



Al-Jedda v SSD: Who is Responsible for British Troops Abroad?

By Naina Patel

The legal consequences of the war in Iraq have been many and varied. Not until *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, however, has the House of Lords had to grapple with the issue of whether the actions of British troops operating as part of a Multi-National Force (“MNF”) in Iraq are attributable to our Government or to the United Nations (“UN”).

Shortly before *Al-Jedda* reached their Lordships, the European Court of Human Rights (“ECtHR”) heard *Behrami v France & Others*, 22 BHRC 477. The ECtHR found that the detention of an individual by French forces, acting as part of the international Kosovo Force (“KFOR”) in accordance with its mandate in UN Security Resolution (“UNSCR”) 1244, was attributable to the UN rather than France. The ECtHR was not therefore competent to review the compatibility of the detention with Article 5 of the Convention. An analogous argument immediately presented itself to the Secretary of State in respect of the complaint of unlawful detention levelled at his own troops in Iraq in *Al-Jedda*.

Their Lordships’ starting point on the issue of attributability was Article 5 of the International Law Commission’s draft articles on the Responsibility of International Organizations, adopted in May 2004 which refers to “*effective control*”: no reference is made to “*ultimate authority and control*”, the test applied by the ECtHR in *Behrami* and ultimately followed by their Lordships. Equally significant is the absence of anything in the Article or the notes to it that precludes dual attribution to both a Member State and the UN in this situation.

Their Lordships next considered the reasoning in *Behrami*. By UNSCR 1244, acting under the UN’s collective security powers in Chapter VII of the Charter, the Security Council “*authorise[d] Member States and relevant international organisations to establish*

the international security presence in Kosovo”, and to be deployed under unified command and control. The ECtHR found that the effect of this instrument was to “delegate” the power to establish KFOR – a peculiar choice of term, since the UN does not have standing troops at its disposal, and is therefore never able to deploy and command a force itself. Crucially, it seems, for their Lordships, this delegation was “neither presumed or implicit, but rather prior and explicit in the Resolution itself”. So, the UN was deemed to retain “ultimate authority and control” over KFOR, notwithstanding the delegation of its formation and of operational command to Member States and NATO. Under Article 5 of the draft articles, the detention complained of, carried out by French troops acting as part of KFOR, was therefore attributable to the UN.

In determining whether the predicament of the MNF in Iraq was analogous to that of KFOR, their Lordships considered UNSCR 1511. This instrument post-dated the invasion and occupation by US and UK forces and the creation of the Coalition Provisional Authority, but nevertheless “authorise[d] a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq” – a position affirmed by UNSCR 1546, which governed the situation at the time Mr Al-Jedda was detained. Notwithstanding the similarity in the wording of the instruments in Iraq to that in Kosovo, Lords Bingham, Hale, Carswell and Brown focused on the fact that whereas KFOR was expressly formed under UN auspices, UNSCRs 1511 and 1546 gave ex-post facto recognition to the MNF. Accordingly, there was no delegation of power in Iraq; the UN did not have ultimate authority and control over the MNF and so the impugned detention remained attributable to the UK.

The immediate result in *Al-Jedda* might be welcomed: there remains a clear accountability mechanism for our troops in Iraq. However, the disappointing reasoning of their Lordships suggests that the conclusion was driven by the lingering political sentiment surrounding the war in Iraq rather than any clear legal rationale.

But what is perhaps most unsatisfactory about the decision is its failure explicitly to address the deficiencies in the *Behrami* ruling. Thus, the longer-term, and

unattractive, implications of *Behrami*, which leave the international community to ponder the legal limitations on the powers of the UN, and their enforceability so far as the rights of individuals are concerned, are left to stand. As are the equally undesirable implications of the findings on the second issue in *Al-Jedda*, namely the extent to which Article 103 of the UN Charter can qualify the protection of Article 5(1) of the Convention.

Michael Fordham QC appeared for the Appellant; Shaheed Fatima appeared for the Intervenor