Case No: CO1684/2010

Neutral Citation Number: [2010] EWHC 1823 (Admin)
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**DIVISIONAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2010

**Before** :

**PRESIDENT OF THE QUEEN'S BENCH DIVISION**
**MR JUSTICE SILBER**

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**Between :**

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| **ALI ZAKI MOUSA AND OTHERS** | **Claimants** |
| **- and -** | |
| **SECRETARY OF STATE FOR DEFENCE** | **Defendant** |
| **- and -** | |
| **LEGAL SERVICES COMMISSION** | **Interested Party** |

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**Michael Fordham QC, Dan Squires and Rachel Logan** (instructed by **Public Interest Lawyers Limited**) for the **Claimants**
**James Eadie QC and Cecilia Ivimy** (instructed by **Treasury Solicitor**) for the **Defendant**
**David Hart QC** (instructed by **LSC)** for the **Interested Party**

Hearing dates: 6th July 2010

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# Judgment

**President of the Queen's Bench Division:**

**This is the judgment of the Court**

1. The claimant, Ali Zaki Mousa, is representative of a group of Iraqis numbering about 100 who either have brought, or wish to bring, judicial review proceedings against the Secretary of State for Defence alleging that they were ill-treated in detention in Iraq at various times between 2003 and 2008 by members of the British Armed forces in breach of Article 3 of the European Convention on Human Rights. There are said to be up to 100 other Iraqis who may wish to join the group in the future. The remedy, or at least the principal remedy, sought is an order to compel the Secretary of State to hold a single public inquiry which complies with the Secretary of State's alleged duty to investigate breaches of Article 3 in relation to each of the claimants or potential claimants.

2. This is the claimant's application for permission to bring such proceedings. Since we have decided to give permission, this judgment will be reasonably short, but we think that the parties may be helped if we give some provisional indication of our thinking.

3. The nature of the ill-treatment which the claimant alleges, which is broadly representative of the ill-treatment alleged by other claimants or potential claimants, is summarised in a document provided to the court as follows:

> "The Claimant, an Iraqi citizen, was arrested on 16 November 2006 by British soldiers. They beat him severely, slammed him against a wall and forced him into a stress position in which they stood on his knees and back. His 11 month old son's arm was stamped on and broken, and his father had to urinate on himself. The soldiers removed business documents, computers, mobile telephones, licensed guns and 40 million Iraqi dinars. They hooded and handcuffed the claimant. He was transported to the BPF at COB. They beat and sat on him, then dragged him, scarring his feet. At the BPF the Claimant was initially hooded and ear muffed, then goggled. He was interrogated aggressively, struck with a stick and threatened with Guantanamo. In between sessions he was forced into a stress position in the cold for 30 hours and stoned and beaten. He was twice taken to medics, but not to the toilet, so he urinated on himself. Transported to al-Shaibah DTDF in a helicopter, cold water was poured over his head and he was kicked. On arrival he was goggled and earmuffed, forced to undress in public and examined by a medic while naked. A female saw him nude. He spent 36 days in solitary confinement in a tiny freezing cell with restricted bedding, food and water. Soldiers beat him, prevented him sleeping by banging his door and shouting insults, restricted his privacy in toileting and showering and twice had sexual intercourse in front of him. Pornographic movies were played loudly and pornographic magazines left in sight. Soldiers exposed themselves, groped each other and masturbated in front of him. Repeated interrogations involved forced standing for hours and

> interrogators threatening to attack his family and himself. Humiliations continued at Camp B with poor conditions, beatings, food deprivation, threats, intimate searches and intimidation with dogs. In mid 2007 the Claimant was moved to Basra airport DIF, beaten, goggled, earmuffed and cuffed, then kept in a boiling hot cell with no food or water the first day. He was released in November 2007 having had no explanation for his detention. His property was never returned."

4. It is accepted for present purposes on behalf of the Secretary of State that these allegations (and those made by other claimants) raise an arguable case of breach of Article 3 of the Convention, which forbids torture or inhuman or degrading treatment or punishment.

5. It is further accepted for present purposes that the claimants (or most of them) are able to establish that this court has jurisdiction for the purposes of Article 3 of the Convention notwithstanding that the ill-treatment is said to have taken place in Iraq – this on the basis that the court's human rights jurisdiction extends to ill-treatment alleged to have taken place at a British Military base overseas – see *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153. We were told that a judgment of the European Court of Human Rights is awaited in *Al-Skeini* which may enlarge, but is not expected to attenuate, the extent of jurisdiction which the House of Lord's decision established.

6. Those representing the claimants have produced a number of schedules collating the various claims. One of these shows that a large majority of the incidents of alleged ill-treatment are said to have taken place in one or other of three British Military bases in Iraq. The schedule refers to a total of 14 places all of which may well constitute British Military bases. The court does not expect to be troubled by questions of human rights jurisdiction, especially since the Secretary of State will no doubt want to investigate all credible allegations, wherever precisely they are said to have taken place. Other schedules show, that there is an arguable case that the alleged ill-treatment was systemic, and not just at the whim of individual soldiers.

7. Article 3 of the Convention is related procedurally to Article 2, which protects everyone's right to life. The state's obligations under these Articles embrace an obligation to carry out an effective investigation of credibly alleged breaches. For Article 2, this will often be achieved by an appropriately conducted inquest. Whatever the mode of inquiry adopted, certain minimum standards of review are required.

8. *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653 concerned a person who was murdered while he was serving a custodial sentence in a young offender institution. Various investigations were conducted. The House of Lords, reversing the Court of Appeal, restored the order of the first instance judge requiring the Secretary of State to hold an independent public investigation with the deceased's family legally represented and able to cross examine the principal witnesses. Lord Bingham of Cornhill examined a number of recent European cases including (at paragraph 21) *Edwards v United Kingdom* (2002) 35 EHRR 487, where the killer of a person in prison had pleaded guilty to manslaughter, but there had been no acceptance

of responsibility by the prison service. Lord Bingham observed that a systemic failure to protect the lives of persons detained may well call for even more anxious consideration and raise even more intractable problems than deliberate killing by state agents. Lord Bingham quoted at some length from the European Court's judgment in *Edwards*. This included, at paragraph 70, the observation that for the investigation to be effective, it was generally necessary for it to be independent of those implicated in the events. This meant not only a lack of hierarchical or institutional connection, but also a practical independence. Paragraph 73 contained the requirement of a sufficient element of public scrutiny to secure accountability in practice as well as in theory.

9. In paragraph 24 of his judgment in *Amin*, Lord Bingham referred with approval to the judgment of Jackson J in *R (Wright) v Secretary of State for Home Department* [2001] UKHRR 1399. Jackson J there derived (paragraph 43) five propositions from a review of recent decisions. These included that the obligation to procure an effective official investigation arises by necessary implication in Articles 2 and 3; that there is no universal set of rules for the form which an effective official investigation must take; and that, for Article 2 at least, the investigation should have the general features identified in paragraphs 106-109 of *Jordan v United Kingdom* (2003) 37 EHRR 2. Jackson J had identified these features in paragraph 41 as (1) the investigation must be independent; (2) it must be effective; (3) it must be reasonably prompt; (4) there must be a sufficient element of public scrutiny; and (5) the next of kin must be involved to an appropriate extent.

10. Lord Bingham described at paragraph 31 of his judgment the purposes of a public investigation as follows:

> "… to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relatives may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."

He said at paragraph 32 that *Jordan* and *Edwards* established that certain minimum standards must be met. (See also Lord Slynn of Hadley at paragraph 43.) Lord Bingham said at paragraphs 36 and 37 that a conscientious and professional investigation by a member of the prison service did not enjoy institutional or hierarchical independence and was held in private so that the deceased's family were not able to play an effective part in the investigation.

11. Mr Eadie QC, for the Secretary of State, points to *Banks v United Kingdom* (App No 21387/05, Admissibility decision of 6th February 2007), where there were allegations of assaults and ill-treatment in Wormwood Scrubs Prison during the 1990s. There had been an internal prison inquiry and investigation by the Metropolitan Police resulting in some prosecutions and a report in April 2002 by the Chief Inspector of Prisons following an unannounced inspection of Wormwood Scrubs. This referred to a failure to establish what took place there in the 1990s or to establish whether there were underlying systemic problems. There were also civil proceedings which were settled. The complaint under Article 3 was that there had been a failure, despite repeated requests, to provide an adequate investigation. The court noted a different

emphasis between Article 2 and Article 3. It would not always be necessary or appropriate to examine the procedural complaint under Article 3 because, unlike under Article 2, the victim of the alleged ill-treatment is generally able to act on his own behalf and give evidence as to what occurred. The court was not persuaded that this was a case in which issues arose under the procedural head of Article 3. But assuming that Article 3 was engaged, in the normal course of events, a criminal trial with an adversarial procedure before an independent and impartial judge must be regarded as furnishing the strongest safeguards. A civil and disciplinary remedy may be sufficient to provide protection under Article 2. The procedural element in Article 3 imposes the minimum requirement where the State or its agents bear responsibility for serious ill-treatment. There was no indication in the case before the court that the facts had not been sufficiently investigated and disclosed or that there had been any failure to provide a mechanism whereby those with criminal or civil responsibility might be held answerable. The wider questions as to the background of the assaults and the remedial measures apt to prevent any recurrence were, in the court's opinion, matters for public and political debate which fell outside the scope of Article 3. The application was declared to be inadmissible, as was a more recent similar application in *Bailey v United Kingdom* (Application no 39953/07, 19th January 2010).

12. In *R (AM) v Secretary of State for Home Department* [2009] EWCA Civ 219, Sedley LJ referred to part of the passage in Lord Bingham's judgment in *Amin* which we have quoted in paragraph 10 above, and said that it was well established that an analogous procedural duty of investigation to that for Article 2 is created by Article 3, where credible evidence suggests that one or more individuals have been subjected by or with the connivance of the state to treatment sufficiently grave to come within the article. The issue was whether the obligation arose and was discharged on the evidence of disturbances at Harmondsworth Immigration Detention Centre in late 2006. A major aspect was whether there are differences of kind as well as degree between the Article 2 obligation and the Article 3 obligation.

13. Sedley LJ said at paragraph 31 that the central issue was whether the availability of tort proceedings, the possibility of a criminal investigation and an investigation and report by a Home Office official either singly or in combination fulfilled the States investigative obligation under Article 3. It was agreed that a sufficient investigation needed to be capable of leading to the identification and punishment of those responsible; should be independent in practice and without hierarchical or institutional connections; should be effective and thorough; and must give effective access for the complainant to the investigatory process. What was in issue was the content of the investigation. Sedley LJ said in paragraph 33 that what will suffice for an isolated instance of inhuman or degrading treatment will not necessarily suffice for systemic and multiple breaches of Article 3. Litigation is designed to secure individual redress; prosecution to establish individual culpability. The case advanced was about why the ill-treatment happened and why it was said not to be accidental. Sedley LJ discussed the case of *Banks* to which we have referred. He said that there were serious issues about what *Banks* decides and whether it was in conflict with *Amin*. He found it a surprising proposition that the wider questions raised by the case as to the background of the assaults and remedial measures were said to be matters of public and political debate. He referred to *Taylor v United Kingdom* (No 23412/94, Commission decision of 30.8.94), and then turned to decisions which appeared to controvert or at least not

support the dichotomy suggested in *Banks* and *Taylor*. These cases included *Wright* and *Amin* to which we have referred. He concluded in paragraph 60:

> "For the reasons I have given, there is no reason in principle to draw a line in this regard between Article 2 and Article 3. So long as the minimum requirements are met, the distinction between a need for an independent ad hoc inquiry and the satisfaction of the investigative obligation through existing procedures is a fact-sensitive and pragmatic one. But our domestic jurisprudence, including the binding decision of the House of Lords in *Amin*, makes it clear that the investigative obligation of the State may – depending on what facts are at issue – go well beyond the ascertainment of individual fault and reach questions of system, management and institutional culture. In so far as this goes beyond the jurisprudence of the Strasbourg court (and I am not persuaded that it does), it is domestic authority which we are bound to follow."

Sedley LJ said at paragraph 61 that the state's investigatory functions will often be discharged by the ordinary processes of law. But he concluded in paragraph 66 that in the case before the court the issues raised by the claimants about the culture and conduct of Harmondsworth management and staff had not been, and were highly unlikely now to be, addressed in any conventional forum to which the claimant had access. There was however the question of time and a full independent inquiry would have major resource implications. The right course was not to make a mandatory order, but to grant declaratory relief that the Home Secretary had failed to meet the United Kingdom's obligation under Article 3 to institute an independent inquiry to which the claimants would have had full access and which would have made its findings public.

14. Elias LJ agreed in the result with Sedley LJ. He said that the essential question was whether civil proceedings, together with possible criminal investigation, would have sufficed. He did not accept that *Banks* dictated that no investigation at all was required. The facts in *Banks* were quite different. He accepted that for many, perhaps most, Article 3 complaints, the combination of civil and criminal proceedings would be enough to satisfy the Article 3 procedural obligations. But he did not consider that that was the position in the case before the court. The second of the reasons which he gave for this was that the allegations included complaints of systemic ill-treatment. It was however certainly too late to carry out an effective investigation.

15. Longmore LJ disagreed. He contrasted *Jordan*, *Edwards* and *Amin*, which were Article 2 cases, with *Banks*, an Article 3 case with remarkable similarities with that before the court. The European Court in *Banks* had considered that the Article 2 cases were inapplicable to Article 3 cases and that established principle meant that a combination of the availability of a criminal trial and civil proceedings would normally be adequate for Article 3. He said, however, in paragraph 76 that it was not difficult to imagine cases of alleged Article 3 mistreatment (such as torture or the infliction of serious harm) which would merit a full independent inquiry. It seemed to him, however, that the allegations of breach of Article 3 in the case before the court could properly be dealt with by the combination of the availability of criminal and

civil proceedings. This availability constituted compliance with the procedural obligations of Article 3 on the facts of the case.

16. We are told that leave to appeal to the House of Lords in *AM* was refused. The majority Court of Appeal decision is thus binding on this court to the effect that the principles discussed in *Amin* with reference to Article 2 apply to Article 3 cases and that *Banks* may be in conflict with *Amin*. It remains entirely possible that in particular cases the availability of criminal and civil proceedings, with or without other investigation short of a full independent public inquiry, may constitute sufficient compliance with the procedural requirements of Article 3. This may not, however, be so where there are allegations of serious systemic failure which require full public investigation.

17. In the present cases, some of the claimants have begun civil proceedings for damages, which we understand are proceeding in the Queen's Bench Division. We trust that individual claims for just satisfaction by way of damages under Section 8 of the Human Rights Act 1998 will be brought in, or transferred into that jurisdiction. They are not, broadly speaking, suitable for determination in the Administrative Court.

18. As to criminal proceedings, there have been no prosecutions to date apart from a court marshal resulting in one conviction arising out of the death of Baha Mousa. But the Secretary of State has established two related investigating bodies as described in the witness statement of Peter Ryan dated 1st July 2010. These are the Iraq Historic Allegations Team (IHAT) and the Iraq Historic Allegations Panel (IHAP). We have as exhibits to Peter Ryan's witness statement the terms of reference of each of these bodies and of the Head of IHAT, who is to be a civilian. As we understand it, the Secretary of State is in the process of establishing these bodies as a dedicated team of criminal investigators to deal with the large influx of claims. IHAT's function is to conduct criminal investigations into the allegations made in the judicial review claims. It will operate in accordance with the framework set out in the Armed Forces Act 2006, which governs investigation of criminal conduct by members of the serving armed forces and referral for prosecution. IHAT will be led by a civilian who will report to the Provost Marshal (Army), who is the Chief Officer of the Royal Military Police. It will build on the investigative work carried out to date by the RMP as described in the witness statement of Colonel Jeremy Green with the benefit of substantial additional resources. In addition to RMP investigators, IHAT will have 31 specially recruited civilians with relevant criminal investigation experience. They will be supported by an administrative staff, dedicated accommodation and facilities including a computer system designed to assist management of evidence in major inquiries. The sum of £6m. has been made available to fund IHAT.

19. The terms of reference of IHAT include that the unit will be fully staffed and operating at full capability by 31st October 2010 and will have concluded all appropriate investigations and reported to the Provost Marshal by 1st November 2012. That is two years, which is a long time, but not disproportionately so in the circumstances, given the number of cases to be investigated and the inherent complications to which Colonel Green refers.

20. The Terms of Reference of IHAP include that the panel has authority, subject to and in accordance with legal advice, to disclose information and documents relating to the cases to the complainants or their representatives. There would obviously be

inhibitions if there is a decision to prosecute. The IHAP Terms of Reference also provide that at the conclusion of the Ministry of Defence's work the IHAP will disclose the contents of the case file, as widely defined in paragraph 9 of the Terms of Reference, to the claimants subject to any relevant omissions or redaction of documents for proper disclosure reasons.

21. It is evident that IHAT and IHAP are not, for present purposes, hierarchically independent, although Mr Eadie reserved his position on this. He explained to us, however, that this is unavoidable because the Armed Forces Act 2006 requires criminal allegations against serving soldiers acting as such to be investigated by the RMP reporting to the Provost Marshal, and for prosecution to take place under that legislation. In brief, Part 5 of the 2006 Act requires serious offences in the army to be referred to the RMP for investigation (section 113), who have to refer the case to the Director of Service Prosecutions (a civilian) if investigations indicate that a service offence has or may have been committed (section 116). This therefore is an unavoidable statutory process which nevertheless has the merit of being a well-resourced fact finding operation whose stipulated time scale does not appear to be excessive given the scale of the task and its difficulties.

22. There are already two public investigations taking place into allegations of ill-treatment or worse by British soldiers in Iraq. The first is the Baha Mousa inquiry under the chairmanship of Sir William Gage which concerns the treatment and death of Baha Mousa and 9 other victims. This inquiry has so far sat for 109 days and heard evidence from 247 witnesses. The report is expected by the end of 2010 or early in 2011. It has addressed systemic issues as described in exhibit PJS3 to the witness statement of Philip Shiner. The second investigation is the Al-Sweady inquiry under the chairmanship of Sir Thayne Forbes. This will concern the matters which were the subject of proceedings in this court – see *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 1687 (Admin). This inquiry has yet to start its public hearings. The subject matter of these two inquiries broadly relates to the matters alleged in the present proceedings at least to the extent that the individuals whose treatment is under investigation in the two inquiries feature in the schedules that have been prepared for these proceedings.

23. The claimants' case, as presented on their behalf by Mr Fordham QC, is straight forward. The claimants' allegations taken as a whole raise a credible case of systemic ill-treatment of Iraqi civilians by British soldiers which requires public investigation sufficient to fulfil the State's Article 3 procedural obligations as described in *Amin*. The IHAT/IHAP proposed arrangements are not sufficient. They do not comprise a sufficiently independent investigation. They are directed towards the possibility of individual prosecution or disciplinary proceedings and will not concern, or sufficiently concern, systemic failures which the combination of cases plainly indicates. They will thus not be effective. They will not fulfil the requirement of promptness, since, if a public inquiry were to be delayed for at least 2 years with a clear risk that it might be longer, a public investigation would not get under way until then. The IHAT investigations will not take place in public and the claimants will not have a sufficient opportunity to participate. The individual claims for damages in the Queen's Bench Division will not address (or sufficiently address) systemic matters. The two existing public inquiries only cover a small part of the allegations raised by the claimants.

24. Mr Fordham acknowledges that the IHAT/IHAP arrangements may properly lead to prosecutions and that public hearings of a public inquiry would have to wait for the conclusion of those prosecutions. But he argues that prosecutions, civil proceedings and the existing inquires will not sufficiently address systemic matters and it is now clear that a public inquiry will be necessary. Promptness requires that this is set in train now and there will be plenty of preparatory work that can be usefully undertaken while the IHAT investigations run their course.

25. Mr Eadie for the Secretary of State makes a number of concessions for the purposes only of the permission application. He does not contend at this permission stage that it is not arguable that lessons to be learnt form part of the Article 3 duty to investigate. Nor is it contended that it is not arguable that Article 3 may require in the present cases further investigation of issues connected with incidents of ill-treatment, if those issues are not adequately investigated by criminal or civil proceedings. In short, he accepts for permission purposes that it is arguable that *Amin* and the majority decision in *AM* apply and that *Banks* and *Bailey* do not. But he reserves the possibility of arguing at the full hearing that a proper application of the authorities, including *Banks*, should not result in a mandatory order now for a full public inquiry. The IHAT procedures should run their course, at the end of which the picture may be very different. At the moment, the court is invited to proceed on allegations alone which have not been investigated or tested.

26. Despite these concessions, Mr Eadie submits narrowly that permission should be refused because the Secretary of State has not ruled out the possibility of the need for an independent public investigation into systemic issues at some stage. It is necessary, appropriate and proportionate to meet the primary investigative purpose of Article 3 by investigating individual cases first, after which it will become apparent if there are systemic issues and, if so, what is their nature. That is a perfectly proper procedural approach under Article 3 and the Secretary of State should not be ordered now to embark on a hugely expensive and wide ranging public inquiry which may not be necessary and which, until more is known, may be wastefully misdirected. Mr Eadie did not rise to the challenge of seeking instructions to enable him to undertake on behalf of the Secretary of State not to take any delay point dependent on the passage of time between now and future reconsideration of the need for a public investigation, if permission is refused now.

27. We see the force of these submissions, but we are not persuaded by them to refuse permission. The claimant's case is sufficiently persuasive for permission purposes. It sufficiently makes the case that the alleged ill-treatment may be seen as systemic and raises questions of its authorisation or failure to stop it. Civil and criminal proceedings may not sufficiently address these questions, and would not therefore be effective. The IHAT/IHAP arrangements are not hierarchically or institutionally independent. They do not enable the claimant's sufficient participation. Postponement of a public investigation would not achieve sufficient promptness where some allegations are already quite old, and where there is a substantial risk that IHAT's investigation will not be effective. These are matters which the Secretary of State will no doubt wish to address by the time of the full hearing.

28. For his part, Mr Fordham on behalf of the claimants may wish to consider the matters of due progression and proportionality. Is it necessary to require the Secretary of State to put in train a hugely expensive public inquiry now when it may never be

necessary in a form such as may be envisaged now? Is it proportionate to require such expenditure and effort when there are already two expensive public inquires looking into related aspects of alleged ill-treatment by British Forces in Iraq?

29. For these reasons we give permission. We reserve to ourselves the substantive hearing which should take place as soon as reasonably possible. We will give such directions as are needed when we hand down this judgment. These will include what we trust will be an agreed order relating to paragraph 5 of Silber J's order of 22nd February 2010.

30. Although this judgment is on an application for permission, it may be referred to as appropriate as a considered judgment in other cases, subject of course to further submissions at the full hearing.