumstances HMG would "consider making representations". Whether to make any representations and, if so, in what form, was left entirely to the discretion of the Secretary of State. The court reiterated that foreign policy considerations are not in themselves justiciable and that the court cannot enter into the forbidden area of decisions affecting foreign policy. It thought it highly unlikely, however, that it would impinge upon any forbidden area to examine whether a request for assistance had been considered. Nonetheless it was clear on the facts that the request had been considered in Mr Abbasi's case, and that the British detainees at Guantanamo had been the subject of discussions between this country and the US Government. This meant that the claim necessarily failed. The court also observed that on no view would it be appropriate to order the Secretary of State to make any specific representations to the US Government, as it was obvious that this would have an impact on the conduct of foreign policy. In the event we know that requests were made by HMG for the return of British nationals held at Guantanamo and that such requests met with success through the return of British nationals in March 2004 and January 2005. Mr Abbasi himself was in the second group of returnees. Very recently the court has been faced with a similar application by another group of Guantanamo detainees, the principal distinguishing feature being that none of them is a British national, though each has been a long term resident in the United Kingdom: see R (Al Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs [2006] EWHC 972 (Admin), 4 May 2006. The first claimant, Mr Al Rawi, was an Iraqi national who had come to this country as a child with his family as long ago as 1983; the rest of the family became British citizens but the family made a deliberate decision that he should not do so. The second claimant was a Jordanian national who had come to this country in 1994 and had been given indefinite leave to remain as a refugee. The third claimant had come from Libya with other members of his family in 1986; all had been granted asylum as refugees; the rest of the family had in due course obtained British citizenship, but the third claimant had gone to Afghanistan before he was called for interview for that purpose. These various claimants were arrested in different places and different circumstances but had all ended up in Guantanamo. Their families had asked the Foreign Secretary to make a formal request for their return to the United Kingdom, but he had consistently declined to do so, making it clear that he considered himself under no obligation to do so because the claimants were not British nationals, and that he considered in any event that such a request would be ineffective and indeed counterproductive, particularly in the context of HMG's efforts generally to secure closure of Guantanamo. He had in fact raised their cases with the US Government, but had not made a formal request of the kind that the claimants said he should have made. The court held that the Foreign Secretary was entitled as a matter of law to draw the distinction of principle he did between the claimants, as non-nationals, and British citizens like Mr Abbasi. Under international law and the Consular Convention between the United Kingdom and the USA it was only by reason of nationality that a state had standing to make any formal claim on a person's behalf. The existence of good humanitarian arguments such as long residence in the United Kingdom and the fact that other members of the family were British citizens did not affect the legal position. Nor did the refugee status of the second and third claimants, though there existed proposals which, if implemented, would entitle states in certain circumstances to exercise diplomatic protection of persons recognised by them as refugees. The court dismissed a number of other arguments by the claimants before coming onto, and also dismissing, a challenge to the substance of the Foreign Secretary's decision. The claimants were arguing that HMG was being unduly deferential to the US Government; that a formal request might make a difference; and that the assertion that a formal request would be counterproductive was wholly inconsistent with the evidence that the US authorities were anxious to return as many Guantanamo detainees as they could. The court described these arguments as "strong arguments in the context of political debate" but did not accede to them as legal arguments. It is interesting

to note the terms in which that last point was expressed. The court asked itself whether the arguments were sufficient to justify the conclusion that the Foreign Secretary "had failed to exercise his judgment in a proportionate way, bearing in mind the fundamental human rights at stake". But it said that in determining that question it had to bear in mind that the context was one in which the courts had consistently trodden cautiously All this meant that, whilst the court could in principle interfere, for example by requiring the Foreign Secretary to reconsider his decision, if he had made an error of law or if he had failed to take relevant material into account, the court could not require him to make a formal request. As regards the Foreign Secretary's actual exercise of discretion, it could not be said that there had been a failure to take relevant matters into account. The real problem facing the claimant was the judgments by the relevant officials, acting on behalf of the Foreign Secretary, that any formal request would be ineffective and counterproductive:

"Prima facie these are judgments which are quintessentially judgments taken in the context of a foreign policy decision which the court simply does not have the tools to evaluate. … … The United Kingdom Government is in continuous dialogue with the United States authorities with a view to securing a solution to the problems presented by Guantanamo Bay which include the allegations of breaches of human rights including torture. Those discussions, whilst not specific to the three detained claimants, affect them. It is impossible for this court, without knowledge of how those discussions have progressed to make a judgment about the way in which they can best be progressed in order to achieve the aims of United Kingdom foreign policy, which is clearly to secure closure of Guantanamo Bay. In our view, the powerful submissions made on behalf of the claimants founder, perhaps uncomfortably and unsatisfactorily, on the rock which prevented theAbbasi claim from succeeding, and for the same reasons" (paras [92] and [97]).

A cynic might say in the light of these cases that things have not changed greatly since the days when the prerogative powers in relation to the conduct of foreign affairs were not susceptible to judicial review at all. The courts have asserted a jurisdiction to intervene but all the claims to which I have referred have failed. In truth, however, I believe that there has been a very important shift of position. There is a close scrutiny of those aspects of the decision-making which the courts are equipped to deal with. When a legal challenge is made, the executive has to justify its position with detailed evidence and arguments; it cannot simply stick up a "keep out" notice. In Al Rawi, the question whether there had been an error of law was assessed not just by reference to domestic law, but also by reference to the principles of international law and the content of international treaties - perhaps representing a move forward even since the CND case concerning the lawfulness of the military invasion of Iraq. Both in Al Rawi and in Abbasi there was a careful assessment of the evidence to ensure that proper consideration had been given to the issues and relevant material. It is only at the stage of judgments as to substantive policy that the courts draw back, recognising that it is not for them to determine the foreign policy of this country and that they are not well placed to make a proper evaluation of judgments made by the executive in this field. Even with that limitation, however, the availability of judicial review serves to impose a valuable discipline on the executive decision-making process. Nevertheless it is time to turn to a couple of cases where the claimants won, and dramatically so. The claimants in question are the Chagos islanders. Their home was once the Chagos Archipelago in the Indian Ocean, formerly governed as part of the British colony of Mauritius. By an Order made in 1965 in the exercise of powers deriving from the prerogative, it became a separate colony called the British Indian Ocean Territory. The Order also provided for the appointment of a Commissioner for the Territory (effectively the local legislature) to hold office during Her Majesty's pleasure. One function conferred on the Commissioner was the power to make laws for the "peace, order and good government" of the Territory. In 1971 the Commissioner, acting under instructions from ministers in London, enacted an Immigration Ordinance which made it unlawful for a person to enter or remain on the territory without a permit. All this formed part of a scheme for the compulsory removal of the whole of the existing civilian population of the territory to Mauritius and a prohibition on their return. The purpose of the various measures was to facilitate the establishment of a strategic American military base on the main island of the archipelago, Diego Garcia, pursuant to an agreement between the Governments of the UK and the USA, and to protect the future operations of that base. These events have been the subject of civil litigation over many years. I can concentrate on the judicial review claims. In 1998, some 25 years after the last Chagossians had left the islands, the leader of the Chagos refugee group, Mr Bancoult, brought a claim for judicial review in the English High Court to challenge the legality of the 1971 Ordinance: R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2001] QB 1067. The court, proceeding by reference to arguments of high principle, found that it had jurisdiction to entertain the claim and grant relief.

It had been held in the past that the prerogative writ of habeas corpus might in a proper case issue beyond the seas "to any place under the subjection of the Crown"; and the reach of the court's jurisdiction should be no different in relation to another prerogative order, certiorari (in modern parlance, and very much more prosaically, a quashing order). Just as habeas corpus protects against unlawful detention, so certiorari should be available as a remedy against arbitrary, capricious and oppressive conduct. The existence of local courts in the Territory neither negatived the jurisdiction of the English court nor made it inappropriate for the English court to intervene in a case where the making of the instrument under challenge was wholly procured by the United Kingdom Government. As to the merits of the challenge, the court held that the 1971 Ordinance fell outside the power conferred by the 1965 Order to make laws for the "peace, order and good government" of the Territory. Such a power required its people to be governed, not removed; and the political reasons for removal, although dictated by pressing considerations of military security, could not by any forensic test of reasonableness be said to touch the peace, order and good government of the Territory. Accordingly, the relevant provision of the 1971 Ordinance was quashed. The UK Government's reaction was to accept the ruling, in the sense that it did not appeal it and did not seek to defend what was done or said 30 years before; but it seems fair to say that the Government did not accept the practical outcome of the ruling. In the short term, respecting the court's judgment, a new measure was adopted which would have allowed the Chagossians to return and reside in any part of the Territory except Diego Garcia itself. But in June 2004 two Orders in Council were made – a Constitution Order and a subsidiary Immigration Order – the effect of which was to deny any person the right of abode in the Territory and to prohibit entry into or presence in the Territory without a permit. The Government explained that it had decided that resettlement could not be permitted, and that the decision had therefore been taken to legislate to prevent it and to restore full immigration control over the Territory. This was because it was considered that any attempt to resettle any of the islands would compromise the security of the base at Diego Garcia and prejudice the military operations there. Unsurprisingly this led to a further judicial review claim, the first instance judgment in which was given in May 2006: R (Bancoult) v Secretary of State for Foreign Commonwealth Affairs [2006] EWHC 1038 (Admin). The earlier case is referred to as Bancoult (1), the new one as Bancoult (2). In Bancoult (2) it was argued that the Orders were immune from challenge in the courts and thatBancoult (1) was in various respects wrongly decided. In relation to one of the arguments advanced on behalf of the Foreign Secretary, namely that the power to legislate for the peace, order and good government of a territory is effectively an unlimited legislative power, the court expressed itself in strong terms: "The suggestion that a minister can, through the means of an Order in Council, exile a whole population from a British Overseas Territory and claim that he is doing so for the 'peace, order and good government' of the Territory is, to us, repugnant" (para 142). Despite this, and because it did not affect the result, the court was prepared to assume the point in the Government's favour. It was also prepared to assume that an Order in Council made by Her Majesty for a colony or overseas territory historically attracted at least the same sovereign immunity as that of Parliament itself, provided it was not repugnant to a Parliamentary enactment. The court held, however, that the modern approach to judicial review of executive action, stemming from the CCSU case in 1984, meant that the Orders could be challenged. In this case there was a straightforward challenge on grounds of irrationality. It was held that the rationality of the measures must be judged by reference to the interests of the Territory, not of the United Kingdom; and the interests of the Territory must primarily be the interests of those whose right of abode and unrestricted right to enter and remain was being removed. Yet, there was in this respect no reference at all in the Constitution Order to the interests of the Territory. The Order referred only to the defence purposes of the Governments of the UK and of the USA. For this reason, the court held the Order to be irrational on public law grounds. This kind of irrational challenge did not involve government policy or matters on which the court could not properly adjudicate. It was unnecessary to make any assessment of the defence interests of the United Kingdom or the United States. In a further strong statement, the court said this (para 163):

"In our view the defendant's approach to this case involves much clanking of 'the chains of the ghosts of the past'. [Counsel's] persistent references to 'the Queen in Council' during the course of argument cannot hide the fact that 'the act in question [was] the act of the executive'. 'To talk of that act as the act of the sovereign savours of the archaism of past centuries'. The decision was in reality that of the Secretary of State, not of Her Majesty, and is subject to a challenge by way of judicial review in the ordinary way."

So, in Bancoult (1) and (2) one sees a robust approach by the courts to the assumption of jurisdiction and the review of prerogative powers – in each case on the basis that the issue was one that the courts could

properly decide without entering into forbidden areas. The limits of the forbidden areas, and the importance of non-forbidden areas, become more apparent. I have made only brief reference so far to the topic of human rights. There was of course an important human rights backdrop to the Guantanamo cases. But the real breach of human rights in those cases related to the conditions of detention at Guantanamo and was the responsibility of the US Government. Attempts by the detainees or their families to mount a human rights challenge against HMG for failing to do more to try to bring the situation to an end were unsuccessful. The Human Rights Act 1998, incorporating the European Convention on Human Rights, had a relatively minor part to play in the analysis and was ultimately of no assistance to the claimants. But I am going to turn now to a series of cases where the Human Rights Act has been at centre stage and has had a major impact on judicial review, both in terms of geographical or jurisdictional scope and in terms of substantive content, in particular as regards the importance of public international law. The first, R (B) v Secretary of State for Foreign and Commonwealth Affairs [2005] QB 643, arose out of events in the United Kingdom Consulate in Melbourne, Australia. The claimants were two young children, members of a family which had arrived in Australia claiming to be Afghans and seeking asylum. They had been detained by the Australian authorities in the Woomera Detention Centre, conditions at which were said to be very bad, and were among a group of detainees who escaped and presented themselves a few weeks later at the British Consulate, again requesting asylum. They were given food and protection for 6 hours before the Foreign and Commonwealth Office in London decided that there were no grounds for considering an asylum request since a request had already been made to the Australian authorities. The claimants and the others were told that they could not remain in the Consulate and that the consular officials would not intervene on their behalf with the Australian authorities. At that point they left the Consulate of their own accord and were taken into custody by the Australian authorities. They brought a claim in England for judicial review of the decision not to grant them asylum, on the ground that it breached their rights under the ECHR by exposing them to the risk of inhuman and degrading treatment contrary to article 3 by being returned to Woomera, and of indefinite and arbitrary detention contrary to article 5. The primary interest of the case lies in the discussion of jurisdiction under the ECHR and the Human Rights Act. Article 1 of the Convention requires the contracting states to secure to “everyone within their jurisdiction” the rights and freedoms defined in the Convention. This jurisdiction is primarily a territorial concept, but there are exceptional cases where it has an extraterritorial scope; and one such exceptional case concerns the activities of a state’s diplomatic and consular agents abroad. This took the court into the principles of international law concerning diplomatic and consular status, the outcome of which was that the court was prepared to assume, without reaching a positive conclusion on the point, that while in the Consulate the claimants were sufficiently within the authority of the consular staff to be subject to the jurisdiction of the United Kingdom for the purpose of article 1 of the Convention. But more is needed for a judicial review claim in the national courts, as opposed to a petition to the European Court of Human Rights in Strasbourg. For the purposes of a domestic judicial review claim it is necessary to bring the case within the scope of the Human Rights Act itself, since it is only through the Act that the Convention has force in domestic law. The normal presumption is that an Act of Parliament applies only within the territorial jurisdiction of the United Kingdom and not extraterritorially. The Human Rights Act contains no express language to displace that normal presumption. The Court of Appeal held, however, that it must be interpreted in such a way that its jurisdictional scope is, in effect, coextensive with that under article 1 of the Convention. Accordingly, the court was prepared to proceed on the basis that the Act was capable of applying to the actions of the diplomatic and consular officials in Melbourne. On the merits of the claim, however, it went on to hold that the claimants’ rights under the Act and Convention had not been infringed, and indeed that to have given the claimants refuge from the demands of the Australian authorities for their return would itself have been an abuse of the privileged inviolability accorded to diplomatic premises and would have infringed the United Kingdom’s obligations under international law. Acts done by officials in embassies or consulates abroad fall within one of the recognised categories where the ECHR has been held to apply beyond the territories of the contracting states. Another example of its extended reach concerns acts done on board ships and aircraft flying the flag of, or registered in, a state. These are situations where customary international law recognises a state’s extraterritorial exercise of jurisdiction, and it is not too difficult to give the Convention a similarly extended jurisdictional scope. Altogether more problematic and more important, however, is the application of the Convention to military operations outside the territory of the contracting states. One of the leading decisions of the European Court of Human Rights in Strasbourg is Bankovic v Belgium and Others (2001) BHRC 435, which arose from the bombing by NATO forces of a television station in Belgrade during the Serbian conflict. The court held that this act fell outside the jurisdictional scope of the Convention and that the states concerned could not therefore be liable under the Convention for the deaths and injuries caused by the bombing. More recently,

the significance of the judgment in Bankovic and the correct approach generally towards the issue of jurisdiction under the Convention have been taxing the English courts as a result of events in Iraq. The first of those cases involves claims by the families of six Iraqi civilians who were killed in the area of south eastern Iraq around Basra between the time of the invasion of that country and the assumption of authority by the Iraqi Interim Government – i.e. during a period when the United Kingdom was an occupying power for the purposes of relevant provisions of international law. The circumstances of the deaths differed greatly. One of the deceased, Mr Mousa, died while in custody in a British military detention centre, allegedly as a result of ill-treatment he suffered at the hands of British troops. Others died during exchanges of gunfire on the streets, or when a British patrol broke into a house on a search and arrest mission, or in circumstances of a similar nature. In the judicial review proceedings, their families were arguing that there had been violations of articles 2 and 3 of the Convention (concerning the right to life and the right to protection from inhuman or degrading treatment or torture). A preliminary issue was whether there had been breaches of the implied obligation to carry out an effective investigation where persons have suffered death at the hands of the state. This depended in turn on whether the acts fell within the jurisdictional scope of the Convention and, since these were claims in the national court rather than before the European Court of Human Rights in Strasbourg, whether they also fell within the jurisdictional scope of the Human Rights Act. There have been judgments so far at first instance and by the Court of Appeal. The case is on its way to the House of Lords. I shall look at how things stand following the judgment of the Court of Appeal: R (Al-Skeini and Others) v Secretary of State for Defence [2005] EWCA Civ 1609. As regards the reach of the Human Rights Act, the court in effect followed the approach in R (B) v Secretary of State for Foreign and Commonwealth Affairs, that the Act is intended to be coextensive in jurisdictional scope with the Convention. Whether that is correct will now be for the House of Lords to decide. That approach turns the focus onto jurisdiction under the ECHR, which becomes the determining factor in whether a judicial review claim will lie in the national court. In relation to Mr Mousa, who was killed while in a British military detention centre, the Secretary of State conceded that he was within the jurisdiction of the United Kingdom within the meaning of article 1 of the Convention. The issue before the court in his case was whether a sufficient investigation had been carried out to amount to compliance with the procedural obligation under article 2. Whilst concerns were express about the adequacy of the early investigations, the court said that the whole history had to be looked at in the round in order to decide whether sufficient had been done to comply with article 2; and since court-martial proceedings were pending and further investigations might follow, it would be premature to reach any final conclusion. The matter was therefore sent back to the Administrative Court with a recommendation that further proceedings be stayed until after the conclusion of the court-martial proceedings. In relation to the other claimants, the court embarked upon an extensive analysis of the case-law under the ECHR and international law. This is not an area that lends itself easily to summary, but in broad terms there were considered to be two bases upon which jurisdiction might be established under the Convention. One was if the United Kingdom was in effective control of the area at the relevant time – control such as, for example, Turkey has been held to have had in northern Cyprus, sufficient to generate an obligation to secure in that territory the rights and freedoms under the Convention. The court held that, although an occupying power, the British forces were not in effective control of Basra for the purposes of the Convention, having regard to their limited numbers, the highly volatile situation on the ground and their lack of control over the civil administration: they were simply there to maintain security and to support the civil administration in Iraq in a number of ways. The second, and more specific, basis on which jurisdiction might be established was if the particular individual concerned was under the control or authority of British troops at the time he was killed, as was conceded to be the case with Mr Mousa through being in the custody of British forces. The court held on the facts that none of the others could be said to have been under the control or authority of British troops when they were killed. In their cases, therefore, the claim failed on jurisdictional grounds. So much for the outcome. What is striking about the case is the extent to which the Human Rights Act has propelled the national court into the area of public international law. The court found itself having to look beyond the Strasbourg cases to the underlying principles of international law – to the effect of treaties governing military occupation and to cases decided by the International Court of Justice, by the UN Human Rights Committee and by the Inter-American Commission on Human Rights. Even more remarkable in terms of its examination of matters of international law is the next case, R (Al-Jedda) v Secretary of State for Defence [2006] EWCA Civ 327. Mr Al-Jedda had dual British and Iraqi nationality and had been in detention in Iraq since October 2004 as a suspected terrorist: his was a case of internment without trial. He challenged his detention, primarily on the ground that it was in breach of article 5 of the ECHR (which defines the circumstances in which a person can lawfully be deprived of his liberty). The Secretary of State's response was that Mr Al-Jedda's detention was authorised by UN Security Council Resolution 1546 and that the effect of the resolution was

to qualify his rights under article 5 of the Convention and his corresponding rights under the Human Rights Act. We are concerned here with the period after the hand-over to the Iraqi interim government in June 2004. The continuing presence of a multi-national force in Iraq was at the request of the interim government, with a view to helping the government to maintain security. UNSCR 1546 authorised the multi-national force to take all necessary measures to contribute to the maintenance of security in Iraq and authorised the internment of persons for imperative reasons of security, irrespective of their nationality. The court examined in some detail the rules of international humanitarian law and the development of international human rights law. It had to rule on the question whether in international law, through the operation of the UN Charter, UNSCR 1546 qualified the rights contained in the ECHR. Article 103 of the UN Charter provides that in the event of a conflict between the obligations of the members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. The court held that, in accordance with the practice of the members of the United Nations, a state acting in accordance with an authorisation conferred by a resolution such as UNSCR 1546 is to be treated as having agreed to carry out the resolution and as being bound by it for the purposes of article 103. Accordingly, in acting as a member of the multi-national force pursuant to UNSCR 1546, the United Kingdom was subject to the obligations in the resolution rather than under any human rights conventions in so far as the resolution was in conflict with the latter. In so far as the resolution sanctioned the continued use of internment as a means of restoring peace in Iraq, it was inconsistent with, and therefore qualified, the requirements of article 5 of the ECHR. It followed from all this that Mr Al-Jedda could not succeed in a claim under article 5 against the United Kingdom in Strasbourg. There was a further question whether the same result applied in domestic law under the Human Rights Act. The court held that it did: the Act "brought home" Convention rights to the extent that they have effect for the time being in relation to the United Kingdom. To the extent that, by virtue of an UNSCR and the UN Charter, the articles of the Convention do not have effect for the time being in relation to the United Kingdom, they do not create rights that can be relied on in domestic law through the machinery of the Act. There is a happy consonance between this and the jurisdictional issue I touched on earlier: the Convention and the Act are treated as running in parallel, having the same jurisdictional and substantive scope. I set myself the modest task of surveying some recent cases with a view to illustrating the growing international dimension, as I have put it, of judicial review in the English courts, and the significance of these developments. It can be seen that the approach of the courts has been very far from insular or narrow. There has been a readiness to tackle issues arising across the world and involving complex and sensitive questions of public international law. The point could be underlined by reference to other areas, for example the examination of international law in the context of asylum – but that would take me back to cases where the Home Secretary was the defendant, whereas my chosen focus has been on foreign affairs and military conflict. In those fields there are, inevitably, certain forbidden areas – areas where the courts themselves have accepted that it is not appropriate for them to intervene. But that should not be allowed to obscure the fact that modern judicial review is operating in a way that exposes ministers and their officials to close and effective judicial scrutiny, to which the human rights legislation has given additional impetus.