WRITTEN EVIDENCE ON THE PROPOSAL FOR A PRESUMED DEROGATION FROM THE ECHR IN FUTURE OVERSEAS ARMED CONFLICTS

A. INTRODUCTION

1. On 4 October 2016, the Government of the United Kingdom (UK) announced a 'presumption to derogate' from the European Convention on Human Rights[1] in 'future conflicts/overseas operations'.[2] The stated aim of the proposal for a presumption to derogate from the ECHR is to 'protect [British] troops from vexatious claims'[3] and/or to ensure that UK Armed Forces operating 'overseas are not subject to persistent legal claims.'[4]

2. This submission is made by Oxford Pro Bono Publico, a postgraduate student public interest law group, overseen by the Faculty of Law at the University of Oxford. We make this submission to provide a comparative procedural perspective on this issue. We hope this will assist the Joint Committee on Human Rights (JCHR) in its deliberations. This report addresses two of the questions raised in the JCHR's call for submissions.

3. First, it seeks to establish whether there are alternatives to derogation which would achieve the Government's objective of protecting the Armed Forces against unfounded legal claims. It does so by investigating whether there are less restrictive means of protecting troops from unfounded legal claims, offering a comparative analysis of how such claims are ordinarily dealt with in the UK, the Commonwealth, and beyond.

4. Second, this report addresses whether the requirements of Article 15 ECHR are likely to be satisfied in the circumstances in which the Government intends to derogate. One requirement is that derogation be strictly required by the exigencies of the situation.[5] This report summarises key elements of the UK's civil procedure rules which protect troops from unfounded legal claims and compares these with similar rules adopted in comparative jurisdictions. This will help the JCHR to scrutinise the Government's proposal.

5. This report does not limit its assessment to the rules relating to 'vexatious' claims according to the strict English law meaning of the term, which is that the claim's purpose is inimical to the process which it purports to invoke.[6] Instead, the report offers a more general assessment of the procedural tools available to limit claims which are weak or unfounded. The jurisdictions

[1] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)
[2] *https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations*
[3] *Ibid.*
[4] *http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-10-10/HCWS168/*
[5] Article 15(1) ECHR
[6] The White Book, (2016) Sweet and Maxwell [3.4.3.1]

researched for the purposes of this report are the UK, Australia, Canada, Germany, India, Russia, Ireland, New Zealand, South Africa, and the United States of America (US).

B. EXECUTIVE SUMMARY

- Article 15 ECHR requires that a derogation be strictly required by the exigencies of the situation. No State Party to the ECHR has derogated from any part of it to protect troops from vexatious claims.

- There are many procedural mechanisms and powers which exist in the general civil procedure of the English courts which operate to prevent unfounded, weak or vexatious claims.

- These mechanisms and powers are reflected, in broadly similar terms, in jurisdictions around the world. They include: standing requirements; costs consequences; strike out and summary judgment; permission requirements; and time limits.

- There are also doctrines of English civil procedure which apply specifically in the context of the Armed Forces: combat immunity and Crown act of state. These, too, are reflected in other jurisdictions.

- Some jurisdictions go further than England in offering special procedural protections for troops, such as requiring permission from the central government before suit may be commenced.

- No jurisdiction studied offers blanket immunity to its troops from civil and human rights law claims.

- On the basis of this comparative study, we submit that the rules of civil procedure are adequate to protect troops from unfounded claims. Procedural innovations from abroad may reinforce this protection. As a result, we submit that derogation from the ECHR to protect British troops from vexatious litigation would not be strictly required by the exigencies of the situation.

C. ARTICLE 15 ECHR

1. The Requirements of Article 15

6. Article 15(1) provides that a valid derogation is only permissible in a time of war or other public emergency threatening the life of the nation, and that derogating measures must not go beyond 'the extent strictly required by the exigencies of the situation.'

7. Our submission focuses only on the requirement that the derogation must be strictly required by the exigencies of the situation. In determining this, one of the key factors relied upon by the European Court of Human Rights is the extent to which ordinary laws would be sufficient to achieve the goals of the derogating measure.[7]

[7] *Ireland v the United Kingdom* (1978) 2 EHRR 25, [212]

8. There are some rights from which no derogation is permissible,[8] including the prohibition on torture, inhuman or degrading treatment or punishment.[9] No derogation will affect the applicability of these rights.

2. The Application of Article 15: On what bases have States derogated in the past?

9. Nine States have entered derogations in the past, with the UK and Turkey entering the highest number of derogations. The bases which have been used to justify derogations include: public disorder verging on civil war; domestic unrest; *coups d'état*; colonial disturbances; terrorism; epidemics; occupation of part of the State by a foreign power; and armed aggression against the State.[10] No State has derogated to protect its troops from unfounded legal claims.

D. COMPARATIVE ANALYSIS OF LIMITATIONS ON UNFOUNDED CLAIMS

1. General Limits on Claims

1.1 Disposing of Claims where there is No Reasonable Prospect of Success on the Merits

1.1.1 Strike Out

10. Courts around the world adopt processes by which claims which are vexatious, abusive, or unfounded may be filtered out before full trial. In England, part of the court's duty[11] of active case management is to dispose of issues which do not need full investigation at trial. The court has the power to strike out a statement of case which discloses no reasonable grounds for bringing a claim, is an abuse of the court's process, or is otherwise likely to obstruct the just disposal of proceedings, or where there has been a failure to comply with a rule, practice direction or court order.[12] A case may be struck out at any stage if a litigant has engaged in fraudulent behaviour.[13]

11. Where a claim is vexatious in the strict sense,[14] it should be struck out. Malicious prosecution of civil proceedings is an actionable tort.[15]

12. Where a person habitually and persistently, and without reasonable grounds, institutes vexatious proceedings, or makes vexatious applications in proceedings, that person is a 'vexatious litigant,' and an order may be made requiring them to obtain permission from the High Court to begin, continue, or make an application in proceedings covered by the order.[16] England is not alone in protecting the court process from abusive litigants. For example, a similar order may be made in South Africa under the Vexatious Proceedings Act 1965.[17] New Zealand courts may also make civil restraint orders preventing applications within existing proceedings. However, unlike in

[8] Article 15(2) ECHR
[9] Article 3 ECHR
[10] Council of Europe Treaty Office, Search on Reservations and Declarations: Derogations, ECHR (ETS No. 005) complete chronology 05/05/1949 – 27/03/2017, <www.coe.int/en/web/conventions/search-on-reservations-and-declarations/-/conventions/declarations/search/cets> accessed 27 March 2017
[11] CPR 1.4(2)(c)
[12] CPR 3.4
[13] *Fairclough Homes Ltd v Summers* [2012] UKSC 26
[14] The White Book, n6 [3.4.3.1]
[15] *Willers v Joyce* [2016] UKSC 43
[16] The White Book, n6 [3.4.9]
[17] Section 2(1)(b), Vexatious Proceedings Act 1965

England, a general order restraining litigation may only be granted on application to the High Court by the Attorney-General.[18] Under the US All Writs Act,[19] Federal Courts have inherent jurisdiction to restrain filings by vexatious litigants.[20] The European Court of Human Rights may declare inadmissible at any stage applications which are manifestly ill-founded, or an abuse of the right of individual application.[21]

1.1.2 Summary Judgment

13. An English court may give summary judgment against a claimant in a case where there is no real prospect of succeeding on the claim, and there is no other compelling reason why the case should be disposed of at trial.[22] The prospect must be real, and better than merely arguable.[23] This test was specifically developed in order to dismiss claims that were weak, even if they were not patently hopeless.[24] An application for summary judgment is available in any kind of proceedings against a claimant.[25] Similar procedures, with sometimes differing wording of the exact test, are available in New Zealand,[26] Australia,[27] the US Federal Courts[28] (where there is 'no genuine dispute as to any material fact') and Canada (aside from Quebec), where courts have pushed for greater use of summary judgment in managing claims, where possible.[29]

1.2 Permission

14. Some jurisdictions limit the availability of claims against public authorities by requiring permission to bring a claim. In England, permission is not required for civil cases against the Armed Forces. It is however required before a case may proceed by way of judicial review. The purpose of this requirement is to filter out frivolous and hopeless applications.[30] Permission should be granted if, on the material available and without going into the matter in depth, there is an arguable case for granting the relief claimed.[31] Permission may be refused where a successful application for judicial review would bring no practical benefit.[32] A similar approach is adopted in Germany, in the Administrative Court, although it is seen as a standing requirement, and so will be discussed below.

1.3 Standing

15. Rules of standing limit the possibility of unmeritorious judicial review claims. In England, a claimant must have standing to bring a judicial review claim.[33] This is a matter of jurisdiction.[34]

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[18] Senior Courts Act 2016, s 166 - 169
[19] All Writs Act, 28 U.S.C. § 1651
[20] *De Long v Hennessey* 912 F.2d 1144 (1990)
[21] Article 35(3) ECHR
[22] CPR 24.2
[23] *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472
[24] *Swain v Hillman* [2001] 1 All E.R. 91; The Right Honourable the Lord Woolf, Master of the Rolls, July 1996, Final Report to the Lord Chancellor on the civil justice system in England and Wales
[25] CPR 24.3(1)
[26] Part 12, District Court Rules 2014; Part 12, High Court Rules 2016
[27] Federal Court of Australia Act 1976 s 31A
[28] Federal Rules of Civil Procedure, Rule 56
[29] *Hryniak v Mauldin* 2014 SCC 7
[30] Sime, 'A Practical Approach to Civil Procedure,' OUP (2016), 557
[31] *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, *per* Lord Diplock
[32] R *(on the application of O) (by her litigation friend the Official Solicitor) v Secretary of State for the Home Department* [2016] UKSC 19, [50]
[33] Woolf et al., 'De Smith's Judicial Review,' Sweet and Maxwell (2013), 2-007
[34] *Ibid.* 2-009

The court may raise the matter of its own motion and has no discretion to hear a case where the claimant lacks standing.[35] A claimant has standing where they have a sufficient interest in the matter to which the application relates.[36] In human rights claims, the standing test is that the claimant must have been a 'victim' of the act which constitutes the alleged violation.[37]

16. This is reflected in other European jurisdictions. In Germany, for declaratory judgment, the claimant has to have a particular interest, legal, economic or non-material, in the desired declaration, read broadly,[38] which is sufficiently important in improving the legal position of the claimant.[39] For constitutional complaints, there are strict standing requirements.[40] The claimant has to allege a fundamental rights violation; the Federal Constitutional Court interprets this as meaning that it must be possible that the act in question amounted to a violation of fundamental rights. The claimant must claim to be injured in his fundamental rights in a direct manner, currently.[41] All other legal remedies must be exhausted for a constitutional complaint.[42] These must be accepted where the case is of fundamental constitutional relevance, or necessary to enforce fundamental rights.[43] In the Administrative Court, it must be shown that there is a possibility of a right having been violated or, put negatively, it must not be evidently impossible that the claimant's right has been violated. This test will be met where a use of force by the German forces results in a human rights violation.[44] In Ireland, the courts will only entertain a constitutional challenge where it is demonstrated that the litigant's rights have either been infringed or are threatened, unless there is no other suitable claimant to bring the action.[45]

17. The ECHR also sets out admissibility requirements. Domestic remedies must have been exhausted, the applicant must be named and have suffered sufficient disadvantage.[46]

1.4 Limitation

18. Limitation periods can have the effect of barring cases where there is a lack of evidence due to the passage of time. This may protect troops from claims where time has passed to the extent that gathering defence evidence may be challenging. In England, claims in tort (except in respect of personal injury and other miscellaneous exceptions)[47] and contract[48] have a limitation period of six years from accrual of the action. Claims in tort for personal injury have a three-year limitation period.[49] A cause of action accrues when all the elements of the cause of action are met, subject to certain exceptions.[50] England, unlike some jurisdictions, does not impose special requirements on civil litigation against the State. In South Africa, by contrast, when a party wishes to litigate for a 'debt' against the State, the party must serve notice within 6 months of the debt falling due, and must commence proceedings within 30 days of that notice. 'Debt' includes

[35] *Ibid.* 2-006
[36] Senior Courts Act 1981, s 31(3)
[37] Human Rights Act 1998, s 7
[38] BVerwGE 36, 218, 226
[39] BVerwGE 74, 1, 4
[40] GG Art. 93(1) (No. 4a), BVerfGG s 90(1)
[41] See, e.g., BVerfGE 6, 376 (385); 40, 141 (156); 56, 87 (94); 56, 175 (181)
[42] BVerfGG s90(2)
[43] BVerfGG, s 93(a)(2)
[44] Administrative Court (VG) Cologne, partial judgment of 30thApril 2010 – 25 K 4280/09, BeckRS 2012, 55317
[45] *Cahill v Sutton* [1980] IR 269
[46] Article 35 EHCR
[47] Limitation Act 1980, s 2
[48] Limitation Act 1980, s 5
[49] Limitation Act 1980, s11(4)
[50] See generally, Sime, n30, Ch. 21

sums payable due to breaches of obligations.[51] A similar rule, with a notice period of two months, applies in India.[52]

19. Where a claim is brought by way of judicial review, applications must be issued within 3 months of the grounds of the claim arising,[53] unless the claim arises under the Human Rights Act 1998, in which case the time limit is a year.[54] Before both the Administrative Court[55] and Constitutional Court[56] in Germany, an administrative act must be challenged within one month. In Ireland, an application for leave to apply for judicial review must be made within 3 months.[57]

20. The ECHR sets a time limit of six months from the final decision which exhausts all domestic remedies for applications to the Court.[58]

1.5 Costs

21. The general rule in England is that the unsuccessful party must pay the reasonably incurred costs of the successful party.[59] The court has broad discretion in making orders as to costs, but must do so with regard to the overriding objective to dispose of cases justly and at proportionate cost. Costs can provide a serious disincentive for parties which are not publicly funded to bring claims which do not have a strong prospect of success. In personal injury cases, a different system of qualified one-way cost shifting applies, which means that generally, claimants do not need to pay the defendant's costs, even if they lose.[60] However, where a claim is struck out on the bases set out above[61] or found to be dishonest,[62] costs may be ordered against the claimant in full.

22. Most jurisdictions, including Canada,[63] Ireland,[64] and South Africa,[65] give courts discretion whether to order costs, but usually follow a general rule that the loser pays the winner's costs. In South Africa, the fact that litigation is against the State and based on the Constitution is relevant in exercising the discretion not to award a victorious State party costs.[66]

23. It can therefore be seen that many mechanisms already exist in English law to filter out claims which are abusive or unfounded. These limits are broadly reflected around the jurisdictions studied. We will now consider whether the Armed Forces are granted any special protections from civil litigation or public law suit, in England and other jurisdictions.

2. Special Limits for Claims Against the Armed Forces

24. In England, there are two doctrines of particular relevance in relation to claims brought against the Armed Forces: combat immunity and Crown act of state.

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[51] Institution of Legal Proceedings Against Certain Organs of State Act 2002
[52] Code of Civil Procedure, s 80
[53] CPR 54.5(1)
[54] Woolf et al., n33, [13-053]
[55] VwGO s 74
[56] BVerfGG s 93(1)
[57] Rules of the Superior Courts, Order 84, r21(1)
[58] Article 35(1) ECHR
[59] CPR 44.2(2)(a); CPR 44.3(2)
[60] CPR 44.13- 44.16
[61] CPR 44.15
[62] CPR 44.16
[63] Glenn in Reimann (ed), 'Cost and Fee Allocation in Civil Procedure,' Springer (2012), 100
[64] Rules of the Superior Courts, Order 99, I(1)(3)
[65] *Ferreira v Levin NO and Others* 1996 (2) SA 621 (CC) at 624B—C
[66] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14, [21] – [25]

2.1 Combat Immunity

25. The doctrine of combat immunity precludes tortious liability in respect of acts or omissions on the part of those who are actually engaged in armed combat.[67] It acts to prevent a duty of care in tort arising.[68] The doctrine applies to actual or imminent armed conflict, in other words, 'active operations against the enemy' or acts of war.[69] In applying the doctrine, a distinction must be drawn between 'actual operations against the enemy and other activities of the combatant services in time of war.'[70]

26. Human Rights Act claims are not covered by the common law doctrine of combat immunity.[71] However, in respect of human rights claims, the majority of the Supreme Court in *Smith* concluded that some issues arising in relation to armed conflict, such as policy issues and things done or not done during active engagement in direct contact with the enemy, are 'non-justiciable.' In relation to other issues, there is no hard and fast rule on what falls outside the reach of the ECHR. The court must give effect to obligations under the ECHR where it would be reasonable to expect the individual to be afforded protection. The extent to which the application of substantive obligations under the ECHR to military operations may be held to be impossible or inappropriate will vary according to the context, in the light of the facts of each case.[72] The majority in *Smith* did not distinguish between derogable and non-derogable rights in reaching this conclusion.[73]

27. Many jurisdictions operate some form of combat immunity. It does not usually extend beyond actual combat. The doctrine originates from and remains part of Australian law.[74] In Germany, State liability claims for compensation against the Armed Forces have recently been judged impermissible where they arise from military operations abroad in the context of armed conflict.[75] This has given rise to controversy in Germany.[76] A constitutional complaint has been filed with the Constitutional Court and the hearing is awaited. In the US, generally, tort claims against the government are regulated by the Federal Tort Claims Act. This provides for statutory combat immunity where the claim arises out of combatant activities of the military or naval forces or the Coast Guard.[77]

28. In some jurisdictions, the protection granted to security forces goes further. New Zealand law protects officials from civil suit where they cause loss, damage or injury due directly or indirectly to an emergency in respect of which authority to exercise emergency powers has been given under the International Terrorism (Emergency Powers) Act 1987, provided the authorities acted in good faith.[78] There are similar provisions in the Civil Defence Emergency Management Act

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[67] *Smith and Others (FC) v The Ministry of Defence* [2013] UKSC 41, [82]
[68] *Smith* [94]
[69] *Smith* [92], [94]
[70] *Smith* [94]
[71] See the separate discussion of Article 2 ECHR claims [56] – [81] and combat immunity [82] – [101] in *Smith* and the definition of 'combat immunity' in Law (ed), 'A Dictionary of Law,' OUP (2015)
[72] *Smith* [58], [76]
[73] *Smith* [76]
[74] *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344
[75] BGH, 6th October 2016 - III ZR140/15
[76] Against the application of the law of State liability: C Raap, *'Staatshaftungsansprüche im Auslandseinsatz der Bundeswehr?' Neue Zeitschrift für Verwaltungsrecht* [NVwZ] (2013) 552 – 555; in favour of an application: S Schmahl, *'Keine Amtshaftung für schuldhafte Völkerrechtsverstöße in bewaffneten Auseinandersetzungen? – Kritische Überlegungen zum Kunduz-Urteil des BGH' Neue Juristische Wochenschrift* [NJW] (2017) 128 – 131
[77] Federal Tort Claims Act 28 U.S. Code § 2680 (j)
[78] International Terrorism (Emergency Powers) Act 1987 s 16

2002.[79] In India, government agents are protected from any civil suit which arises from counter-terror work, provided that they acted in good faith.[80] The Supreme Court has emphasised that this does not give rise to a blanket immunity in cases of unjustifiable death.[81] In some more sensitive provinces, suit may not be brought against members of the Armed Forces without the permission of the central government.[82] The Supreme Court has confirmed that this is constitutional.[83]

2.2 Crown Act of State

29. The defence of Crown act of state applies where the claim relates to acts which were: sovereign acts by their nature; committed abroad; in the conduct of the State's foreign policy; and so closely connected to that policy to be necessary in pursuing it.[84] This is a very narrow class of acts.[85] There is extensive comparative discussion of this doctrine by the Supreme Court in *Belhaj v Straw*.[86]

2.3 Blanket Immunity

30. No State researched operates a blanket immunity from civil or public law suit for its Armed Forces. In Germany, a modified standard of constitutional review is adopted for constitutional rights in the context of armed conflict. This does not preclude a claim, but, recognising the realities of conflict, is more generous to the State.[87] In Ireland, cases involving the Armed Forces or national security are reviewable, although the court takes a deferential approach where what is being challenged concerns security or defence.[88] It is noteworthy that, aside from claims of discrimination, Australia has no State or Territory human rights legislation that gives rise to an enforceable claim against any public authority, including the Armed Forces. Statutory bills of rights exist in the Australian Capital Territory (ACT) and Victoria, but neither statute allows individuals to seek financial compensation as a remedy for a human rights violation by a public authority. In Australia, the Department of Defence on occasion makes 'act of grace' payments to civilians injured in foreign engagements, without admission of wrongdoing or liability.

31. It can therefore be seen that, around the world, including in England, special limits on the right to bring claims against the State are imposed in the military context. However, none of these limits goes so far as to deny in their entirety claims against the military based on human rights law outside actual combat. The foregoing comparative analysis, and the fact that no jurisdiction has derogated to protect troops from vexatious claims, strongly suggest that it is not strictly required by the exigencies of the situation, a requirement of Article 15, to derogate from the ECHR.

E. CONCLUSION

32. In conclusion, this brief survey shows that there are ample procedural mechanisms and powers to protect Armed Forces from unfounded claims, whether based in public or private law. No

[79] Civil Defence Emergency Management Act 2002 s110
[80] Unlawful Activities Prevention Act 1967 s 49(2)
[81] *EEVFAM v Union of India* (2013) 2. SCC 493, [152]
[82] Armed Forces (Special Powers) Act 1958, s 6
[83] *Naga People's Movement of Human Rights v Union of India* (1998) 2 SCC 109
[84] *Rahmatullah (No 2) v Ministry of Defence* [2017] UKSC 1, [37]
[85] *Ibid.*
[86] [2017] UKSC 3
[87] Administrative Court (VG) Cologne, Judgment of 11th November 2011 – 25 K 4280/09, BeckRS 2011 55815
[88] *Dubsky v Ireland* [2007] 1 IR 63, [106]

State studied seems to have derogated from international obligations in order to protect troops from claims. It is therefore our submission that any derogation purporting to protect British troops from unfounded claims would not be strictly required by the exigencies of the situation.

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