

Judicial No Go areas: How far do and should they exist?"

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1. Judicial no-go areas might seem rather sensational as a title. A more sonorous alternative would have been non-justiciability. Neither phrase is particularly familiar in day-to-day law. But, when we start to think, we recognise that there are all sorts of areas where the law does not and cannot tread. And this applies in domestic and in international law.
2. Let me start with a banal domestic example. The law gives effect to principles, principles which society shares or adopts. But principles are one thing, rights another. Otherwise, we would be courts of morals not law. How far principles are enshrined as legal rights is the stuff of law-making, legislative or common law. The dividing line may vary with time, as with promises to marry, or may remain controversial, as with agreements to negotiate in good faith.
3. This point was highlighted by Lord Hoffmann in the Privy Council case of *Matadeen v Pointu* [1999] 1 AC 98. Speaking of the principle of equality, he said:

‘Of course persons should be uniformly treated, unless there is some valid reason to treat them differently. But what counts as a valid reason for treating them differently? And, perhaps more important, who is to decide whether the reason is valid or not? Must it always be the courts? The reasons for not treating people uniformly often involve, as they do in this case, questions of social policy on which views may differ. These are questions which the elected representatives of the people have some claim to decide for themselves. The fact that equality of treatment is a general principle of

rational behaviour does not entail that it should necessarily be a justiciable principle – that it should always be the judges who have the last word on whether the principle has been observed. In this, as in other areas of constitutional law, sonorous judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislature and the executive in deciding how that principle is to be applied’.

4. The boundary to which Lord Hoffmann was referring is a familiar one, often linked with issues of institutional competence. The real focus of my title is on different areas, where there is or appears to be a *prima facie* right, but for some reason the law refrains from intervening to enforce it. The most obvious examples of such areas are in the field of the prerogative powers, and in particular, in an international context. But there are other domestic instances:

- a. One, enshrined in statute in the United Kingdom, is article 9 of the Bill of Rights 1689. This prohibits the impeaching or questioning in any court or place outside Parliament of any debates or proceedings in Parliament. That was identified as a statutorily based instance of non-justiciability in *Shergill v Khaira*¹, citing *Prebble v Television New Zealand Ltd*². In *Prebble* the television station’s defence to a defamation action relied on statements by the plaintiff in Parliament which, it alleged, were calculated to mislead or improperly motivated. The Privy Council struck out that part of the defence, effectively as non-justiciable.

Some pure common law examples can also be identified:

¹ [2014] UKSC 33.

² [1995] 1 AC 321.

b. Take *Carnduff v Rock*³, where a police informer's claim for remuneration allegedly promised was not justiciable, because its trial would require the police to disclose and the court to investigate and adjudicate upon information which should in the public interest remain confidential to the police. A complaint by Mr Carnduff to the ECtHR was rejected as inadmissible.

c. Or take the rule of illegality recognized by Lord Mansfield in *Holman v Johnson*⁴. That was in substance a principle of non-justiciability, whereby:

‘no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.’

Lord Mansfield went on to make clear that the rule operated independently of the merits. Since the Supreme Court's recent decision in *Patel v Mirza*⁵, it may be that this should no longer be seen as a kind of non-justiciability. Instead, the issue of illegality has been effectively subsumed within the merits of the claim. It is an additional factor in determining whether the claim or defence should succeed and in what sense.

5. Before an audience with a strong public service and international law interest, let me turn however to the two overlapping areas of the prerogative and foreign affairs, where the law may hold back from adjudication. Until the middle of the 1980s the prerogative was seen as essentially unreviewable, in both its domestic and its international aspects. As an aspect or perhaps extension of this, courts sometimes simply refused to review or second-guess governmental policy decisions on the grounds that they were

³ [2001] EWCA Civ 680.

⁴ (11775) 1 Cowp 341, 343.

⁵ [2016] UKSC 42.

inherently non-justiciable. This was how Visc Radcliffe had expressed himself in *Chandler v DPP*⁶, where CND activists entered an airfield used by United States airplanes which were kept there combat ready and on station alert, as part of NATO's nuclear deterrent. The aim was to immobilize the airfield by preventing aircraft taking off. The activists were charged with committing and conspiring to commit a prohibited act, namely entering the airfield 'for a purpose prejudicial to the safety or interests of the State'. Their defence was that the country would be better off without nuclear weapons and that their reasonably held belief was that their conduct would be to its benefit, and they wanted - but were refused permission - to call evidence in support of that view. Visc Radcliffe spoke of the non-justiciability of 'the question whether it is in the true interests of this country to acquire, retain or house nuclear armaments'. Lord Devlin may have demonstrated that it was unnecessary to resort to that rationale. He said that, in referring to the State's or any person's interests, the statute must be taken to be referring to those interests as they actually were, not as they might or ought to have been, and such interests were defined by the State's or person's policies at the time. Institutional competence would by itself also appear a quite sufficient reason why courts should not second-guess a policy of this sort.

6. In *Council of Civil Service Unions v Minister for the Civil Service*, ('the *GCHQ* case')⁷, Mr, later Sir Louis, Blom-Cooper, whose recent death we lament, persuaded the House to discard an absolutist view of the immunity of prerogative decisions from judicial scrutiny. The *GCHQ* case concerned the domestic use of the prerogative to vary, without prior consultation, *GCHQ* staff's terms of employment so as to forbid membership of a trade

⁶ [1964] AC 763.

⁷ [1985] AC 374.

union, for reasons of national security. The House held this exercise of the prerogative to be reviewable in principle, although the claim failed on the facts, this time on the express basis that the court would not second-guess the ministerial assessment that prior consultation would have imperilled national security. The actual decision was therefore an application of the principle of institutional competence. But the absolutist view that the prerogative could never be reviewed was gone.

7. A similar approach was taken by the House of Lords in *A v Secretary of State for the Home Department* ('the *Belmarsh* case')⁸ where the courts were asked in the context of article 15 of the ECHR to decide whether there was a threat to the life of the nation, justifying a derogation from the Convention. The House undertook the exercise, while giving great weight to the Home Secretary's judgment, and concluded (Lord Hoffmann dissenting) that there was such a threat, although the actual derogation was disproportionate and discriminatory.
8. Although the House of Lords decided in *GCHQ* that the prerogative is not axiomatically immune from review, the common law moves cautiously, and in a much-quoted passage Lord Roskill suggested that there remained 'many examples...of prerogative powers which as at present advised' he did 'not think could properly be made the subject of judicial review'. He said:

"Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process."

⁸ [2004] UKHL 56.

9. Subsequent history does not support quite so confident a collation of disparate subjects under the heading of immunity from review. Some do appear inherently non-justiciable, e.g. the dissolution of Parliament and the appointment of ministers. Even so, this may well only be because of the absence in the United Kingdom of a written constitution and the doctrine of Parliamentary supremacy. In a constitutional context, the position might be different, as we suggested had not long ago in *Brantley v Constituency Boundaries Commission*⁹. The government of St Christopher and Nevis, by a series of decisions all pushed through on a Friday afternoon, purported to change electoral boundaries prior to a general election. The decisions involved majority approval of a Boundary Commission report, the calling of an emergency meeting of the National Assembly which by majority implemented the changes by statute, the Governor-General's approval and the prorogation of the Assembly, in order to hold an election on the new boundaries. The compression of events was to avoid any legal challenge, since the Constitution prohibited judicial review after any proclamation of boundary changes. What the government had, however, overlooked was that, under the Constitution, the concept of proclamation was itself defined in the Constitution by reference to publication in the Official Gazette and, secondly, any boundary change only took effect following the first prorogation after any proclamation. On the evidence, there was no proclamation in the Official Gazette until four days after the prorogation. On that simple ground, we held that the election must take place on the old boundaries¹⁰, as it then did, leading to the government being swept from

⁹ [2015] UKPC 21.

¹⁰ More specifically, we said:

“In the Board's view there is at least a strongly arguable case that a deliberate attempt by one branch of government, in the control of a governing party, to prevent individuals from obtaining access to the High Court for a constitutional adjudication under section 96 would be unconstitutional as it would deny the protection of the law contrary to section 3(a). In such circumstances, it is strongly arguable that section 2 would nullify the impugned proclamation and section 50(7) would not apply. In any event, on the ordinary principles of judicial review, it is arguable that the making of the proclamation would be open to challenge, notwithstanding the ouster clause, if the power to do so were exercised for

power. However, we left open the possibility that, even if the proclamation had been in time, what had occurred might nonetheless be reviewable as an abuse of power, designed to thwart access to justice.

10. Take also the question who is the appropriate recipient of an honour, or who should be appointed as a minister. These are clearly of such intensely subjective a nature that no recognized ground of judicial review would ordinarily apply. Institutional competence would be enough to ensure that courts let well alone. But does that mean that they are absolutely immune from any review in any circumstances? Suppose that it were shown that an honour, or even a ministerial post, had been procured by bribery? Is it clear that all possibility of judicial review could still be absolutely excluded?
11. Or take the prerogative of mercy. The role of the Crown or executive in relation to sentencing is an area where Strasbourg jurisprudence has had considerable influence in domestic law, ensuring that decisions about length of sentence or of the tariff period before eligibility for parole are no longer taken by ministers, rather than courts or the Parole Board operating in a judicial manner. Not surprisingly, there are circumstances in which it has also appeared that the prerogative of mercy is after all judicial reviewable.
12. In *R v Secretary of State, ex p Bentley*¹¹ the English Divisional Court departed from the Privy Council's approach in *de Freitas v Benny*¹², which, taking a traditional view, had held the prerogative of mercy to be unreviewable. The *GCHQ* case, it said:

an improper purpose: *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 and *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.”

¹¹ [1994] QB 349.

¹² [1976] AC 239.

"made it clear that the powers of the court cannot be ousted merely by invoking the word "prerogative". The question is simply whether the matter of the decision is amenable to the judicial process Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill equipped to do so? Looked at in this way there must be cases in which the exercise of the Royal prerogative is reviewable in our judgment. If, for example, it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and in our judgment would be entitled to do so."

13. Bentley had been hanged for murder despite the jury recommending leniency. A later Home Secretary took the view that he should not have been hanged, but had refused to grant any pardon, not appreciating that he had power to substitute a posthumous conditional pardon to reflect the fact that a life sentence should have been substituted. The Divisional Court ordered the Home Secretary to reconsider his decision.

14. The Privy Council then followed suit in 2000, in one of many turns - usually for the better - in its death penalty jurisprudence. In *Lewis v Attorney-General of Jamaica*¹³, it held that the decision whether or not to exercise the prerogation should be exercised by fair procedures and established a series of requirements, designed to inform the prisoner, enable him to make representations and have them considered and to know the reasons for whatever decision was reached.

15. At that stage, the Board continued to assert that the merits of any decision whether or not to exercise the prerogative were not reviewable. However, that too is a line difficult to defend. In *Pitman v The State*¹⁴, the Board said that judicial review could lie to prevent the execution of a defendant who

¹³ [2001] 2 AC 50.

¹⁴ [2017] UKPC 6.

since conviction had developed significant mental abnormality. That postulates its availability on substance. According to well-established Privy Council jurisprudence, the carrying out of a death sentence becomes unconstitutional due to delay, usually measured as five years from sentence. Some form of commutation is then required, either by a court or by exercise of the prerogative. Whichever route is taken, one would hope the result would be the same. Might not - should not - the prerogative be subject to substantive review in this context to ensure at least general compatibility with the sort of commuted sentence that a court would have passed on a motion for constitutional relief?

16. Let me move to the area of international affairs. Lord Roskill referred to the prerogative power to make treaties as immune from review. The same would presumably apply to their unmaking. But what about the *Miller*¹⁵ or article 50 case? Depending on how one analyses it, the judgment can be seen as recognising a limit to the prerogative enforceable in law. So viewed, it fits astonishingly well with a statement, which I only later discovered, in Dr Francis Mann's magisterial work, *Foreign Affairs in the Courts*; mooted the possibility of "extreme cases in which the Executive's right to conclude treaties comes into conflict with another principle of constitutional law which is of the highest significance", namely the that treaties cannot change domestic law.

17. There is certainly no, or no longer, any general rule that the use of the prerogative in international relations is not reviewable. Several cases will illustrate this. Thus, the executive may by domestically announced policy create a legitimate expectation that it will give effect to a particular international obligation, and, if so, it may be obliged to adhere to it; The

¹⁵ R (Miller) v Secretary of State for Exiting from the European Union [2017] UK.SC 5.

immigration sphere provides examples. So too does *R (Abassi) v Secretary of State for the Foreign and Commonwealth Affairs*¹⁶, where the Court of Appeal held that the Foreign Office had accepted a limited role in protecting the rights of British citizens abroad (in that case in Guantanamo) by making diplomatic representations to avoid an apparent miscarriage or denial of justice. In *R (Youssef) v Secretary of State for the Foreign and Commonwealth Affairs*¹⁷ the Supreme Court also held potentially reviewable (though in the event upholding) the Foreign Secretary's decision to remove a stay placed on the designation of the applicant as a person whose assets were to be frozen under a Security Council Resolution, to which domestic law gave automatic effect. Then, in the sad case of Mrs Sandiford, still under pending sentence of death in Indonesia, the Supreme Court was asked to review the Foreign Secretary's refusal to provide her with a lawyer for an appeal¹⁸. The refusal was pursuant to a formulated blanket policy, whereby the United Kingdom determined that its accepted international law role of providing consular assistance did not involve the provision of legal assistance. The Supreme Court was prepared to accept that such a policy could be reviewable, if irrational.

18. Moving from the prerogative to international affairs more generally, no-go areas still exist where prima facie rights are not justiciable. The most obvious area is that of state immunity. In *Jones v Saudi Arabia*¹⁹ the House of Lords held that even torture was no exception to this immunity. There are of course well-recognised exceptions such as for commercial transactions. Recently in *Benkharbouche v Secretary of State for Foreign and*

¹⁶ [2002] EWCA Civ 1279. 10 [2016] UKSC 4.

¹⁷ [2014] UKSC 44.

¹⁸ *R (Sandiford) v The Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 1. Unlike the position in *Abassi*, this case did not raise any real issues of foreign policy. But the Foreign Office had in fact considered whether to make, and decided not to make, an exception for Mrs Sandiford, and we held that any challenge to the policy must fail on that ground alone.

¹⁹ [2006] UKHL 26.

*Commonwealth Affairs*²⁰ the Supreme Court held that there was no customary international law immunity in respect of claims by purely domestic staff without diplomatic function at London embassies, and that UK law was accordingly contrary to EU employment law and more generally to the ECHR. The boundaries of state immunity have been further explored in *Belhaj v Jack Straw*²¹. There a claim against United Kingdom authorities for alleged involvement in illegal renditions by the United States from the Far East to Libya involved considering whether foreign officials of various states, including the USA, acted contrary to their own and/or local laws. We held that any immunity as regards state "interests or activities"²² referred to legal interests and did not cover purely reputational disadvantage that could be suffered by foreign states as a result of UK litigation against UK authorities. The pleas of state immunity failed accordingly.

19. At the heart of state immunity is customary international law. More contentious in recent years have been attempts to rely on domestic law principles, based on internationalist arguments, but without any clearly defined basis in public international law. There have been attempts to argue that all private international law principles must have a public international law underpinning. To my mind, this is to put the matter entirely the wrong way around. Private international law is where the cutting-edge decisions are made, which may sometimes (in the few public international law cases where comparable issues arise) influence public international law.

²⁰ [2017] UKSC 62.

²¹ [2017] UKSC 3.

²² The phrase appears in article 6(2)(b) of the 2004 UN Convention on Jurisdictional Immunities, which is not however in force.

20. The modern origin of domestic law thinking about no-go areas is *Buttes Gas v Hammer and Occidental Petroleum (Nos 2 and 3)*²³. The difficulty has been in identifying the scope and boundaries of the principle of non-justiciability which Lord Wilberforce endorsed in his erudite and elegant judgment. The complexity and unusual nature of the facts have compounded this problem. The House of Lords held that the courts could not adjudicate upon a counterclaim by Hammer and Occidental which asserted that Occidental had, by conspiracy between Buttes and the Sheikdom of Sharjah, been wrongfully cheated out of an oil concession in the Gulf granted to it by the Emirate of 'Umm Al Qaiwain (UAQ): It was Hammer's and Buttes's case that a decree purporting to extend Sharjah's territorial waters from 3 to 12 miles, so including the concession, had been falsely backdated by six months, in order to appear to exist when Occidental's concession was granted. The UK had in the meantime intervened by force to turn back an oil rig sent by Occidental, and the right to the concession was by international agreement ultimately allotted to Buttes, with Sharjah agreeing to pay UAQ a share of the profits.

21. In the House's view, the counterclaim was not justiciable. In a much-cited speech, Lord Wilberforce pointed to the multiplicity of international legal issues which the counterclaim would involve, and went on:

"They have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which can be said not to have been drawn to the attention of the court by the executive) there are ... no judicial or manageable standards by which to judge these issues, or to adopt another phrase ... , the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they

²³ [1982] UKHL 888.

had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were 'unlawful' under international law."

22.21. The no-go area which Lord Wilberforce identified has been described as one of Foreign Act of State²⁴ or non-justiciability. But what is its scope? If we are really only concerned with situations where there are 'no judicial or manageable standards', there is no diminution of the judicial role at all. Judges cannot be expected to do things which are not judicial or manageable. But, if we are concerned with true restraint, a self-imposed limitation of the ordinary judicial role, then we are into the realm of setting policy and criteria.

23. In *Shergill v Khaira*²⁵, the Supreme Court identified a category distinction between (1) issues with no domestic law basis and (2) issues upon which a domestic court will refrain from adjudicating – to which Lord Sumption added "for reasons associated with the separation of powers and executive competence"; but this may perhaps put the matter too narrowly. On any view, it seems clear that there are, firstly, cases which are non-justiciable simply because there are no domestic law principles or standards by which to judge them, and others where courts as a matter of policy refuse to adjudicate.

24. The former category takes us back to the start of this talk. Many areas of behaviour are simply not covered by domestic law at all. They include issues arising at a purely international level - e.g. allegations by one state that another has made or is in breach of a treaty or customary international law.

²⁴ Dr Francis Mann said of this term in *Foreign Affairs in English Courts* that it displayed "so much uncertainty and confusion and rested on so slippery a basis that its application becomes a matter of speculation". In a recent case, *Mohammed and Rahmatullah v Ministry of Defence* [2015] UK.SC 1., Lord Sumption described 'non-justiciability' as a treacherous word, because of its lack of definition, and because it is commonly used as a portmanteau term encompassing a number of different legal principles with different incidents.

²⁵ [2014] UK.SC 33

The courts will refuse to adjudicate upon issues which do not have what is commonly called a "domestic foothold".

25. *Buttes Gas* fell, on its face, within the latter category, judicial restraint for policy reasons. There was a domestic foothold. A claim for conspiracy to cheat a company out of an oil concession is a recognisable domestic law tort claim: What was it therefore that led the House to refuse to adjudicate? The House referred to and was undoubtedly influenced by United States authority, from which it drew its reference to a lack of “judicial or manageable standards”. If one looks to the US caselaw to illuminate what this phrase means, we see that it is not merely pointing to cases within the first category of issues with no real domestic law basis, but covers a range of policy factors.

26. Thus, in *Baker v Carr*²⁶, Brennan J had spoken of 'political questions' as non-justiciable, giving six heavily over-lapping alternative insignia. These included references to the respect due to co-ordinate branches of Government and the potentiality for embarrassment from multifarious pronouncements by various departments as grounds of non-justiciability. This could suggest a very muted view of the judicial role. In *Goldwater v Carter*²⁷ Powell J suggested a more digestible schema: (i) whether the issue involved resolution of questions committed by the text of the Constitution to a co-ordinate branch of the Government, (ii) whether its resolution would demand that the court move beyond areas of judicial expertise and (iii) whether prudential considerations counsel against judicial intervention.

²⁶ 369 US 186 (1962).

²⁷ 444 US 996, 998 (1979).

27. These are all the sort of factors which could lead to judicial restraint in ordinary judicial review, but here deployed in favour of the possibility of complete restraint amounting to judicial withdrawal from the particular arena. What this suggests is that there may be a spectrum, ranging from no-go areas at the extreme, to areas where review is possible, but more or less latitude is given by the judiciary to the other institutions of state, according to the circumstances. If this is so, then we may expect regular attempts to place cases up or down the spectrum, according to parties' interests. So of course it has proved. There has been a considerable number of attempts to reproduce the result in *Buttes Gas*, but by and large they have failed. They failed in *Kuwait Airways v Iraqi Airways*²⁸, where Iraqi Airways argued that the UK courts could not adjudicate upon the legitimacy of its alleged use and conversion of the Kuwait Airways fleet, which it had been given by decree by Saddam Hussein to use. The House held on the contrary that Kuwait Airways could rely on international law and the Security Council's Resolutions to show that the Iraqi decree should be ignored as contrary to such law and Resolutions.

28. Similarly, in *Belhaj v Straw*²⁹ we rejected not only state immunity, but also a strongly developed submission that the case fell within the no-go area of Foreign Act of State and non-justiciability. True, the case involved adjudicating upon the conduct of both British and foreign state officials. But it lay well within judicial competence to adjudicate upon the kidnapping, forced rendition and alleged torture and maltreatment of two individuals. It did not cease to be so, simply because it occurred on the international level and its judicial examination could embarrass the governments in question.

²⁸ [2002] UKHL 19.

²⁹ [2017] UKSC 3.

29. A separate point is worth mentioning in this connection. There is another common law doctrine called Crown Act of State, which in rare circumstances makes Crown action against third parties outside the UK non-justiciable. Crown Act of State was relied on by the British Government in *Rahmatullah and Mohammed v Ministry of Defence (No 2)*³⁰. The claimant there were detained as suspected insurgents in the course of the armed conflicts in Iraq and Afghanistan. They sued the United Kingdom in tort for alleged wrongful detention. The Government's reliance on Crown Act of State was upheld by the Supreme Court. We identified as preconditions to that doctrine: (i) an exercise by the UK Government of sovereign power, (ii) outside the UK (iii) with the prior authority or subsequent ratification of the Crown and (iv) in the conduct of the Crown's relations with other States or their subjects. We left open whether such a response is only available to claims by foreign subjects. We did not need to examine closely the parameters of sovereign power. The conduct of armed operations abroad is a classic instance of Crown Act of State, and we thought it clear that the detention of suspected insurgents in the course of armed conflict was likewise.

30. It is however worth noting two points. First, there was no plea by the British Government of Crown Act of State in *Belhaj v Straw*. It was, presumably, felt that alleged involvement in kidnapping and forced deportation is not the sort of exercise of sovereign power which Crown Act of State contemplates. Further, where the Crown or executive cannot rely on its own acts as Crown Acts of State, it must always be more difficult for it to suggest that the involvement of foreign powers should lead to non-justiciability on the ground of Foreign Act of State.

³⁰ [2017] UKSC 1.

31. Second, not only is Crown Act of State a confined doctrine, it is nowadays often likely to be overtaken by a claim under the ECHR. Since *Al-Skeini v United Kingdom*³¹, we know that wherever national troops of Members of the Council of Europe are active on the ground in the world, their government carries potential ECHR responsibility for their actions. So a claimant, whose common law claim for wrongful detention or personal injury may fail because of Crown Act of State, may succeed under the Convention. On this basis, in *Al-Waheed v Ministry of Defence*³², Mr Mohammed had a measure of success. Under current Strasbourg caselaw there is a further quirk;; if the complaint is of personal injury suffered in an attack by foreign troops not on the ground, but from the air, that is not apparently within the foreign state's jurisdiction, or therefore subject to the ECHR: see *Markovic v Italy*³³, a case brought by an injured Serb against Italy whose forces were involved in the bombing of Belgrade.

32. Quite where all this might leave drone strikes is a question which the courts have not had directly to confront. We touched on it briefly in *Belhaj v Straw*, with reference to the Court of Appeal case of *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs*³⁴. An issue regarding the lawfulness of the use of drones could depend upon determining whether there was an armed conflict in, say, Pakistan and/or Afghanistan, whether any such conflict was international or non-international in nature and what rights of action or self-defence existed - all issues on which the policy and judgement of the executive and armed forces might be expected to prevail. If there is any core area of the prerogative which is effectively immune from judicial scrutiny, as Lord Roskill suggested, it might be this. *Markovic* might take the matter also outside the range of the Convention rights, though one would

³¹ (2007) 53 EHRR 18.

³² [2017] UKSC 2.

³³ App. No .1398/03.

³⁴ [2014] EWCA Civ 1598.

have to await a decision of the ECtHR before there was any certainty about that.

33. The intermeshing of domestic concepts of justiciability and the ECHR was also at the heart of *Smith v Ministry of Defence*³⁵, where the Ministry sought to rely on another narrow category of non-justiciability, combat immunity, to defeat claims were made in respect of the deaths of British soldiers killed in operations in Iraq. The claims were that the deaths occurred due to unsuitable equipment: in the one set of cases, vulnerable light-weight Snatch vehicles Land Rovers; in the other, tanks without adequate night-sights, so that one group of tanks fired on another. A minority of three of us thought that these situations fell or should be brought within the common law principle of combat immunity, and that the ECtHR should be left to decide whether the position was any different under the ECHR. The majority of four took the opposite view, while stressing the allowances that should be made for the differences of view and difficult judgments that must necessarily be made when deciding how to equip and deploy troops for combat.

34. What conclusions can one draw? There are unquestionably some no-go areas. But they have steadily narrowed. Very often it will be unnecessary and inappropriate to accept the blunt argument of a no-go area. There is a continuing shift to a more nuanced recognition that each case must be approached on its own merits, weighing all relevant factors to decide whether the particular issue is really non-justiciable, or whether any relief by way of judicial review should as a matter of discretion be granted. One element in this shift is that domestic courts will not simply withdraw from adjudication upon the first mention that the issues arise out of State activity

³⁵ [2013] UKSC 41.

on the international plane. International law attaches increasing attention to individual rights. But domestic recourse is often the only practicable means by which an individual, as opposed to a State, may obtain redress for alleged misconduct on the international plane. *Belhaj v Straw* illustrates this. The United Kingdom has recently settled Mr Belhaj's claim with an apology, which is all he wanted, and damages of £500,000 for Ms Boudchar.

35. The shift to greater involvement of domestic law with the exercise of the prerogative and with international affairs will however be promoted and eased by fuller recognition that the intensity of any judicial review should always reflect the respect for the institutional competence and expertise of the original decision-maker. The four-stage test of proportionality identified in *Bank Mellat v Her Majesty's Treasury*³⁶ - sometimes thought to require equivalently intrusive review in every case - must be read in this light. Elliott and Thomas have made the very pertinent comment that “justiciability and deference may be thought of as different points on a continuum”³⁷. Save that it is preferable to speak not of “deference” but of “respect for institutional or constitutional competence”, I entirely agree. The modern tendency is, and I think rightly so, to give weight to institutional and constitutional competence, rather than grasp at the lock-out of a no-go area.

³⁶ [2013] UKSC 39. The four stage test was: “(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.”

³⁷ *Public Law* OUP (2017) 3rd ed, 563.