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Rights and Security International's Briefing on the Overseas Operations Bill

Background on Rights and Security International

1. Rights and Security International (RSI) is a legal charity which works to promote just and accountable security policy, drawing on over 25 years' experience working in the field of human rights and national security policy in the United Kingdom. RSI has been closely involved in monitoring the Government's involvement in joint overseas military operations as well as measures taken under the ambit of its national security and counter-terrorism strategies, seeking to ensure that these measures are compliant with human rights standards and international law.

Introduction

1. This briefing outlines RSI's key legal and policy concerns with the Overseas Operations Bill ('the Bill') and provides an explanation of RSI's proposed amendments (appended to this briefing). RSI is concerned about the impact of the Overseas Operations Bill ('the Bill') on both criminal prosecutions (addressed in Part 1 of the Bill) and civil claims (addressed in the Part 2 of the Bill). However, in this briefing we have chosen to address only the impact of Part 2 of the Bill on civil claims for two reasons. First, the impact of Part 1 on criminal prosecutions is well documented by other NGOs working in this field. We echo their concerns. Second, the impact of Part 2 on civil claims has received far less attention in debates over the Bill. This is extremely concerning in light of the fact that only a very small number of prosecutions for criminal activity have arisen out of UK overseas operations (such as those in Iraq and Afghanistan).[1] In contrast, numerous civil claims have been brought, including by service personnel or their families alleging wrongful death or injury in the course of their deployment,[2] and by foreign claimants alleging cruel, inhuman and degrading treatment.[3] As a result, if the impact of Part 2 on civil claims is not properly addressed, there is a high risk that the Ministry of Defence will not be held accountable for violations of soldiers' and civilians' rights.

[1] A spokesperson for the Ministry of Defence has confirmed that there have only been four publicly disclosed cases of UK soldiers facing courts martial over abuses in Iraq, with five soldiers convicted, see: https://www.dailymaverick.co.za/article/2020-06-23-exclusive-british-army-sent-unqualified-investigators-to-iraq-where-troops-got-away-with-murder-veterans-say/#gsc.tab=0. In addition, there is a real possibility that none of the allegations of serious international crimes committed in Iraq will lead to prosecution see Jonathan Beale, 'Iraq war: All but one war crimes claim against British soldiers dropped' (BBC News, 2 June 2020 <https://www.bbc.co.uk/news/uk-52885615>.

[2] See *Smith v MOD* [2013] UKSC 41, in which a number of negligence claims were brought against the Ministry of Defence. Note also the claimants in *Alseran v UK* [2017] EWHC 3289 (QB), a significant number of which were private law (personal injury) claimants.

[3] This is demonstrated by reference to the collective actions taken by civilian litigants against the MOD arising out of the UK's involvement in Iraq. In *Al-Saadoon* [2016] EWCA Civ 811, the claimants advancing ECHR claims numbered 1,230, and the personal injury claimants numbered 1,000. Notably, many of these claims were settled favourably to the claimants. Furthermore, *Alseran* (n 2) was a test case for over 600 claimants, with whom the UK Government has since settled. In light of these cases, it must be acknowledged that legitimate claims arose out of UK involvement in Iraq that could only be ventilated and settled following appropriate court action. In the case of *Alseran* (n 2), the pursuit of justice directly implicated the question of timing, which presented a hurdle that needed to be overcome.

Summary

2. RSI is gravely concerned about the Bill's **absolute six-year longstop** on the basis that it will (a) unjustifiably bar meritorious claims; (b) foster a wider culture of impunity within the MoD in respect of overseas operations; and (c) risk placing the UK in breach of its international human rights law obligations.

3. RSI is also concerned about the creation of a **one-sided discretion to disapply the standard limitation periods** within the six-year mark on the basis that it is (a) discriminatory, (b) inappropriate, (c) disproportionate, and (d) unnecessary.

Absolute six-year longstop on civil claims

4. RSI is gravely concerned about the absolute six-year longstop for both Human Rights Act claims (where the standard limitation period is one year, but can currently be disapplied where the court considers it equitable to do so), and claims for death or personal injury (where the standard limitation period is three years, but can currently be disapplied if the court considers it 'equitable' to do so) (see draft section 11; Part 1 Schedule 2; Part 1 Schedule 3; Part 1 Schedule 4) for two reasons.[4] First, the longstop would result in the **barring of many meritorious claims**. Second, the longstop would **promote a wider culture of impunity** within the Ministry of Defence ('MoD') in the context of overseas operations. Both of these results risk placing the UK in **violation of its international legal obligations**.

5. Insofar as it is necessary to respond to the Government's allegations of a proliferation of 'vexatious' claims arising from overseas operations, the imposition of an absolute longstop is **unnecessary**, **inappropriate** and **disproportionate**. It is **unnecessary** because there are already judicial principles and practices in place that effectively dispose of such claims (see Limitation Act 1980, s 33; Civil Procedure Rules, rule 3.4, which give judges the power to strike out applications where allegations are unfounded or 'vexatious'). It is **inappropriate** because it does little to combat vexatious claims, which can still be brought within six years. It is **disproportionate** as it is wildly over-inclusive, precluding many legitimate claims, including from soldiers themselves (see below).

6. Insofar as it is necessary to respond to the Government's alleged need to protect soldiers from ongoing and repeat investigations, the best and most effective mechanisms of achieving this is to ensure that there are strong upfront investigations which are competent and independent, within a reasonable time frame from the allegations being made. A better solution to this problem, therefore, is for the Government, MoD and military branches to ensure that such investigations can take place. This would obviate the need for an absolute longstop, with its consequent negative effects.

Impact on individual meritorious claims

7. The absolute longstops remove all discretion on the part of judges to disapply the standard limitation periods beyond the six-year mark, even where it would be in the interests of justice to do so, for example,

[4] See draft clause 11, inserting clause 7A into the Human Rights Act 1998, which rules that the time in which to bring a relevant claim cannot be extended beyond six years from the date the relevant act occurred, or one year from the date from which the event comes to be known; and Part 1 of draft Schedule 2, amending the Limitation Act 1980 in respect of civil claims for personal injury or death, which prevents the extension of time in respect of such claims beyond six years from the date on which the relevant time starts to run.

where there has been a legitimate, explicable, or justifiable delay. In doing so, it severs victims' access to justice for wrongful death, personal injury or harm caused to them as a result of human rights violations, arising out of or in the course of the UK's deployment of its military forces in overseas operations.

8. Many claims resulting from overseas operations are subject to legitimate, explicable, or justifiable delays which may bring them outside of the six-year longstop. Such delays can be due to the **nature** of the injury or harm caused (e.g. the delayed onset and/or diagnosis of conditions such as PTSD, or the inability to take legal action for a period of time resulting from the mental trauma of such conditions) **logistical delays** (e.g. difficulties for foreign claimants in securing a lawyer in the UK and filing in (what is for them) a foreign court; or difficulties in accessing the necessary evidence to bring a claim when the evidence is shrouded in secrecy, such as in the case of secret detentions, extraordinary renditions, and targeted killing operations), and/or the fact that many potential foreign claimants **do not initially realise that what has been done to them is a human rights violation** or that they are entitled to do anything about it. The reasons for delay in cases such as these do not undermine the legitimacy of the underlying claim.[5] However, the Bill, as currently drafted, would prevent such claims from being brought beyond the six-year mark.

9. The significance of this is evident from the fact that, had the Bill previously been in force, many important claims would have been arbitrarily and unjustifiably excluded.[6] For example, the claim in *Alseran* (concerning a number of victims of serious human rights abuses perpetrated by British soldiers) was brought **10 years** after the occurrence of the abuse due to **logistical problems** and a **lack of access to information** which could have assisted in bringing the claim sooner.[7] Similarly, some claims in *Multiple Claimants v. Ministry of Defence* (concerning injuries suffered by service personnel in the course of deployment) were instigated over **20 years** after the fact as a result of **delayed onset of injuries**.[8] In both of these cases, the court was able to exercise its discretion and admit the claims despite the delay. The absolute longstop proposed by the Bill would have barred these claims, preventing the claimants from being redressed.

10. Note should also be taken of the disadvantageous impact of the proposed absolute longstop on members of the military, or their families, bringing claims against the MoD vis-à-vis other employees who are not similarly barred from bringing civil claims against their employers after six years.

Impact on wider culture of impunity

11. In barring some meritorious claims, as the absolute longstop will do, the opportunity will be lost for robust **oversight** by courts of the policy decisions and operational practices of the MoD in the context of overseas operations. This is particularly worrying in the context of the UK, where civil and criminal accountability for human rights abuses committed during military operations has historically been lacking.[9]

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[5] Significantly, these barriers to bringing a claim have been accepted by UK courts as being legitimate bases for delay and good reasons to extend time limits under the HRA on a discretionary basis: see specifically *Alseran* (n 2), where the question of lawful excuse for delay was analysed at length at [863] onwards, and also [769] where the judge set out at length the factors that created legitimate practical barriers on the part of Iraqi citizens bringing a claim in the English courts against the MoD in respect of the Iraqi limitation period, factors which apply in equal measure re bringing an HRA claim in a British court and which were referred to in the judge's reasoning on the HRA extension at [854]–[855] (see [785]–[786]).

[6] The Government has confirmed that since 2007, 70 of the 522 (13%) civil claims recorded as arising out of operations in Iraq or Afghanistan were brought more than six years after the date of incident.

[7] *Alseran* (n 2), [7].

[8] *Multiple Claimants v. Ministry of Defence* [2003] EWHC 1134 (QB).

[9] A pertinent example being the unexplained and unjustified delay in instigating the Baha Mousa inquiry, which eventually uncovered evidence of systemic flaws. Leggatt J described this as 'extraordinarily difficult to understand' in *Al-Saadoon* (n 3), [46].

12. Courts are well equipped to identify structural issues. Indeed, several UK cases concerned with human rights violations have identified not only isolated instances of individual wrongdoing but also policies that implicate the military and security apparatus on an *institutional* level. For example, the central issue in *Al-Skeini* concerned policies pertaining to detainee treatment and transfer.[10] As a result, it is clear that the ability of courts to proceed with individual human rights-related claims serves an important wider accountability function, ensuring that there is independent oversight of military policy and practice. If judges are not permitted a discretion to disapply the standard limitation period and allow such appeals beyond the six-year mark, there is a high risk that such cases will not proceed, and systemic problems will never come to light (and thus never be improved). This risks creating a culture of impunity within the MoD in the context of overseas operations. The reality of this is evident from, for example, the Baha Mousa inquiry, which confirmed that the 'five techniques' (including hooding and stress positions) had been deployed, despite past commitments by the UK in 1971 in respect of Northern Ireland not to use such techniques again.[11]

13. A further value of rigorous judicial oversight is evident from past institutional and governmental **responses** to litigation. For example, in the case of Baha Mousa it was only after court proceedings were brought,[12] and the House of Lords had confirmed the applicability of human rights, that a public inquiry was instigated. The inquiry went on to reveal wider issues regarding the way soldiers were trained and provided an opportunity to analyse and determine whether this training was plagued by systemic flaws.[13] The Bill's proposed absolute longstop thus reduces the chance of the important accountability mechanism of a public inquiry being triggered.

Relevant international legal obligations

14. The UK is subject to international legal obligations to prevent, investigate and punish violations of human rights.[14] These human rights obligations apply even in the context of overseas military operations.[15]

15. For the reasons detailed above, the Bill's proposed absolute longstop risks placing the UK in breach of these international legal obligations as it prevents victims of human rights violations from bringing legitimate claims beyond the six-year mark. This limits their ability to receive an effective remedy, contrary to international human rights law. The reality of this has been demonstrated above with reference to the case of *Alseran,* which would have been prevented from proceeding had the Bill, as currently drafted, been in place.[16]

16. As well as threatening the structural protections for human rights within the UK, the Bill also sets a dangerous **precedent** for other States to bar access to justice in relation to human rights claims in the

[10] *Al-Skeini and others v Secretary of State for Defense* [2007] UKHL 26. Other cases, such as *Hassan v. UK* App no. 29750/09 (ECHR, 16 September 2014) and *Serdar Mohammed v MOD* [2017] UKSC 1, also concerned systemic approaches to detention and/or policy-level decisions about detention timing and the legal foundations for Army practices in a given context rather than specific instances of wrongdoing attributable to individual soldiers.

[11] A key finding of the Baha Mousa Report, accessed here <https://www.gov.uk/government/publications/the-baha-mousa-public-inquiry-report>, was that broad institutional knowledge of this ban on the five techniques (specifically, the ban on hooding) had "largely been lost" by the time of the Iraq War and no MOD doctrine on the interrogation of prisoners of war within the army was generally available at the time, despite the findings of the Compton Inquiry (https://cain.ulster.ac.uk/hmso/compton.htm).

[12] *Al-Skeini* (n 11).

[13] The Baha Mousa Public Inquiry and corresponding report gave rise to 73 recommendations, including on institutional aspects of training with respect to prisoners.

[14] For example, International Covenant on Civil and Political Rights, article 2; European Convention on Human Rights, articles 2, 3, 6, 13; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, principles 6, 7.

[15] *Al Skeini* (n 11); *Hassan* (n 11).

[16] *Alseran* (n 2).

context of operations involving the use of force. Further, this undermines the UK's stature and **authority** in matters of military practice and justice, thereby limiting the impact of its pronouncements on other rights-violating States.

Proposed amendments

17. As a result, RSI has proposed that a degree of judicial discretion be reintroduced into the Bill so as to account for these common and justifiable delays in bringing proceedings (see draft section 11 (2) (5); Schedules 2, Part 1, subsection (2) (1ZB) of RSI's proposed amendments, appended to this briefing). After the expiration of six-years, the court should have the power to disapply the limitation period if it considers that it is equitable to do so having regard to the reasons for the day, in particular whether the delay resulted from (a) the nature of the injuries, (b) logistical difficulties in securing the services required to bring a claim, so long as the claimant was making all reasonable attempts to secure such services, or (c) any other reasons outside the control of the person bringing the claim. In addition, RSI has proposed that the 'date of knowledge' from which the six-year time period starts to run be amended to include knowledge of (a) the manifestation of the harm resulting from the act which is the subject of the claim, and (b) the fact that the claimant was eligible to bring a claim against the MoD or SS for Defence in the courts of the United Kingdom (see draft section 11 (2) (6); Schedule 2, Part 1, subsection (6) of RSI's proposed amendments, appended to this briefing).

Imbalance in considerations that courts are required to take into account

18. RSI is also concerned about the creation of a one-sided discretion to disapply the standard limitation period within the six-year mark. The Bill introduces a set of considerations to which a court or tribunal must have 'particular regard' when deciding whether to disapply the standard limitation period when a claim is brought before the six-year mark but after the end of the standard limitation period (i.e. between 1-6 years for HRA claims, and 3-6 years for PI claims): (i) 'the likely impact of the operational context on the ability of members of Her Majesty's forces to remember relevant events or actions fully or accurately', (ii) 'the extent of dependence on the memories of members of Her Majesty's forces, taking into account the effect of the operational context on their ability to record, or to retain records of, relevant events or actions', and (iii) 'the likely impact of the action on the mental health of any witness or potential witness who is a member of Her Majesty's forces'. There are a number of issues with the proposal to introduce these considerations.[17]

19. First, the proposed considerations have a **discriminatory** impact against the claimant. This is because they are illegitimately weighted in favour of the MoD, operating solely to the detriment of claimants. They are overly focused on factors tending to preclude claims, with no reference to the interest of the claimant in having his/her rights vindicated. This has the effect of creating a hierarchy of values and subordinating the claimant's interest in bringing the claim.

20. Second, it is questioned whether it is really **necessary** that the court give particular regard to these additional factors. This is because it has been demonstrated that effective litigation can still take place way after the event occurred. For example, though the 'Mau Mau' litigation proceeded over 50 years after the incident, the courts were still able to identify systematic rights abuses and systemic flaws on the part of the British colonial administration. This is evidence of the fallacy of the allegation that effective

[17] The Government has confirmed that since 2007, 125 of the 522 (24%) civil claims recorded as arising out of operations in Iraq or Afghanistan were brought between three and six years of the date of incident.

investigations can never take place well after the fact due to loss of evidence or a decreasing reliability of evidence over time.[18]

21. Third, particular issue is taken with the requirement that the court give particular regard to the likely impact of the action on the mental health of any witness or potential witness who is a member of Her Majesty's forces. This is an **inappropriate** and **disproportionate** test. It is **inappropriate** because it is again heavily weighted in favour of precluding claims from proceeding. This is because giving evidence is almost always stressful for any witness, be they members of Her Majesty's forces or not. It is **disproportionate** because there are many alternative ways to support vulnerable witnesses that do not have the effect of preventing access to justice for potential victims of human rights abuses, wrongful death or personal injury. Were the Government really serious about protecting members of Her Majesty's Forces, ensuring the provision of such support services would be the focus of reforms to the law, rather than provisions which have the effect of protecting first and foremost the MoD.[19]

Proposed amendments

22. As a result, RSI has proposed introducing a requirement that the court gives particular regard to the importance of the claim proceeding for the claimant to vindicate their rights, alongside the other considerations it introduces (see draft section 11 (2) (2) (c); Schedule 2, Part 1 subsection (4) (5A) (c) of RSI's proposed amendments, appended to this briefing). This is to ensure that the claimant's interests are put on an equal footing with the considerations favouring the MoD. RSI has also proposed deleting the requirement that courts have particular regard to the likely impact of the action on the mental health of any witness or potential witness who is a member of Her Majesty's forces (see draft section 11 (2) (2) (b); Schedule 2, Part 1, subsection (4) (5A) (b) of RSI's proposed amendments, appended to this briefing). This is because, as detailed above, this provision is inappropriate and disproportionate.

For further information or to discuss these issues please contact Emily Ramsden, Legal and Policy Officer at Rights and Security International on eramsden@rightsandsecurity.org

[18] *Kimanthi & Ors v. Foreign and Commonwealth Office* [2018] EWHC 2066 (QB).
[19] As noted by the Centre for Military Justice in their briefing on the Bill, the Civil Justice Council recommended in their February 2020 paper entitled 'Vulnerable Witnesses and Parties Within Civil Proceedings' accessed here < https://www.judiciary.uk/wp-content/uploads/2020/02/VulnerableWitnessesandPartiesFINALFeb2020-1-1.pdf> that the inherent powers that courts have to protect vulnerable witnesses be codified into law.

Appendix: RSI's proposed amendments to the Overseas Operations Bill

11 Court's discretion to extend time in certain Human Rights Act proceedings

(1) The Human Rights Act 1998 is amended as follows.
(2) After section 7 insert –

"7A Limitation: overseas armed forces proceedings

(1) A court or tribunal exercising its discretion under section 7 (5) (b) in respect of overseas armed forces proceedings must do so –
  (a) in accordance with subsection (2), and
  (b) subject to the rule in subsection (4).

(2) The court or tribunal must have particular regard to –
  (a) the effect of the delay in bringing proceedings on the cogency of evidence adduced or likely to be adduced by the parties, with particular reference to –
    (i) the likely impact of the operational context on the ability of individuals who are (or, at the time of the events to which the proceedings relate, were) members of Her Majesty's forces to remember relevant events or actions fully or accurately, and
    (ii) the extent of dependence on the memories of such individuals, taking into account the effect of the operational context on the ability of such individuals to record, or to retain records of, relevant events or actions;
  ~~(b) the likely impact of the proceedings on the mental health of any witness or potential witness who is (or, at the time of the events to which the proceedings relate, was) a member of Her Majesty's forces.~~
  (c) the importance of the proceedings in securing the rights of the claimant.

(3) In subsection (2) references to the "operational context" are to the fact that the events to which the proceedings relate took place in the context of overseas operations, and include references to the exceptional demands and stresses to which members of Her Majesty's forces are subject.

(4) The rule referred to in subsection (1) (b) is that overseas armed forces proceedings must be brought before ~~the later of –~~
  ~~(a) the end of the period of 6 years beginning with the date on which the act complained of took place;~~
  ~~(b)~~ the end of the period of 6 years beginning with the subsection (6) date of knowledge.
  This is without prejudice to subsection (5).

(5) The court may disapply the rule in subsection (1) (b) where it appears to the court that it would be equitable to do so having regard to the reasons for the delay, in particular whether the delay resulted from–
  (a) the nature of the injuries;
  (b) logistical difficulties in securing the services required to bring a claim, so long as the claimant was making all reasonable attempts to secure such services, or
  (c) any other reasons outside the control of the person bringing the claim.

(6) In subsection (4), the "date of knowledge" means the date on which the person bringing the proceedings first knew, or first ought to have known~~, both~~ –
  (a) of the act complained of~~, and~~;
  (b) that it was an act of the Ministry of Defence or the Secretary of State for Defence;

(c) of the manifestation of the harm resulting from that act which is the subject of the claim; and
(d) that they were eligible to bring a claim under the Human Rights Act 1998 against the Ministry of Defence or Secretary of State for Defence in the courts of the United Kingdom.

(7) "Overseas armed forces proceedings" means proceedings—
(a) against the Ministry of Defence or the Secretary of State for Defence, and
(b) in connection with overseas operations.

(8) "Overseas operations" means any operations outside the British Islands, including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in the course of which members of Her Majesty's forces come under attack or face the threat of attack or violent resistance.

(9) In this section the reference to the British Islands includes the territorial sea adjacent to the United Kingdom and the territorial sea adjacent to any of the Channel Islands or the Isle of Man.

(10) In this section "Her Majesty's forces" has the same meaning as in the Armed Forces Act 2006 (see section 374 of that Act)."

(3) In section 22 (short title, commencement, application and extent), after subsection (4) insert—

"(4A) Section 7A (limitation: overseas armed forces proceedings) applies to *10* proceedings brought under section 7 (1) (a) on or after the date on which section 7A comes into force, whenever the act in question took place."

Schedule 2 Limitation periods: England and Wales
[to be similarly amended in Schedules 3 and 4 in relation to Scotland and Northern Ireland]

Part 1 Court's discretion to disapply time limits

(1) Section 33 of the Limitation Act 1980 (discretionary exclusion of time limit for actions in respect of personal injuries or death) is amended as follows.

(2) After subsection (1) insert—

"(1ZA) The court shall not under this section disapply any provision of section 11 in its application to an overseas armed forces action if the action was brought after the expiration of the period of 6 years from ~~the section 11 relevant date~~ the date of knowledge (see subsection (7)). This is without prejudice to subsection (1ZB).

(1ZB) The court may disapply the rule in subsection (1ZA) where it appears to the court that it would be equitable to do so having regard to the reasons for the delay, in particular whether the delay resulted from –
(a) the nature of the injuries;
(b) logistical difficulties in securing the services required to bring the claim, so long as the claimant was making all reasonable attempts to secure such services, or
(c) any other reasons outside the control of the person bringing the claim.

(1ZC) An "overseas armed forces action" means an action, or cause of action, which –
(a) is against the Ministry of Defence, the Secretary of State for Defence, or any member of Her Majesty's forces,
(b) is brought in connection with overseas operations (see subsection (7)), and

(c) relates to damage that occurred outside the British Islands.

(1ZD) In subsection (1ZC), "damage" means—

(a) in the case of an overseas armed forces action for which a period of limitation is prescribed by section 11, the personal injuries to which the action relates;

(b) in the case of an overseas armed forces action for which a period of limitation is prescribed by section 12(2), the death to which the action relates (and where a person sustains personal injuries outside the British Islands which are a substantial cause of their later death in any of the British Islands, or vice versa, the death is for the purposes of subsection (1ZB)(c) to be treated as occurring where the injuries were sustained)."

(3) After subsection (2) insert –

"(2A) But where the reason why the person injured could no longer maintain an action was because of the time limit in section 11, the court may disapply section 12 (1) in its application to an overseas armed forces action only if the person died within the period of six years beginning with ~~the section 11 relevant date (ignoring, for this purpose, the reference to section 11 (5) in paragraph (a) of the definition of that term)~~ the date of knowledge (see subsection (7)).

(2B) The court shall not under this section disapply section 12 (2) in its application to an overseas armed forces action if the action was brought after the expiration of the period of six years from the ~~section 12 relevant date (see subsection (7))~~ the date of knowledge (see subsection (7))."

(2C) The court may disapply the rules in subsections (2A) and (2B) where it appears to the court that it would be equitable to do so having regard to the reasons for the delay, in particular whether the delay resulted from –

(a) the nature of the injuries;

(b) logistical difficulties in securing the services required to bring the claim, so long as the claimant was making all reasonable attempts to secure such services, or

(c) any other reasons outside the control of the person bringing the claim.

(4) After subsection (5) insert –

"(5A) In acting under this section in relation to an overseas armed forces action –

(a) when considering the factor mentioned in subsection (3) (b), the court must have particular regard to –

(i) the likely impact of the operational context on the ability of members of Her Majesty's forces to remember relevant events or actions fully or accurately, and

(ii) the extent of dependence on the memories of members of Her Majesty's forces, taking into account the effect of the operational context on their ability to record, or to retain records of, relevant events or actions; and

~~(b) the court must also have particular regard to the likely impact of the action on the mental health of any witness or potential witness who is a member of Her Majesty's forces, and~~

(c) the court must also have particular regard to the importance of the proceedings in securing the rights of the claimant.

(5B) In subsection (5A) references to the "operational context" are to the fact that the events to which the action relates took place in the context of overseas operations, and include references to the exceptional demands and stresses to which members of Her Majesty's forces are subject."

(5) After subsection (6) insert –

"(6A) In the application of subsection (1ZA), (2A) or (2B) to an overseas armed forces action in respect of which a limitation period has been suspended in accordance with section 1 (1) of the Limitation (Enemies and War Prisoners) Act 1945, any reference to the period of six years is to be treated as a reference to the period of six years plus –

(a) the period during which the limitation period was suspended, and

(b) any extra period after the suspension ended during which the action could have been brought only because of an extension provided for by section 1 (1) of that Act."

(6) For subsection (7) substitute –

"(7) In this section –

"the court" means the court in which the action has been brought;

"Her Majesty's forces" has the same meaning as in the Armed Forces Act 2006 (see section 374 of that Act);

"overseas operations" means any operations outside the British Islands, including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in the course of which members of Her Majesty's forces come under attack or face the threat of attack or violent resistance;

~~"the section 11 relevant date" means the latest of the following –~~

~~(a) the date from which the period of three years starts to run in accordance with section 11(4) or (5);~~

~~(b) where section 28 applies, the date from which the period of three years mentioned in subsection (1) of that section (as that subsection has effect with the modification made by subsection (6) of that section) starts to run;~~

~~(c) where section 32(1)(a) or (b) applies, the date from which the period of three years starts to run in accordance with subsection (1) of that section;~~

~~"the section 12 relevant date" means the latest of the following –~~

~~(a) the date from which the period of three years starts to run in accordance with section 12(2);~~

~~(b) where section 28 applies, the date from which the period of three years mentioned in subsection (1) of that section (as that subsection has effect with the modification made by subsection (6) of that section) starts to run."~~

"the date of knowledge" means the date on which the person bringing the proceedings first knew, or first ought to have known;

(a) of the act complained of;

(b) that it was an act of the Ministry of Defence or the Secretary of State for Defence;

(c) of the manifestation of the injury resulting from that act which is the subject of the claim, and

(d) that they were eligible to bring a claim against the Ministry of Defence or Secretary of State for Defence in the courts of the United Kingdom.

(7) In subsection (8), after "this section" in the first place it occurs, insert " –

(a) to the British Islands include the territorial sea adjacent to the United Kingdom and the territorial sea adjacent to any of the Channel Islands or the Isle of Man (and the reference to any of the British Islands is to be read accordingly);

(b) to a member of Her Majesty's forces, in relation to an overseas armed forces action, include an individual who was a member of Her Majesty's forces at the time of the events to which the action relates;

(c) ".

Part 2 Restriction of foreign limitation law

(1) The Foreign Limitation Periods Act 1984 is amended as follows.

(2) In section 1 (application of foreign limitation), in subsection (1) (a), after 'subject to' insert 'section 1ZA and".

(3) After section 1 insert –

"**1ZA Overseas armed forces actions: restriction of foreign limitation law**

(1) Subsection (3) applies where –
  (a) the law of another country relating to limitation applies by reason of section 1 (1) (a) in respect of a matter for the purposes of an overseas armed forces tort action, and
  (b) the commencement condition applies in relation to that action,

and in this section the law relating to limitation that applies for the purposes of that action is referred to as "the relevant foreign limitation law".

(2) The commencement condition applies in relation to an overseas armed forces action if the action commenced on a date which is after the end of the period of six years beginning with –
  (a) the date on which any limitation period specified in the relevant foreign limitation law began to run, or
  (b) where the relevant foreign limitation law has the effect that the action may be commenced within an indefinite period, the first date on which the action could have been commenced.

(3) The relevant foreign limitation law is to be treated as providing the defendant with a complete defence to the action so far as relating to the matter (where that would not otherwise be the case).

(4) The court may disapply the rule in subsection (3) where it appears to the court that it would be equitable to do so having regard to the reasons for the delay, in particular whether the delay resulted from –
  (a) the nature of the injuries;
  (b) logistical difficulties in securing the services required to bring the claim, so long as the claimant was making all reasonable attempts to secure such services, or
  (c) any other reasons outside the control of the person bringing the claim.

(5) An "overseas armed forces tort action" means an action—
  (a) which is an overseas armed forces action as defined in section 33(1ZC) of the Limitation Act 1980, and
  (b) which (under the law of the other country that falls to be taken into account) corresponds to—
  b. an action to which section 11 of that Act applies (personal injuries),
  c. an action in respect of false imprisonment, or
  d. an action under the Fatal Accidents Act 1976 (death).

(6) In the application of subsection (2) to an action in respect of which—
  (a) in accordance with the relevant foreign limitation law, a limitation period specified in that law has been suspended or interrupted for a period by reason of a person's lacking legal capacity or being under a disability, or

(b) in accordance with the relevant foreign limitation law, a period during which a person lacks legal capacity or is under a disability has been disregarded in computing a limitation period specified in that law,

the reference to the period of six years is to be treated as a reference to the period of six years plus the period of suspension or interruption or (as the case may be) the period that was so disregarded.

(7) In the application of subsection (2) to an action in respect of which a limitation period specified in the relevant foreign limitation law has been suspended in accordance with section 1 (1) of the Limitation (Enemies and War Prisoners) Act 1945, the reference to the period of six years is to be treated as a reference to the period of six years plus—

(a) the period during which the limitation period was suspended, and

(b) any extra period after the suspension ended during which the action could have been brought only because of an extension provided for by section 1 (1) of that Act."

(4) In section 7 (short title etc), after subsection (3) insert— "(3A) Section 1ZA (overseas armed forces actions: restriction of foreign limitation law) applies to an action commenced in England and Wales on or after the date on which that section comes into force, whenever the events to which the action relates took place."

(5) In section 8 (disapplication of provisions where the law applicable to limitation is determined by other instruments), in the heading and in subsection (1), after "1," insert "1ZA,".