



R (Gentle and another) v Prime Minister and others

[2008] UKHL 20, [2008] 2 WLR 879

Article 2 ECHR creates no duty on the state to investigate with due diligence, before waging a war, the legality of the war under international law.

By Tom Richards

The claimants, mothers of two British soldiers killed in Iraq, sought a public inquiry into the circumstances which led to the invasion of that country and their sons' deaths – particularly the circumstances in which the Attorney General had changed his opinion on the invasion's legality and advised that it would be lawful under international law.

The claim was based on Article 2 ECHR, which imposes on the UK both a substantive obligation (to protect life and not take it without justification) and a procedural obligation (to hold an independent investigation into any death where it appears that the substantive obligation has been breached and agents of the state may be implicated). The claimants argued that the procedural obligation required the government to set up a public inquiry.

The claimants came before a nine-judge panel of the judicial committee of the House of Lords. They lost for two principal reasons.

First, they could not demonstrate an arguable breach of the substantive obligation, which (they accepted) was necessary for the procedural obligation to be engaged. Their argument that Article 2 created a duty to undertake due diligence as to the legality of war before embarking upon it, and that this duty had been breached, was rejected. Their Lordships' reasons included that this duty would be pointless if there is no duty not to embark upon an unlawful war (Lord Hoffmann [16]); and that the legality of a war may have no effect on the risk that it poses to life (e.g. Lord Bingham [8]).

Secondly, even if the procedural obligation had been engaged, Article 2 could not be interpreted sufficiently broadly to require an inquiry of the scope the claimants sought (Lord Bingham [9]).

In 1956, the Attorney General, Sir Reginald Manningham-Buller, supported the Suez invasion despite considering it unlawful. Times have changed, as Lord Bingham has noted extra-judicially ('The rule of law' [2007] CLJ 67): it is unlikely that a major democratic state today would embark upon a war it acknowledged to be illegal. But he considered it *'naïve to suppose that even today major democratic states do not on occasion resort to legal casuistry to justify the use of force in doubtful circumstances'*.

Where governments justify wars by reference to international law, citizens should be entitled to test whether that justification is casuistry, or worse. The conclusion in *Gentle* is unsurprising: claimants had no such entitlement under Article 2. Its consequence may be that citizens have no such entitlement at all.