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Case No: CO/5503/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice

Date: 24/05/2013

Before:

PRESIDENT OF THE QUEEN'S BENCH DIVISION

MR JUSTICE SILBER

- -

Between :

R (ALI ZAKI MOUSA and others)	**Claimants**
- and -	
SECRETARY OF STATE FOR DEFENCE	**Defendant**

No 2.

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Michael Fordham QC, James Maurici, Danny Friedman QC, Dan Squires (instructed by **Public Interest Lawyers**) for the **Claimants**
James Eadie QC, Philip Havers QC and Kate Grange (instructed by **The Treasury Solicitor**) for the **Defendants**

Hearing dates: 11 December 2012, 29-31 January and 22 March 2013

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Approved Judgment

President of the Queen's Bench Division:

This is the judgment of the court

INTRODUCTION AND SUMMARY

1. In the present case, the claimants are Iraqi citizens who claim they were ill-treated by the British armed forces in Iraq or are relatives of those who were killed by the British armed forces. Although they have brought separate actions for compensation (many of which have been compromised), they brought judicial review proceedings in February 2010 claiming that the investigation established by the defendant, the Secretary of State for Defence (the Secretary of State), was neither independent nor in adequate compliance with the investigative duties under Articles 2 and 3 of the Human Rights Convention. They succeeded in establishing that the investigation was not sufficiently independent in those proceedings. The Secretary of State reconstituted the investigation; in this second set of proceedings, they contended that, as reconstituted, it is still not independent and they seek a more far reaching inquiry.

2. In the course of the proceedings it became clear we had to hear oral evidence in relation to the issue on independence; it also became clear that issues of very substantial difficulty arose as to the way in which the investigative duties should be discharged given the unprecedented nature and the size of the task.

3. The Strasbourg Court has determined that the scope of the Convention extends to a number of circumstances in which deaths and serious ill treatment are alleged to have occurred involving the British forces in Iraq in the period 2003-09. On the basis of the Strasbourg Court's decisions there were thought at the turn of the year to be about 40 cases where it is accepted the investigative duty into deaths under Article 2 and 135 cases where the duty under Article 3 arises. These figures are now much greater. We were told that there might be as many as 150-160 cases involving death and 700-800 cases involving mistreatment in breach of Article 3, though the precise numbers that require investigation will be determined by decisions as to the scope of the application of the Convention to the activities undertaken by the British armed forces in Iraq. This judgment makes no decision on territorial scope.

4. The duty that the Secretary of State now has to discharge as a result of the Strasbourg decisions is therefore unprecedented as it covers the operations of the British armed forces for a six year period whilst they invaded and occupied Iraq as part of the Coalition and subsequent arrangements. The allegations made are allegations of the most serious kind involving murder, manslaughter, the wilful infliction of serious bodily injury, sexual indignities, cruel inhuman and degrading treatment and large scale violation of international humanitarian law. The incidents in relation to which the allegations arise are fact specific. What happened is often unclear and the subject of dispute. Many of the incidents occurred several years ago; the Iraqi witnesses are largely residents of Iraq. Some incidents have been the subject of prosecution and more may be. The only public inquiry that has been completed, Baha Mousa, has cost £25m and the second, Al Sweady, has cost more than £17m so far. The other investigations established by the Secretary of State are costing about £7.5m a year.

5. We are entirely satisfied that the Secretary of State has been assiduous and conscientious in his attempts to try and discharge the duties imposed on the State in

these unprecedented circumstances, but it became apparent in the course of the proceedings that some further reconsideration must be given.

6. Although we are satisfied, for the reasons we set out at paragraphs 108-125, that IHAT has now been structured in such a way that it can independently carry out its investigative and prosecutorial functions, the task of investigating and inquiring into the very large number of deaths occurring at many different times and in different locations requires a new approach if it is to be achieved in a timely, cost effective and proportionate manner that discharges the very important investigative duties imposed upon the State. We set out our views at paragraphs 213 to 221.

7. We are also satisfied that reconsideration is needed of the way in which the duty to assess the systemic issues and to take account of lessons learnt is discharged in a way that provides greater transparency and public accountability. We set out our views at paragraphs 222 to 225.

THE BACKGROUND

(i) The origin of the allegations

8. During the course of the participation of the British armed forces in the Coalition that invaded Iraq in March 2003 and in the occupation of part of Iraq thereafter until the withdrawal of the armed forces in 2009, allegations were made about the conduct of the armed forces towards the population of Iraq.

9. Some of these were investigated by the International Committee of the Red Cross (ICRC); we refer to one of its reports made in February 2004 into allegations made against the Coalition Forces at paragraph 58.ii) below.

(ii) The Al-Skeini litigation

10. On 26 March 2004, the Secretary of State announced his decision not to conduct independent inquiries into the death of 113 Iraqis in Iraq, including the deaths of:

    i) Al Skeini (4 August 2003), Salim (5 November 2003), Shmailawi (10 November 2003) and Muzban (24 August 2003). All of these had been killed by a military patrol or during a security operation.

    ii) Ahmed Jabbar Kareem Ali, a 15 year old, drowned on 8 May 2003 to whom we refer at paragraph 158 below.

    iii) Baha Mousa who was killed while in custody of the armed forces on 14 September 2003.

11. The decision was challenged by the six we have named before the Divisional Court, Court of Appeal and House of Lords. It was held that an Inquiry under Article 2 was not required into the deaths of those other than Baha Mousa as the deaths had not occurred within the territorial scope of the Convention.

12. On 7 July 2011, the Grand Chamber of the Strasbourg Court in *Al Skeini and others v United Kingdom* (2012) 53 EHRR 18 held that the deaths were within the territorial scope of the Convention and an investigative duty arose.

(iii) The Report of Brigadier Aitken

13. In January 2008, a report by Brigadier Aitken into allegations of unlawful killing and mistreatment commissioned by the Army Board was published. It acknowledged that there had been abuse and 6 instances of deliberate abuse, including the deaths of Ahmed Jabber Kareem, Nadheem Abdullah, Sa'eed Shabram, and Baha Mousa to whom we refer at paragraphs 134-135; but, looked at numerically, the level of abuse had been tiny. A wide range of corrective measures had been taken since 2003; we refer to one of these at paragraph 62 below.

(iv) The Baha Mousa inquiry

14. In 2006, soldiers who had or were responsible for the custody of Baha Mousa were tried by a court martial presided over by MacKinnon J. One pleaded guilty. The others were acquitted in circumstances that caused considerable public concern.

15. On 14 May 2008, the Secretary of State appointed The Rt. Hon Sir William Gage to conduct an inquiry under the Inquiries Act 2005 (the 2005 Act) into the circumstances of the death of Baha Mousa and the treatment of those detained with him. The Inquiry was conducted in four modules (the history of conditioning techniques, the facts surrounding the detentions and death, training and the chain of command, and recommendations). Its 3 volume report into the facts with 73 recommendations was published on 8 September 2011. The cost of the Inquiry was £25m.

(v) The Al Sweady inquiry

16. A further investigation under Articles 2 and 3 was sought by the relatives of Al-Sweady and others whom the relatives alleged were taken prisoner by HM armed forces and killed or mistreated between 14 May and 23 September 2004. The need for such an investigation was eventually conceded by the Secretary of State for Defence in the course of proceedings before the Divisional Court (*R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin)).

17. The Secretary of State initially wanted the Metropolitan Police to conduct the investigation, but they declined to do so. On 25 November 2009 the Secretary of State appointed The Hon Sir Thayne Forbes to conduct an inquiry under the 2005 Act. It took some time to gather materials and evidence; hearings of the evidence commenced on 4 March 2013 and a number of witnesses have been heard. As at 30 April 2013, it had cost £17.1m; the figures indicate a cost of about £0.5 million a month.

(vi) The establishment of IHAT

18. On 10 February 2010, the claimants in these proceedings issued their first proceedings for judicial review against the Secretary of State. The nature of the proceedings can be illustrated by reference to those made by the first claimant, Ali Zaki Mousa, who was arrested on 16 November 2006 by the British armed forces and detained by them at various locations until his release in November 2007. He claims that he was subjected to extensive ill-treatment as summarised at paragraphs 9 to 11 of the judgment of this court in *AZM (No.1)*; this amounted to a credible allegation of

systemic abuse. Subsequently the Secretary of State accepted that the allegations were not incredible and that they raised an arguable case of breach of Article 3.

19. On 1 March 2010, the Minister of State at the Ministry of Defence made a written Ministerial Statement establishing the Iraq Historic Allegations Team (IHAT).

20. Following that, on 24 June 2010, the detailed terms under which IHAT would operate were set out in two sets of terms of reference:

    i) Those issued by Provost Marshal (Army) set out the way in which IHAT would operate in investigating allegations of mistreatment by the armed forces.

    ii) Those issued by the Directorate of Judicial Engagement Policy at the Ministry of Defence established the Iraq Historic Allegations Panel (IHAP) to take forward the result of enquiries made by IHAT – see paragraph 85 below.

(vii) The course of the earlier proceeding in AZM (No 1)

21. On 16 July 2010, the court granted permission in *AZM (No.1)* to the claimants. The proceedings were heard on 5, 8 and 9 November 2010 by the Divisional Court. There were two principal issues:

    i) Was IHAT sufficiently independent?

    ii) Was a public inquiry needed because of the wider systemic issues?

22. On 21 December 2010, the Divisional Court held ([2010] EWHC 3304 Admin)) that IHAT was sufficiently independent and that it was not necessary at that time to establish an immediate public inquiry.

23. On 22 November 2011, the Court of Appeal held ([2011] EWCA Civ 1334) that IHAT was not sufficiently independent because of the inclusion of members of the Provost Branch of the Army (the Royal Military Police) in the investigation of matters where that Provost Branch had been involved in Iraq. The Court of Appeal did not therefore need to determine whether an immediate public inquiry was required.

(viii) The reform of IHAT

24. Following the judgment of the Court of Appeal, the Minister of State at the Ministry of Defence told Parliament on 26 March 2012 that the Secretary of State accepted the decision and would remove the Royal Military Police and replace them with the Royal Navy Police headed by the Provost Marshal (Navy). That change would be complete by 1 April 2012. The Minister stated that the need for a public inquiry would be kept under review. It was also announced that the IHAT would review Sir William Gage's report into the death of Baha Mousa to see if more could be done to bring those involved in the mistreatment of Baha Mousa to justice. IHAT would, as a result of the decision of the Grand Chamber in *Al-Skeini*, also investigate deaths in Iraq.

25. 39 Members of the Royal Military Police left IHAT; they had been part of the complement of IHAT that was about 90. They were replaced by five from the Royal Navy Police. That left IHAT at 50% of its strength, but steps were put in hand to

recruit civilian employees with the intention of bringing it up to a complement of just over 110. 94 of these would be externally recruited (primarily retired police officers with investigative experience) with the balance being made up of the five members of the Royal Navy Police and a lawyer and civil servants. By March 2013, 50 out of the required 94 civilian investigators had taken up employment. It appears that there have been difficulties with recruitment (see paragraph 133 below).

26. Two further documents were issued:

i) On 1 May 2012, the Provost Marshal (Navy) issued terms of reference to IHAT. Its objective was to:

> "Investigate as expeditiously as possible those allegations of mistreatment by HM Forces in Iraq allocated to it by the Provost Marshal (Navy), including those matters set out at paragraph 6-8 below: in order to ensure that those allegations are, or have been investigated appropriately".

The matters set out were:

> **"**6. The IHAT shall investigate all the judicial review claims relating to abuse of Iraqi civilians by British service personnel in Iraq during the period from March 2003 to July 2009 issued or notified by way of a pre-action protocol letter as at 30 April 2010. Other cases of alleged mistreatment notified to the Secretary of State after this date will be considered on a case-by-case basis and may be subject to investigation by the IHAT. The PM(N) will direct the Head of IHAT as to any additional allegations that should be investigated by IHAT.
>
> 7. Additionally the IHAT is to investigate the specific cases which the United Kingdom now has an obligation to investigate following the judgment in July 2011 of the European Court of Human Rights in the case of Al-Skeini.
>
> 8. The IHAT is also to review the report of the Baha Mousa Public Inquiry by Sir William Gage, in order to assess whether more can be done to bring those responsible for the mistreatment of Baha Mousa to justice."

ii) In September 2012, the Ministry of Defence agreed a protocol on the provision of information from IHAT to the Ministry of Defence; we refer to this at paragraph 88 below.

(ix) The further judicial review proceedings

27. On 25 May 2012, the original claimants in *AZM (No.1)* commenced these proceedings (*AZM (No.2)*) contending that the Secretary of State was in breach of his duty to discharge the State's investigative duties under Articles 2 and 3 on grounds that:

i) As reconstituted IHAT was not sufficiently independent;

ii) Even if IHAT was independent, it was inevitable that a public inquiry would be necessary and it should be established immediately.

28. In September 2012 the solicitors to the claimants were contacted by Louise Thomas who had been employed at IHAT for six months between February 2012 and the end of July 2012 as office manager in one of IHAT's six teams. Although it will be necessary to refer to her statements and evidence in more detail (see paragraphs 98-107 below), the allegations she made were to the effect that IHAT was failing to discharge its duties. The claimants amended their claim to rely on the allegations made by her. Statements were served in reply by a number of those involved with or working for IHAT and extensive disclosure made.

29. In the event there were three issues before us:

i) Were IHAT and the arrangements associated with it sufficiently independent?

ii) What arrangements had been made by IHAT to investigate the cases relating to deaths of Iraqis whilst in the custody or under the control of the British Armed Forces? Were the arrangements compliant with the duties of the State to investigate deaths?

iii) Are the arrangements made by IHAT to investigate the cases relating to alleged violations of Article 3 compliant with the investigative duties of the State?

30. On 11 December 2012, we heard oral evidence from Louise Thomas who was called by the claimants and 2 other witness called by the Secretary of State. The hearing resumed on 29-30 January 2013. After the hearing, as we shall explain, further information was provided to us. It became necessary to hold a third hearing which we did on 22 March 2013.

ISSUE I: WERE IHAT AND THE ARR ANGEMENTS AS SOCIATED WITH IT SUFFICIENTLY INDEPENDENT?

(1) The evidence

31. The claimant provided:

i) Statements from Louise Thomas, the officer manager in the Media Review Team (a term we explain at paragraph 99 below) from February to July 2012. She was called to give oral evidence and cross examined.

ii) Statements from Mr Shiner of Public Interest Lawyers who has devoted his enormous energy, skill and time to these and related proceedings.

iii) Extensive documentary materials which were largely the result of disclosure by the Secretary of State.

32. The Secretary of State gave extensive disclosure and served statements from:

i) Peter Ryan, a senior civil servant at the Ministry of Defence, who is the Director of Judicial Engagement Policy.

ii) Brigadier Nicholas Davies, the Commander of the Joint Force Intelligence Group; he explained the role of the Joint Forward Interrogation Team deployed to Iraq.

iii) Commander Craig Moran, the Provost Marshal of the Navy.

iv) Lieutenant Commander Stephen Hawkins, the officer in charge of the Royal Navy Police at IHAT.

v) Ex-Detective Chief Superintendent Geoff White, the Head of IHAT from 6 September 2010 to 7 September 2012; his successor from 19 November 2012, ex-Detective Chief Superintendent Mark Warwick, the former head of a Special Investigative Unit in the police.

vi) Members of IHAT: John Birch (a Senior Review Officer), Neil Kelly (a Deputy Senior Investigating Officer), John Hanna (a civilian investigator), Philip Rickard (a civilian investigator), James Butler (a Royal Navy Police Officer assigned to IHAT), Christopher Edgell, Ian Stewart and Mark Willdigg (civilian members of the media review team at IHAT), Sharon Brady (intelligence analyst), Clive Strong (former Deputy Senior Investigating Officer), Mark Wight (Staff Officer Grade 2 Secretariat) and Sgt Andrew Bird (media review office manager).

Lieutenant Commander Hawkins and Mr Birch were called to give evidence and cross examined.

33. We refer in the following paragraphs to the evidence contained in the statements, oral evidence and other materials provided to us.

(2) The status of IHAT

34. IHAT is divided into teams – the media review team to review the interrogations (so called as the interrogations were recorded on video), the Baha Mousa Review team, the death review team dealing with Article 2 cases, a team interviewing Iraqi witnesses, an intelligence team analysing the data and a major incident room team.

35. Its first and primary function is to investigate. The investigations are carried out under the supervision of the Head of IHAT. That person was Geoffrey White QPM, a retired Detective Chief Superintendent of police appointed as Head in September 2010. He finished his employment in September 2012. He was replaced in November 2012 by Mark Warwick, a retired Detective Chief Superintendent of police. The Head of IHAT carries out his responsibilities under the IHAT terms of reference to which we referred at paragraph 26.i).

36. Its second main function is to make or contribute to decisions on whether any members of the armed forces should be charged. Once a case or series of cases has been investigated, the decision on whether there is sufficient evidence to charge a member of the armed forces is in many cases a decision for the service police under

s.116 of the Armed Forces Act 2006 (as amended). Such decisions are made by the officer in charge of the Royal Navy Police, Lieutenant Commander Hawkins. He had joined the Royal Navy in 1983 and transferred to the Royal Navy Police in 1994; he became a commissioned officer in 2003. The officer in charge of the Royal Navy Police at IHAT is required to consult the Director of Service Prosecutions before a final decision is made that there is insufficient evidence to bring a charge. If he decides there is sufficient evidence of offences of a more serious kind, he must refer the case to the Director of Service Prosecutions.

37. Its third function is to report so that wider systemic issues can be considered and, where necessary, remedied. Lieutenant Commander Hawkins made clear in his evidence that material gathered by IHAT was reported to the Ministry of Defence for it to consider systemic issues and make recommendations – see paragraphs 86 - 93 below.

(3) Contentions of the claimants that IHAT was not independent

38. A number of reasons were advanced by the claimants as to why IHAT, even as reformed and reconstituted, was still not independent. These can be summarised as follows:.

i) No armed force police force ("service police") should be engaged in investigative functions of this kind; it was in reality self investigation.

ii) The three service police forces worked closely together. This meant that the Royal Navy Police could not carry out an effective independent investigation.

iii) The Royal Navy Police had been directly engaged in operations in Iraq.

iv) The Royal Marines Police had been directly engaged in Iraq.

v) The Royal Navy and Royal Marines had been involved to a significant extent in the Joint Forward Interrogation Team (often referred to as JFIT) in respect of whom there were substantial allegations of serious misconduct, including unlawful interrogation techniques.

vi) Royal Navy Police had been involved in policy and training in relation to interrogation and detention which would be subject to the investigation.

vii) IHAT did not have sufficient independence to make decisions independently of the Executive or the hierarchy of the British armed forces.

viii) In relation to gathering material in relation to systemic issues, IHAT had failed to identify or analyse any systemic issues. There were no proper arrangements for reporting systemic issues.

ix) The statements of Louise Thomas showed that IHAT was in fact conducting its investigation improperly.

39. We will consider each in turn, first setting out our findings of fact.

(4) The Royal Navy Police, the independence of service police investigations and joint service working

40. The Royal Navy Police is one of the three service police forces established under the Armed Forces Acts. Like the other service police forces its head is a Provost Marshal. Its primary responsibility is to police members of the naval forces. In 2008-9 the Royal Marines Police which had a separate identity as a separate service police force and were accountable to the Provost Marshal (Army) were absorbed into the Royal Navy Police as the Royal Marines Troop. The Provost Marshal (Navy) has been responsible for them since 2008. When the Royal Marines engage in commando operations on land and the Royal Marines Troop deploy with them, the officer commanding the troop is provided from the Royal Military Police, though he is responsible to the Provost Marshal (Navy).

41. Save for the evidence of Louise Thomas to which we refer at paragraphs 98 and following, there is no evidence to suggest that one service police force of the British armed forces cannot carry out investigations into misconduct by members of the other armed services or the service police of another armed force.

42. As might be expected there is some deployment of members of one service police force to another. There is also joint co-operation in other areas. For example, the Royal Navy Police has deployed a very small number of its force to assist the Royal Military Police in its special investigations in Afghanistan and other members to help with forensic work with post mortems.

43. In addition, the service police forces jointly operate a Service Police Crime Bureau where members of the three service police forces work together. The Bureau provides archiving, recording and intelligence for crime prevention and detection. They also operate some joint training. These arrangements for deployment and joint working and training are very similar to the arrangements in place between the 43 civilian police forces in England and Wales.

44. However none of this detracts from the clear evidence before us that each service police force is a separate police force with independent command and independent working, save in the respects which we have mentioned.

45. We set out our conclusions in relation to the ability of the service police to investigate the wrongdoing alleged and the significance of the joint work the forces do to the independence of the Royal Navy Police at paragraphs 110- 118 below.

(5) The direct involvement of the Royal Navy Police in Iraq

46. The duty of the Royal Navy Police is, as we have explained, to police members of the Royal Navy. It is therefore important to examine first what the Royal Navy did in Iraq. It is clear it played a significant role in relation to the invasion and subsequent occupation of Iraq (referred to as operation Telic by many of the witnesses and in the documents). It was amongst the first to be deployed in 2003 and the last to leave service in 2009. However its participation was very largely sea-going. There were land duties, particularly in relation to the Joint Forward Interrogation Team to which we refer at paragraphs 56-59 below. However, the evidence before us is clear that

when naval personnel were assigned to duties on land, the Royal Military Police had general responsibility for policing them.

47. The Royal Navy Police carried out its duties at sea and in Bahrain where the Commander of Royal Navy Forces in Iraq had his headquarters; they did not deploy in support of policing functions in support of land operations in Iraq, save for some brief investigatory tasks on land.

48. It was submitted by Mr Fordham QC that the Royal Navy Police's deployment on land might be open to criticism, as they were not there in sufficient numbers or with an adequate supervisory function; there might therefore be criticism of the inadequacy of the systems for supervision which implicated them. One example was the evidence that one member of the Royal Navy Police who had been assigned to land duties with the Iraqi police had visited the Joint Forward Interrogation Team in relation to a transfer of a prisoner; it was submitted that he was open to criticism for not discovering more about what went on in that unit.

49. However, on the evidence before us, we are satisfied that in the instances when the Royal Navy Police deployed on land to investigate, it did so to investigate isolated incidents in relation to the conduct of naval personnel who were drunk or involved in misconduct towards other naval personnel or in respect of one who had negligently discharged a firearm. It was not involved in other investigations. In respect of the visit to the Joint Forward Interrogation Team, we are also satisfied that his visit had a very limited scope in connection with helping the Iraqi police in the investigation of a break-in at Basra Air station; it is therefore most unlikely that he could be the subject of any investigation or criticism.

50. Thirteen current members of the Royal Navy Police were also members of the Royal Navy Police who served in Iraq between 2003 and 2009. Seven of these carried out the minor policing tasks in Iraq of the kind to which we have referred. We are satisfied on the evidence that none was involved in the interrogation of Iraqi citizens.

51. We set out our conclusions in relation to the significance of the role of the Royal Navy Police in Iraq to the independence of the investigation by IHAT at paragraphs 115-119 below.

(6) The direct involvement of the Royal Marines Police in Iraq

52. The Royal Marines Police at the time of the invasion of Iraq were under the command of the Chief of Joint Operations and were part of the Royal Military Police and accountable to the Provost Marshal (Army). As we have explained at paragraph 40, the Royal Marines Police are now incorporated into the Royal Navy Police as the Royal Marines Troop. However none who was a member of the Royal Marines Police or is a member of the Royal Marines Troop participates or will participate in IHAT.

53. It is clear that the Royal Marines Police had a greater role in Iraq than the Royal Navy Police. They were deployed with the 3 Commando Brigade Royal Marines at the beginning of the invasion of Iraq from 19 March 2003 to 12 July 2003. They undertook a general policing role and assisted the Royal Military Police with the protection of the main supply route, investigating shooting incidents, identifying the

location of weapons caches and the handling of Iraqis who were captured during the period of fighting. The evidence of Commander Moran was that those captured were for the most part treated as prisoners of war; he had no evidence that any member of the Royal Marines Police was engaged in the capture or detention of persons who were not treated as prisoners of war. When 40 Cdo Royal Marines were deployed to Iraq in 2004, no Royal Marines Police deployed with them. Thereafter two members of the Royal Marines Police were deployed between June and December 2005 in a close protection role; they accompanied a senior officer on his visit to Abu Ghraib prison. Between 2006 and 2009, four members were deployed and undertook other close protection duties. Of the 18 current serving members of the Royal Marines Police, only one had a function in relation to detainees, but at the time was a member of the Royal Military Police. It also seems clear that although some members of the Royal Marines Police were involved in some way with captured persons and their detention, none was involved in or connected to the Joint Forward Interrogation Team which is the body against which most of the allegations are made.

54. It was submitted by Mr Fordham QC that the evidence provided as to the functions the Royal Marines Police had carried out on land when serving with 3 Commando Brigade Royal Marines at the beginning of the invasion of Iraq from 19 March 2003 to 12 July 2003 was not sufficient. We are satisfied on the evidence placed before us that no member of the Royal Marines Police was involved with the Joint Forward Interrogation Team, though as we shall explain at paragraph 58 the Royal Marines were. No member of the Royal Marines Police is being investigated by IHAT, or has been identified as a witness in such an investigation. A vast amount of work has been done to try and ascertain what the Royal Marines Police did. Given that work and the fact no existing or former member of the Royal Marines Police will be involved in IHAT, we consider that sufficient has been done to establish their extremely limited role in relation to the matters in issue.

55. We set out our conclusions in relation to the significance of the role of the Royal Marines Police in Iraq to the independence of the investigation by IHAT at paragraph 117 below.

(7) The involvement of the Royal Navy a nd Royal Marines in the Joint Forw ard Interrogation Team

56. Although the Royal Navy's engagement on land was very limited as we have set out at paragraph 46, it had an involvement in the Joint Forward Interrogation Team which was established by the British Armed Forces in Iraq to perform the function of "the timely and systematic extraction of information and intelligence from selected prisoners of war to meet intelligence requirements."

57. From early in the invasion until mid December 2003, the Joint Forward Interrogation Team operated in what became known as Camp Bucca near Um Qasr. From December 2003 until April or May 2005, it was at the logistics base at Shaibah in a compound known as the North Compound. It did not operate between April or May 2005 and November 2006. It then resumed at the North Compound at Shaibah until April 2007 when it moved to Basra Airport until it ceased work at the end of 2008 with the termination of the mandate.

58. It was comprised of an officer in command and personnel from the intelligence units of the army, navy and air force. There are two significant connections with the Royal Navy and Royal Marines:

    i) Of the 124 interrogators at the Joint Forward Interrogation Team, 24 were personnel of the Royal Navy or the Royal Marines. We accept that they were, as Mr Fordham QC submitted, 'embedded' in the Joint Forward Interrogation Team's policies and training;

    ii) The Royal Navy provided four of the seventeen Commanding Officers including an officer identified as SO40 in the Baha Mousa inquiry. He was the first commander who was deployed from the Defence Intelligence and Security Centre at Chicksands, Bedfordshire to Camp Bucca (see pages 685 and 723 of volume 2 of the report of Sir William Gage's Baha Mousa inquiry). It is also clear that the officer commanding was a naval officer at the time of various incidents or allegations of mistreatment and unlawful interrogation techniques such as hooding - for example at the time of the ICRC Report of February 2004, when concerns were raised over the interrogation techniques being used, even though no criticism was made of physical mistreatment (see paragraph 31 of the Report).

59. However, no members of the Royal Navy Police were at any of the locations at which the Joint Forward Interrogation Team worked. It follows that although IHAT will not have to investigate any conduct of Royal Navy Police at any of these locations, it will have to investigate matters when Royal Navy or Royal Marine personnel formed part of the Joint Forward Interrogation Team or commanded it.

60. We set out our conclusions in relation to the significance of the involvement of the Royal Navy and Royal Marines in the Joint Forward Interrogation Team to the independence of the investigation by IHAT at paragraphs 115-119 below.

(8) Royal Navy Police involvement in policy and training in relation to interrogation

61. Although it was submitted by Mr Fordham QC that there was general involvement of Royal Navy Police in the formulation of policy and training in relation to interrogation and detention and that insufficient disclosure had been made, it is clear three specific matters arose in relation to the involvement of the Royal Navy Police.

(a) The Review of Service Police Investigations: October 2004

62. On 21 May 2004, the Vice Chief of the Defence Staff, following the court martial of a US soldier for mistreatment of detainees on 19 May 2004 at Abu Ghraib, asked the Director General Security and Safety to investigate and review the effectiveness of investigations by Service Police in Iraq. Those consulted by the review included the Provost Marshal (Navy) and his Deputy. A wide range of data was collected from the service police including the Royal Navy and Royal Marines Police. The work done was set out in the *Review of Service Police Investigations and Operations* dated 12 October 2004. This review appears to have been one of the measures to improve standards referred to in the report of Brigadier Aitken to which we have referred at paragraph 13 above.

63. Mr Fordham QC submitted that this was one example of the close co-operation between the service police and that the court did not have the full picture which would only emerge as the investigations into what had happened in Iraq proceeded.

(b) Masters of Arms at the Defence Intelligence and Security Centre, Chicksands

64. There was, as is unsurprising, co-operation between the British Army, Navy and Air Force in training and the development of policy for interrogation and detention at the Defence Intelligence and Security Centre at Chicksands. It is necessary to explain the role of the Royal Navy Police in more detail, as it was contended that members of the Royal Navy Police attached to IHAT might not therefore investigate, with sufficient independence or rigour, policy and training issues in relation to detention and interrogation.

65. The Defence Intelligence and Security Centre at Chicksands had the function of 'training related to interrogation and searching' of detainees. It was not involved in the policy and training for detention which was a matter for the Royal Military Police. The work done at Chicksands is nonetheless of material significance to the work of IHAT; as the report of Sir William Gage sets out, two of those involved in the Baha Mousa investigation were trained there (see page 232-245 of volume 1 of the Report).

66. The involvement of the Royal Navy Police in the work at Chicksands was through three Masters at Arms deployed to Chicksands. Masters at Arms are naval Chief Petty Officers (the equivalent to a staff sergeant in the army) who are responsible for the contingent of Royal Navy Police deployed on board ships; their function is to focus on general discipline and good order; they do not investigate serious offences.

67. The work to which those Masters at Arms deployed to Chicksands were assigned was initially described by Commander Moran in his statement of 14 September 2012 as holding the post of "Training Validation and Job Analysis". In a further statement of 13 November 2012, he gave a much fuller description of the work. The three Masters of Arms worked as analysts at the Intelligence Customer Cell of the Intelligence Collection Strategy and Plans Unit. The role of this Cell was to produce requirements which would ensure the relevance and adequacy of any subsequent training, including compliance with policy in relation to interrogation. This work included determining the responsibilities for tasks to facilitate interrogation, including planning for tasks such as transport and the provision of basic information such as maps, the formation of an interrogation strategy and the provision of interpreters. As an analyst, a Master at Arms would be required to break down these tasks into component units for the purpose of training and to analyse whether existing training covered the tasks. Analysts were not involved in the development of policy for interrogation and did not carry out any of the training. The work done by each of the three Masters at Arms was set out in detail; we are satisfied that it was technical work and did not involve policy making. Nor did it involve the design of training; it was work that was part of the necessary preparation for the design of the training. It is clear that the responsibility for the design of training was at a much higher level.

68. It was submitted by Mr Fordham QC that the involvement of the Masters at Arms must have entailed interaction with intelligence officers as to the effectiveness and fitness for purpose of the training used in operations. This involvement therefore indicated a substantial involvement by a member of the Royal Navy Police or Royal

Navy in relation to the regimes adopted in units such as the Joint Forward Interrogation Team. Moreover, they had a role in validating the training. This involvement meant that they would have to be investigated.

(c) Training in conduct after capture

69. One Royal Navy Police Officer was involved in 'Conduct After Capture' training, as a resistance to interrogation instructor. A further Master of Arms was deployed to Chicksands and assigned to train service personnel exposed to high risk of capture on how to deal with interrogation.

70. It was submitted by Mr Fordham QC that if personnel were being trained to withstand interrogation which would no doubt involve techniques that violated well established principles of international law, then this could influence the treatment of those captured by the British armed forces. We accept that this risk exists: see Sir William Gage's Report on the Baha Mousa Inquiry, Volume 2 at Page 523, Paragraphs 6.63-6.64. It is therefore important to ensure those trained in techniques of evading interrogation on capture do not interrogate those detained and that their training is kept separate.

(d) Our findings of fact on the involvement in training and policy.

71. There is plainly a vast amount of documentation in relation to the policies and training for interrogation and detention in the period from 2002-9. The Secretary of State has conducted an extensive search of documentation. We accept that, although it is possible that new material might emerge in the course of the investigations, it is most unlikely that it will change the findings we make. For example, the Secretary of State produced a document dated 12 February 2003 entitled *Delivering a Deployable Defence Interrogation Capability*; this referred to the capability of all the armed forces including the Royal Navy, the need for the establishment of a Joint Forward Interrogation Team and the need for personnel from the Royal Navy. However it is clear from a study of the document, in the light of the explanation from Commander Moran, that this was a high level planning document addressed to the Chiefs of Staff. We accept his explanation that it never involved the Royal Navy Police and, as we have set out above at paragraph 59, no member of the Royal Navy Police was involved in the Joint Forward Interrogation Team.

72. We are satisfied that no senior officer in the Royal Navy Police had any involvement in the formulation of detention and interrogation policy or in training. The role of other members of the Royal Navy Police in the development of land-based detention and interrogations policy and training was minor. It was what might be best described, without in any way seeking unduly to downplay the contribution made, as low level technical assistance given by the Masters at Arms and some involvement at a low level in training after capture. We do not accept the submission of Mr Fordham QC that it amounted to any more than that. There was, as is unsurprising, obvious consultation with the Provost Marshal (Navy) in relation to matters relating to the three services, but none that can be described as having any connection with the formulation of policy or training in relation to detention and interrogation in Iraq.

73. We set out our conclusions in relation to the significance of the involvement in policy and training to the independence of the investigation by IHAT at paragraphs 116- 119 below.

(9) Charging and prosecution: the power or influence of the Executive and the armed forces hierarchy

(a) The necessity of independence in investigations and prosecution decisions

74. It is axiomatic that decisions on whether to pursue an investigation and then whether to prosecute must be made independently of the Executive. No civil servant, let alone a Minister can be permitted to have any influence whatsoever. It is clear that in making such a decision the police are constitutionally independent of the Executive and of any local authority or official to which they are accountable in other matters: see *Fisher v Oldham Corporation* [1930] 2KB 364, *R v Commissioner of Police for the Metropolis ex p Blackburn* [1968] 2QB 118 at 136 and 139. We can see no reason why the service police could be in any different position. They must be able to make their decisions entirely independently of the Secretary of State for Defence, any civil servant in that Ministry and, even more importantly, of anyone in the hierarchy of the armed forces.

75. If in cases to be prosecuted in the ordinary courts a decision to prosecute is referred to the Director of Public Prosecutions or another member of the Crown Prosecution Service, it is well established that in deciding whether to prosecute, a wide margin of discretion is accorded on recognised principles arising from the independent constitutional position of the Director of Public Prosecutions: see *R v A* [2012] EWCA Crim 434; *Moss v CPS* (2013) 177 JP 221 and *R(Barons Pub) v Staines Magistrates Court* [2013] EWHC 898 (Admin). The Director of Service Prosecutions is in exactly the same position as his civilian counterparts: for an illustration see *R v Armstrong* [2012] EWCA Crim 83 at paragraphs 38-42.

(b) The arrangements in place to ensure independence

76. No question was or could possibly have been raised about the independent way in which Mr Bruce Houlder QC, the Director of Service Prosecutions, has acted. Nor can any issue sensibly arise as to the independence of the Head of IHAT (Mr White until September 2012 and Mr Warwick since 19 November 2012). The only real issue is whether Lieutenant Commander Hawkins (as the person within IHAT responsible for taking decisions on prosecutions and for the members of the Royal Navy Police assigned to IHAT), has been or may in the future be subject to influence in any decisions in relation to investigation and prosecution.

77. He is under the direct command of the Provost Marshal (Navy), Commander Moran, who is in operational command and effective control of the Royal Navy Police assigned to IHAT. Commander Moran is responsible for the conduct of the investigations and professional standards. He is answerable, under s.115A of the Armed Forces Act 2006, to the Defence Council (the body entrusted with the highest level of command by letters patent from Her Majesty) as to whether he has carried out his duties independently and free from improper interference. His letters of appointment make clear that that responsibility is owed to the Admiralty Board of the Defence Council and its executive committee, the Navy Board.

78. We are satisfied that Commander Moran has complete institutional independence as regards the conduct of investigations by the Royal Navy Police and is not subject to any interference on an individual basis with that independence by the hierarchy of the armed forces. He cannot be told what to do in any investigation by any member of the Executive or the armed forces. Indeed any member of the armed forces who tries to interfere in any investigation or prosecution would be liable to prosecution under s.27 of the Armed Forces Act 2006 for an offence punishable with two years imprisonment; that person would also be liable to prosecution for interference with the course of justice, a much more serious offence invariably punished with a significant period of imprisonment.

79. However there is one other aspect of the evidence to which it is necessary to draw attention. Commander Moran is not responsible for disciplinary action in relation to members of the Royal Navy Police; such powers are held by the commanding officer of the naval unit to which the police are attached. That has become the rule because the Royal Navy Police are often at sea for long periods of time and have to perform other functions. The commanding officer therefore, it is said, is required to have powers of discipline over them. The Navy, for reasons not explained, apply this principle to the Royal Navy Police when ashore. The Royal Marines Police Troop has similar arrangements. Commander Moran and therefore other members of the Royal Navy Police have as their commanding officer, Commander Paul Jones of HMS Excellent, a shore establishment in Portsmouth; he appears to have commanded the Fleet Diving Squadron in 2003 when it played a large role in Iraq.

80. We set out our conclusions in relation to the significance of these arrangements (and in particular those relating to disciplinary powers) to the independence of the investigation by IHAT at paragraphs 120 and following below.

(c) The work done by IHAT

81. As Mr White explained, the plan of IHAT was to look at a cross section of cases first. By June 2011, it was considering 97 separate cases involving 152 Iraqis; this included the review of 9 deaths of Iraqis whilst in the custody or under the control of British armed forces. In seven of those deaths there had been previous investigations. By June 2011, 2 reviews had been completed. By September 2012, its case load had grown to 117 separate cases involving 181 Iraqis.

82. It is clear that some delay was caused by a dispute between those representing some of the claimants and the IHAT team about how the interviews were to be conducted. It is unnecessary to set out the detail, but it is clear that there has been an impasse from November 2011 in relation to a number of matters including the use of the Istanbul Protocol as a basis, the necessity for the Iraqis to come to the UK and a proposal by the claimants that members of the Royal Navy Police should not be involved in the work or its product.

(d) The death cases

83. We consider these separately as the second issue – see paragraphs 126 and following below.

(10) The arrangements for reporting systemic issues: the role of the Executive

(a) The role of IHAT and IHAP

84. As we have set out at paragraph 37 above, the third function of IHAT is to report on systemic issues so that consideration can be given as to whether any appropriate action is needed.

85. As originally constituted, IHAT was to work in conjunction with IHAP to which we have briefly referred at paragraph 20.ii). It was to act as a supervisory panel to ensure the prompt and effective handling of cases investigated by IHAT and to consider the results of the investigations made by IHAT with a view to identifying wider issues to be brought to the attention of the Ministry of Defence or its Ministers. IHAP included the Director of Judicial Engagement Policy and the Director of Personnel Service (Army). In *AZM (No.1)*, the Court of Appeal expressed concerns about its composition and hence its lack of independence: see paragraph 39 of the judgment. IHAP was thereafter disbanded.

(b) The reporting to the Ministry of Defence

86. The evidence of Mr Peter Ryan, the Director of Judicial Engagement Policy (to whom we have referred at paragraph 32.i) above) was that it was always envisaged that the investigations would touch on broader issues such as training and policy. IHAT therefore now reported on such issues through the Directorate of Judicial Engagement Policy established in 2009.

87. The Directorate is responsible for the Ministry of Defence's response to and cooperation with inquiries and litigation arising from military operations. It is also responsible for ensuring that wider lessons are learnt. It works closely with the armed forces.

88. The reporting process which has been established is that IHAT submits quarterly reports and interim reports to the Provost Marshal (Navy) and identifies emerging patterns that may be indicative of systemic issues. These are then provided to the Directorate. As we have mentioned at paragraph 26.ii) a protocol was agreed between the Provost Marshal and the Directorate for the provision of full unredacted reports on each case at an appropriate time. The protocol also enables the Head of IHAT to supply information, provided it does not prejudice the on-going work of IHAT. The Directorate has also reached agreement with the Director of Service Prosecutions as to the provision of information when appropriate.

(c) The review by the Directorate of Judicial Engagement Policy

89. The Directorate identifies, from the quarterly and interim reports and other information it receives, systemic issues and measures already taken to address such issues. If measures have not been taken or appear to be inadequate, then consideration is given to what needs to be done. Implementation follows. The Directorate works closely with others in the Ministry and armed forces in these tasks. Since 23 October 2012 the work is subject to assessment by the Systemic Issues Working Group chaired by Mr Ryan; all the systemic issues are recorded on the Directorate's Systemic Issues Master Register.

90. 27 issues had been identified by the Systemic Issues Working Group on 23 October 2012 and forwarded "for action" by designated Subject Matter Experts. Seventeen of these issues were classified as "manifestations of abuse".

91. One example provided to us was what happened after the detailed and incisive report of the Director of Service Prosecutions on his decision that a prosecution did not meet the public interest test or the evidential test in the case relating to *Kammash* where the allegations related to what had happened in interrogations in 2007. The Director of Service Prosecutions had identified seventeen wider issues in relation to the training of interrogators, their supervision and the techniques used which the Directorate were considering together with the issues that had emerged from the Baha Mousa Inquiry; the Systemic Issues Working Group was dealing with these. A report was made to the Detention Working Group to which we refer at paragraph 97 below.

92. By January 2013, the Directorate had reviewed five interim reports and three quarterly reports from IHAT as well as the report on the *Kammash* case. By the same time work had progressed on the 27 issues identified by the Systemic Issues Working Group; it decided that 15 had been dealt with adequately.

(d) The status of the work done by the Directorate

93. We are satisfied on the evidence before us that the Directorate of Judicial Engagement Policy, despite its work done in the conscientious manner we have set out, cannot be described as independent. It acts on behalf of the Secretary of State and is an integral part of the defence and military hierarchy.

(e) Provision of information to the public

94. At the time of the hearing in January 2013, neither the Directorate nor IHAT reported its work to the public, save to the extent a ministerial statement was made to Parliament. However in his statement made on 20 March 2013, Mr Ryan told us that:

    i) IHAT would establish a website (expected to be operational in the summer of 2013) in order to keep the public informed of its work, but in a manner which would not prejudice its investigations or any prosecutions. It would publish some information about progress and it would at the conclusion of its work publish its final closing report.

    ii) IHAT would keep the complainants (including the claimant in these proceedings) informed of progress and of decisions made.

    iii) The Ministry of Defence would publish annually on its website information about systemic issues identified and steps taken. It was anticipated that the first report would be published in December 2013.

95. We set out our conclusions in relation to the discharge of the investigatory duty at paragraphs 193-195 and 199-223 below.

(f) The Secretary of State's reasons for not establishing an immediate public inquiry into systemic issues

96. The Secretary of State does not consider that it is necessary to establish a public inquiry at the present time into systemic issues. He wishes IHAT to continue with its fact finding work and, in conjunction with the Director of Service Prosecutions, to take decisions on prosecutions. It will then be possible to assess from its work what systemic issues arise and what is the best way of dealing with them. The need for such an inquiry would also be dependent on a consideration of other inquiries.

97. He drew attention to the fact that the Report of the Baha Mousa Inquiry had made 73 recommendations all but one of which had been accepted; work was ongoing as to the implementation of these which was being overseen by the Ministry's Detention Working Group and Detention Steering Group established by the Chief of Defence Staff. Furthermore the Secretary of State did not want a public inquiry to prejudice any prosecutions that might be undertaken. He was also concerned as to the cost of such an inquiry, given the severe pressure on public finances.

(11) The allegations of Louise Thomas as to the way in which IHAT in fact operated

(a) The statements made by Louise Thomas

98. We have so far set out our findings on the objective evidential material which was largely relevant first to the ability of IHAT to carry out its investigative, prosecutorial and reporting functions independently and, second, as to the perception that it was able to do so.

99. In September 2012, as we mentioned at paragraph 28 above, the solicitors for the claimants notified the court of information they had received from Louise Thomas, the former office manager of IHAT's Media Review Team, who had left IHAT in July 2012. She was highly critical about the way in which IHAT was carrying out its tasks. Her criticism was primarily directed at the way the Media Review Team had carried out its review of the video and audio recordings that had been made of the interrogations in Iraq and its analysis of them for the purposes of determining whether the methods of interrogation or detention had been unlawful.

100. Louise Thomas subsequently made three statements and gave oral evidence to us on 11 December 2012. In summary, her statements set out serious criticism of IHAT which can be summarised as follows:

i) Despite the decision of the Court of Appeal in *AZM (No. 1)* six members of the Royal Military Police were still employed at IHAT in May and June 2012.

ii) The matrix devised by Mr John Birch for grading instances of unacceptable behaviour during interrogation was not being correctly applied by the Royal Military Police working at IHAT; they would not view behaviour as unacceptable where it clearly was. Some of the Royal Navy Police had the same attitude towards behaviour. Many examples were given.

iii) There were missing recordings. IHAT staff were not concerned to find out why they were missing or to pursue other obvious gaps in the evidence. Her own attempts to find them were blocked. The missing recordings were significant.

iv) The logs kept of the review of the recordings were of poor quality.

v) The culture at IHAT was incompatible with her own work ethic; many of the employees were ex-policemen who had lost their enthusiasm for their work. They spent time surfing the internet or doing nothing. Many were cynical as to the process and the allegations made.

vi) She concluded that IHAT was not a genuine investigation intended to provide justice to the victims, but a face-saving exercise.

101. In addition, her initial evidence was that her work had helped uncover a British operation to arrest and interrogate five Iraqis in mid-May 2009. That was a very serious allegation, as by that time the mandate had been determined and there was no power to do this. She also said that the interrogation had employed techniques that were prohibited and that the detainees were handed over to the US forces in June 2009. As she accepted, these were very serious allegations against the British armed forces. However, she subsequently withdrew her evidence on these issues on the basis that she had made a mistake as to the year. What had happened, had happened in 2008.

102. The matters we have summarised in paragraph 100 were adopted by the claimants as part of their case on the lack of IHAT's independence. A thorough, time consuming and costly investigation was carried out by the Treasury Solicitor; all of those who were identified in her statement were questioned. A substantial amount of material was produced on behalf of the Secretary of State along with detailed evidence in the form of written statements.

(b) The position of the claimants at the hearing on 11 December 2012

103. Shortly before the hearing on 11 December 2012 at which Louise Thomas gave evidence, the claimants' legal team reviewed the allegations in the light of the evidence served on behalf of the Secretary of State in answer to them. With characteristic responsibility, the claimants' legal team decided that the claimants could not properly sustain several of the allegations. We were provided with details of the points accepted by Louise Thomas and other points that were not being pursued.

104. In the result, the claimants only required three of the witnesses whose statements had been served on behalf the Secretary of State to attend. One of those, Mr Kelly was overseas and it was agreed that only two would be called – Mr Birch and Lieutenant Commander Hawkins. The allegations pursued were allegations that instances of wrongful behaviour had been inaccurately graded, there was inadequate critical examination of material and IHAT was placing reliance on the work done by the Royal Military Police. IHAT was therefore not only failing to investigate individual instances of wrongful conduct, but also failing to uncover systematic ill-treatment. It was therefore not acting independently and effectively in the manner required of an investigation under Articles 2 and 3.

(c) Our findings on the evidence

105. After hearing the evidence of Louise Thomas, considering the written materials and seeing for ourselves some of the recordings that were said to have been inaccurately graded, we are entirely satisfied that the allegations made by Louise Thomas are without foundation. At the outset of her cross examination by Mr Havers QC she maintained that the IHAT was not a genuine investigation, but merely a face saving exercise; it was a cover up. Having heard her evidence and examined the documentation we regret to conclude that we could place no reliance on her evidence. She had realised before confirming the allegation set out in paragraph 101 that the incident had occurred in 2008. She resigned from IHAT not because of concerns about its work (as she had said in her statement), but to obtain better employment. When that employment did not materialise, she asked to withdraw her resignation, but IHAT refused. Her CV submitted to IHAT contained matters (the length of time and position she had held in previous employment and a negative answer to a question about integrity issues) which she must have known were untrue. Apart from these matters which in themselves show that she was not a person who could be relied on to tell the truth, the careful, thorough and penetrating cross examination of Mr Havers QC and our own viewing of some of the recordings demonstrated that her evidence as to the conduct of the analysis and grading by those at IHAT, the extent of the missing recordings, the attitude of the staff and of the Royal Military Police were without foundation. We regret to conclude that she put forward an inaccurate account, probably in a misguided attempt to discredit IHAT.

106. In contrast, the statements of witnesses served by the Secretary of State showed that the investigation was being carried out in a careful and systematic way. For example, there was a procedure for prioritisation of examining the worst cases first and to ascertain where the bar was set for unlawful behaviour in interrogation. When an interrogation session was reviewed in detail, what had occurred during the session was recorded on a session report which graded the behaviour. When proceedings are contemplated, a forensic review was then made summarising the interview.

107. The evidence of Lieutenant Commander Hawkins was impressive. We have no doubt that, as the senior member of the Royal Navy Police attached to IHAT, he is robustly and independently making decisions and will continue to do so.

Our Conclusion

108. As we explain at paragraphs 136-146**,** an inquiry, whether it be investigative only or have additional functions such as deciding on prosecution or making recommendations, must be effective and independent and be seen to be independent.

109. We have reached the conclusion on the evidence we have heard and the findings of fact that we have set out in the preceding paragraphs that IHAT is independent and objectively can be seen as independent.

(a) The independence of service police investigations and prosecutorial decisions

110. First, we must address the submission that military self-investigation is insufficient to be compatible with the required standards of independence. Mr Fordham QC, relied on the decisions of the Strasbourg Court in cases such as *Barbu Anghelescu v Romania (App No 46430/99), Shevchanko v Ukraine (2006) 45EHRR 27* and *Kallis v Turkey (App No 45388/99)* to the effect that the service police are ultimately part of

the military hierarchy and cannot carry out independent investigations of military personnel. There were inherent problems of safeguards and independence with regards the capability of carrying out an 'internal' investigation. Furthermore it was submitted that as part of service law under Queen's Regulations, the Royal Navy Police are generally required to refrain from criticism of their superiors and the service**.**

111. We cannot accept that broad submission. Nothing in the authorities relied on by the claimants shows that the current investigative process established by IHAT lacks independence. The decisions in *Barbu Anghelescu, Shevchanko* and *Kallis* involved investigations where it was clear that the military investigating officers and those they investigated formed part of the same hierarchy with no provision for institutional or individual independence.

112. We can see no objection in principle to a service police force investigating service personnel of the service which they police or another service police force. The only question is whether on the facts of a given case, the service police is independent of the events or personnel being investigated. We consider that at paragraphs 115-119 below.

113. The fact that the service police forces work together in other matters or share some facilities (as we have set out at paragraphs 42-44 above), does not affect the ability of one of the forces to investigate another. There are very similar arrangements between civilian police forces, but such arrangements have never been seen as precluding one force investigating allegations against another; indeed the experience is that they do so with great thoroughness and complete independence.

114. Moreover, if the broad submission of Mr Fordham QC was correct, it would strike at the whole structure of the service police and prosecution service. There is no evidence to suggest that the service police do not carry out thorough and independent investigations of alleged crimes. On the contrary, the evidence clearly shows that the service police do carry out independent investigations which result in the bringing of prosecutions, not only in relation to misconduct in general, but also in relation to events in Iraq. It can be seen that the investigation into the deaths of Rhadi Nama, Abdul Jabbar Mossa Ali and Tanik Mahmood (carried out by the service police of the armed force in respect of which allegations of misconduct were made) may not have been sufficiently thorough and therefore require reinvestigating (see paragraphs 128.i) and 128.ii) below). However, the fact that IHAT has reached that conclusion is a clear pointer to its ability to carry out an independent investigation.

(b) Direct involvement in Iraq, the development of policy and training

115. We next turn to the submission that the involvement of the Royal Navy Police in IHAT meant that it was not independent of the events and personnel being investigated given our findings on the direct involvement of the Royal Navy Police and the Royal Marines Police in Iraq, Royal Navy and Royal Marine personnel in the Joint Forward Interrogation Team and participation in developing training.

116. We have set out our findings as to involvement of the Royal Navy Police in Iraq (paragraphs 46-50 above) and in policy and training (paragraphs 61-72 above). That very limited involvement is entirely immaterial to the allegations raised. No member

of the Royal Navy Police had any knowledge of the allegations made by the claimants. It cannot therefore be contended that the Royal Navy Police had failed to prevent or detect the abuses alleged by the claimants.

117. We have set out our findings in relation to the Royal Marines Police at paragraphs 52-54 above. The Royal Marines Police were not under the control of the Provost Marshal (Navy) or part of the Royal Navy Police at the time of the matters being investigated or likely to be investigated. No member of the Royal Marines Police Troop past or present will be involved in IHAT. However, the relevant question is whether, now that the Royal Marines Police Troop is part of the Royal Navy Police, the Royal Navy Police will fail to investigate the actions of persons who are now part of their force or will be perceived as lacking the requisite independence because they might fail to do so. We do not consider that they will. Furthermore, as is clear from paragraph 36 of the judgment of the Court of Appeal in *AZM (No. 1),* a much more direct connection or involvement is required for any perception of lack of independence to arise.

118. Mr Fordham QC submitted that it was not sufficient to state that a scheme was in place whereby people could recuse themselves if they were implicated in the operations during the invasion. The fact that some personnel have already recused themselves was an indication of the true scope of the Royal Navy Police's involvement in operations.

119. We see no reason to conclude that Royal Navy Police cannot investigate the serious allegations relating to the involvement of the Royal Navy and Royal Marine personnel at locations of the Joint Forward Interrogation Teams, details of which we have set out at paragraphs 56-59 above. The fact that Royal Navy or Royal Marine personnel were involved through participation or command makes no difference. Quite apart from the very small scale of the participation in IHAT, the members of the Royal Navy Police are, in our judgment, so organised (as we have set out) that their investigation and any decisions on prosecution are and will continue to be independent.

(c) Independence of IHAT's investigative and prosecutorial function

120. We do not accept the initial contention of the Secretary of State that it was necessary to have a member of the service police as part of the investigative body to comply with the requirements as to prosecution set out in s.116 of the Armed Forces Act to which we have referred at paragraph 36 above. Even if the decision to refer for prosecution a member of the armed forces for the type of crime likely to be in issue in the investigation must be made by a member of the service police under s.116 (which it is not necessary for us to decide), that function could have been provided for either by assigning one officer to IHAT or asking IHAT to submit information to that officer in a manner similar to the submission to the Director of Service Prosecutions.

121. However, that is not the question. We have already set out our conclusion that the actual and perceived independence of the Royal Navy Police is not affected by what happened in relation to the invasion and occupation of Iraq. We are also satisfied that IHAT is independent and, subject to the issue relating to the disciplinary powers of the Royal Naval command, is perceived in its investigative role to be institutionally independent from the Ministry of Defence and the hierarchy of the armed forces. The

Provost Marshal (Navy) also has sufficient institutional independence. We are satisfied that Lieutenant Commander Hawkins has individual independence in that he makes his own decisions as to investigation and prosecution independently and will continue to do so.

122. We are nonetheless troubled by the powers of discipline that the Royal Naval command has over the Royal Navy Police, including the Royal Marine Police Troop. Whilst we understand the reasons for this at sea, we can see no reason for such powers to be held by the Naval Command whilst the Royal Navy Police are assigned to IHAT. There is a risk of perception as to the independence of a police officer who is subject to the disciplinary sanctions of the armed forces command.

123. Despite this troubling concern, we have had the benefit of hearing from Lieutenant Commander Hawkins. We are satisfied that neither the Ministry of Defence nor the Royal Naval command nor any part of the hierarchy of the armed forces have or will have any influence whatsoever on his decisions including his decisions as to investigation or prosecution. Taking that into account and the other factors to which we have referred (including the significant penal sanctions which would be visited on any member of the Royal Navy or Royal Marine command who sought to interfere in any investigation or prosecution), we have concluded that this troubling concern should not lead to the conclusion that IHAT is not independent and not perceived to be independent in relation to its investigative and prosecutorial functions. However, we would hope that this concern would, for the future, be addressed by the Defence Council and the Secretary of State so that the risk of the perception of lack of independence by reason of the disciplinary powers of the Royal Navy and Royal Marine command is removed. That must, however, be a matter for them.

(d) The discharge of the lessons learnt function.

124. It was submitted by Mr Fordham QC that the current investigative structure is even more inadequate, by removing a key investigative function to an even more 'internal' body.

125. For reasons we set out at paragraphs 193-195 below, the arrangements for the discharge of the function in relation to the wider issues and lessons learnt are not adequate and require further consideration.

ISSUE 2: WHAT ARRANGEMENTS HAD BEEN MADE BY IHAT TO INVESTIGATE THE CASES RELATING TO DEATHS OF IRAQIS WHILST IN THE CUSTODY OR UNDER THE CONTROL OF THE BRITISH ARMED FORCES? WERE THE ARRANGEMENTS ADEQUATE?

126. As we have explained, it was the claimant's contention that, even if IHAT were sufficiently independent, its establishment and its work did not discharge the investigative duties placed on the Secretary of State. It was contended, as it had been in *AZM No.1* that a wider ranging inquiry was needed. In the course of the proceedings, it became clear that the real focus of concern related to cases where

deaths of Iraqis had occurred in the custody or under the control of the British armed forces.

(1) The original focus of IHAT

127. The original focus of IHAT when established in March 2010 was the cases where allegations of breach of Article 3 had been advanced. It was therefore structured by Mr White to carry out that task. However, in December 2010, the Provost Marshal (Army) who was then responsible for IHAT required IHAT to investigate the adequacy of the investigation of 9 deaths as we have set out at paragraph 81. It does not appear that additional resources were allocated for this task; Mr White therefore had to assign some of the team to carry out this work.

128. In his statement of 12 September 2012, Mr White drew to the attention of the court the position in these cases. Three of the reviews had by then been completed; two reviews were nearing completion. The three which had been completed were:

i) **Rhadi Nama** and **Abdul Jabbar Mossa Ali:** The review concluded that, in the case of two (the deaths at Camp Stephen, Basra of Rhadi Nama on 8 May and of Abdul Jabbar Mossa Ali on 13 May 2003 whilst in the custody of the 1st Battalion, The Black Watch), the investigation by the Royal Military Police had been inadequate and further investigation by IHAT was required. That decision was made on 11 April 2011. Mr White stated that significant progress was being made in the case of Ali as a result of the finding of further documents and the taking of statements. As the same sub-unit was involved in both deaths, the progress on Ali was likely to assist on the case of Nama. We return to progress in the investigation of these deaths at paragraphs 134.v) and 134.vi) below.

ii) **Tanik Mahmood**: He had been detained by Australian Special Forces and was in the custody of the RAF whilst being transported as a prisoner of war in a helicopter on 11 April 2003. IHAT concluded that the investigation was inadequate. This was reported to the Provost Marshal (RAF) and the RAF police have re-opened the investigation.

Work on the other Article 2 cases had not been commenced because of the constraint on resources. As we have set out at paragraph 25, by March 2013 only 50 of the required 94 civilian investigators had taken up employment at IHAT.

(2) The number of death cases

129. It became evident to us at the hearing in January 2013 that the information in relation to the investigation of cases where deaths had occurred was far from satisfactory. The skeleton argument of the claimants set out a number of such cases some where their solicitors, Public Interest Lawyers, had been instructed and others where they had not. It was difficult to reconcile the information. We requested and then ordered the provision of further information. We were told that there might be as many as 150-160 cases that required investigation.

130. On 20 March 2013 we were provided with much more information in relation to specific cases by Mr Warwick and by Mr Ryan, as well as two schedules providing

some information about 165 cases where death had occurred. The first schedule set out a total of 65 cases which had been identified by the claimants' lawyers. 44 of these cases had been referred to IHAT and were being examined; 9 of the 65 had been referred to IHAT but were not being examined by IHAT and 12 further cases had not been referred to IHAT. Some in the last category were accepted to be cases where an Article 2 investigative duty arose. We were provided with a second schedule setting out a further 100 deaths in Iraq known to the Ministry where the Royal Military Police were called upon to investigate. It is accepted that 26 of these further cases fall within the Article 2 duty. These schedules make clear that the scale of the task is unprecedented.

(3) The position of IHAT in relation to death as explained to us

131. The information provided to us by Mr Mark Warwick and Mr Ryan in respect of the work being done by IHAT in relation to 10 specific cases can be summarised as follows. Their statements contained considerable detail, but we do not set that out as it might prejudice ongoing investigations.

(a) The nature of reviews of investigations of deaths

132. The death cases which had been the subject of an earlier investigation were subject to a review. That comprised a pre-investigative assessment to see if a full review was required. Such a review was not an investigation to see if a criminal offence had been committed, but a review of the investigation to see if it had been properly investigated and whether a further investigation was required and practicable. The review model followed the model established by the Association of Chief Police Officers, ACPO.

133. That work had been assigned to the review team headed by Mr McKeaveney, a retired Superintendent who had served with the Wiltshire Constabulary; he had worked for IHAT since December 2010. It had seven staff, but frequent staff turnover meant that there had been unavoidable and detrimental effects on the reviews. Pay levels had been increased to reduce the impact of losing staff.

(b) The cases in relation to which detailed information was available

134. The position was as follows:

i) **Tanik Mahmud**: He was one of the three to whom Mr White referred: see paragraph 128.ii) above. The RAF Police are conducting the investigation; details were provided to us, but it is not appropriate to set them out in view of a possible prosecution. We return to this death at paragraph 166.

ii) **Uday (Atheeer) Kareem Khalif**: He was shot and killed at a petrol station at Basra. His death was investigated in 2003; one soldier was reported to the Prosecuting Authority for prosecution for murder. The prosecution was discontinued. The investigation was referred to IHAT on 30 October 2012; records have been retrieved. The review is awaiting allocation to the Review Team as and when capacity allows. We return to his death at paragraph 166.

iii) **Sayeed Shabram (Shabrab)**: We consider his death at paragraph 160 below.

iv) **Ahmed Jabber Kareem Ali**: He was a 15 year old boy who was detained by Iraqi police on 8 May 2003. It is alleged that he had been transferred to the British armed forces and forced into the Shatt Al Basra Canal and drowned. The death was investigated by the Royal Military Police and was the subject of a court martial of four soldiers for manslaughter in 2006. All four were acquitted. The review by IHAT is ongoing. It had been delayed because of the turnover of personnel. It was anticipated that the report on this case would be available by the end of 2013. We return to his death at paragraph 159 below.

v) **Abdul Jabbar Mossa Ali** : He was one of the three to whom Mr White referred – see paragraph 128.i) above. The reinvestigation had started in September 2011, but it had encountered several problems. Although the archive search was completed by March 2013, there was a significant amount of further work required, including interviewing Iraqis; the family was represented by Public Interest Lawyers who had requested that the family not be contacted directly. It was hoped the investigation would be complete by the end of 2013. We return to this death at paragraph 166.

vi) **Rhadi Nam a**: He was one of the three to whom Mr White referred – see paragraph 128.i) above. The problems and the time scale were similar to those of Abdul Jabbar Mossa Ali. We return to this death at paragraph 166.

vii) **Naytham Jabir Ati Al-Mayahi**: After being hit by gun fire in Um Qasr on 23 March 2003, he was taken to a British military medical facility; his family say he was last seen by them after being placed in a British military helicopter and flown away. This investigation is being conducted without prejudice to the Secretary of State's contention that his death does not fall within the territorial scope of the Convention; one likely possibility is that he died of his gunshot wounds.

viii) **AJ Khalif**: He was detained at a British Army Vehicle check point on 7 August 2003; he was detained and when being transported in a military vehicle, it was involved in an accident. He was injured. He was subsequently found dead on the roadside; he had been shot. The matter was not investigated by the Royal Military Police although he had been under the control of the British armed forces. IHAT has reviewed this case but has not yet decided on whether an investigation is required.

ix) **Baha Mou sa**: The matter is being investigated to see if any of those responsible for his death can be brought to justice.

x) **Sabiha Khudur Talib**: She died on 15 November 2006 during a search of her house by British armed forces when shooting broke out. She and her son were shot. Her son was killed; she was taken to a British medical facility but certified dead on arrival. Her body was found either by the side of the road or in a British Army body bag. There was no contemporary investigation. IHAT is reviewing the death.

135. Mr Ryan set out in his statement of 20 March 2013 details of two cases not being investigated by IHAT:

i) **Nadheem Abdullah**: He died on 11 May 2003. The Judge Advocate General decided there was no case to answer on 3 November 2005. We will consider this case in greater detail in paragraph 155 below.

ii) **Hassan Abbad Said:** He died on 2 August 2003. This is another case which we consider in detail at paragraph 154 below.

(3) The State's Duty to investigate deaths

(a) The nature of the issue

136. It was Mr. Fordham QC's submission that the circumstances we have set out demonstrated that the Secretary of State had to comply with the State's duties to ensure that there has been a full, fair and fearless investigation of the circumstances in which the relevant Iraqi died in custody and which had been accessible to the victim's families and to the public.

137. As is apparent (and illustrated by the investigation into the death of Naytham Jabir Ati Al-Mayahi to which we have referred at paragraph 134.vii) above), there are disputes as to whether certain deaths fall within the territorial scope of the Convention. In the present judgment, it is not necessary to resolve any of those disputed issues. It is accepted that we can address what the Secretary of State must do to comply with the State's investigative duty without having to determine whether any particular case falls within that duty. For that purpose it is sufficient to state that it is accepted that there are a significant number of deaths that fall within the territorial scope and a much larger number which potentially fall within that scope.

(b) The common law duty to investigate deaths in custody

138. It has been long established at common law that deaths which occur whilst a person is in the custody of the State are of particular concern. That is because of the particular vulnerability of those in custody and the dominant position of those agents of the State, whether soldiers, police officers or prison warders who are charged with looking after them, especially as they might be seeking admissions of guilt from the detainees. Lord Bingham in *R (Amin) v Secretary of State* [2004] 1 AC 653, 664 referred at paragraph 30 to the fact that the State owes a particular duty to those "involuntarily in its custody".

139. In the same case Lord Steyn referred at paragraph 50 to "the crucial public importance of investigating all deaths in custody properly." Lord Bingham in the same case quoted with approval at paragraph 30 the statement of Anand J in *Hilabati Behera v State of Orissa* (1993) 2SCC 746, 767 that:

> "There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life."

140. The need to ensure that this duty is complied with and that possible breaches of it are carefully investigated has long been recognised. Lord Bingham explained at paragraph 16 of his judgment in *Amin* that "for many centuries the law of England has required a coroner to investigate the death of one who dies in prison". Indeed section 8 (1) (c) of the Coroners Act 1988 ("the 1988 Act") requires a coroner to hold an

inquest where the deceased had died in prison "or such a place or in such circumstances as to require an inquest under any other Act".

141. There is also an important statutory provision relating to the need to have juries where an inquest is about to be held or is held and where there is reason to believe that the death occurred when the deceased was in police custody or was caused by a police officer "in the purported execution of his duty". In such circumstances, the coroner "shall proceed to summon a jury" (section 8(3) of the 1988 Act). In Scotland, there was a different, but comparable, regime as described by Lord Hope in *Amin* at paragraphs 55-59.

142. The long established principles, the statutory machinery and these judicial comments show the inevitable and justified concern about deaths of those held in custody. This is borne out by the need for the coroner to carry out a very thorough and detailed examination of the relevant facts and this duty was described by Sir Thomas Bingham M.R. when giving the judgment of the Court of Appeal in *R v North Humberside Coroner ex parte Jamieson* [1995] QB 1 at page 26 when he said that:

> "It is the duty of the coroner as the public official responsible for the conduct of the inquests, whether he is sitting with a jury or without, to ensure that the relevant facts are **fully, fairly and fearlessly investigated.** He is bound to **recognise the acute public concern rightly aroused when deaths occur in custody. He must ensure that the relevan t facts are exposed to public scrutiny,** particularly if there is evidence of foul play, abuse or inhumanity. He fails in his duty if his investigation is superficial, slipshod or perfunctory." (Emphasis added.)

143. As Lord Bingham said in *Amin,* the purpose of such an investigation is clear:

> "The purposes of such an investigation are clear: 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 relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."

The purposes of an inquiry into deaths during a military operation are discussed in more detail in *Keyu & others v Foreign Secretary* [2012] EWHC 2445 (Admin) at paragraphs 136-175.

(c) The duty under Article 2 of the Convention

144. It is common ground that Iraqis in the custody of the British armed forces were entitled to the protection of the Convention. Where deaths occur in such custody, the question for us to determine is whether the relatives of the claimants should be the subject of a special inquiry pursuant to Article 2 of the Convention, which is concerned with the right to life. It provides, insofar as is material, that:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of the court following his conviction of a crime for which the penalty is provided by law."

145. This Article 2 right has been described by the Strasbourg court as "one of the most fundamental provisions in the Convention": see *McCann v United Kingdom* (1996) 21 EHRR 97 at paragraph 147 and *Jordan v United Kingdom* (2003) 37 EHRR 52 at paragraph 102. That Court has made it plain that its approach to the interpretation of Article 2 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires its provisions to be interpreted and applied so as to make its safeguards practical and effective: see *McCann* at paragraph 146 and *Jordan* at paragraph 102.

146. The scope of Article 2(1) is not limited to the substantive right to life, but it also includes a very important additional procedural aspect, the application of which is in issue on this application. The Strasbourg court set out the broad scope of the duty in *Al Skeini*:

> "there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State …The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility …" (paragraph 163).
>
> "The obligation to comply with the United Kingdom's Article 2 obligation continues "even in difficult security conditions including in the context of armed conflict" as in the present cases. Therefore even in those circumstances, "all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into the alleged breaches of the right to life": *Al Skeini* (paragraph 164).

147. In addition to that broadly stated obligation, three aspects should be emphasised:

i) The investigation must be public and accessible to the victim's family. In *Al Skeini*, the Grand Chamber held in respect of the claim of the fifth applicant in those proceedings and a claimant in these proceedings (the father of Ahmed Jabbar Kareem Ali who died in the circumstances described in paragraph 134.iv) above) that there should be: -

> "an independent examination, accessible to the victim's family and to the public, of the broader issues of State responsibility, for the death, including the instructions, training and supervision given to soldiers undertaking tasks such as this in the aftermath of the invasion". (paragraph 174)

ii) The investigation must encompass broader issues such as planning. In *Al Skeini*, it was pointed out that although the essential purpose of an Article 2 investigation was to ensure the accountability of State agents or institutions for death occurring under their responsibility:

> "The investigation should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the State complied with its obligation under Article 2 to protect life" (paragraph 163)

iii) The investigation must include "lessons learned" following the identification of wider or systemic issues. Lord Bingham in *Amin* at paragraph 31 stated in a passage, which was applied by Maurice Kay LJ in *AZM (No.1)* at paragraph 12, that the purpose of an Article 2 investigation was:-

> "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 relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."

148. In our judgment, the Article 2 investigative duty of the State in the case of deaths in custody is only discharged by a full, fair and fearless investigation accessible to the victim's families and to the public into each death, which must look into and consider the immediate and surrounding circumstances in which each of the deaths occurred. These circumstances will ordinarily include the instructions, training and supervision given to soldiers involved in the interrogation of those who died in custody in the aftermath of the invasion. It should also identify the culpable and discreditable conduct of those involved, including their acts, omissions as well as identifying the steps needed for the rectification of dangerous practices and procedures. We accept that wider policy matters are essentially matters for public and political debate and do not fall under the Article 2 investigative duty.

149. Although we have set out these considerations by references to deaths in custody, similar principles will apply to other deaths within the territorial scope of the Convention, though the detailed approach may vary.

150. We turn therefore to consider the extent to which that duty has been discharged. That entails first considering what the prospects are of a prosecution in individual cases.

(4) The relationship between investigative duties and criminal prosecution.

151. There are three reasons why it is necessary to consider whether a prosecution can be brought before deciding how and when the Secretary of State can comply with the Article 2 duties imposed on the State:

i) We accept, as is contended by the Secretary of State, that a properly conducted criminal process may be the most effective way of discharging the State's investigative duty: *McKerr v United Kingdom* (2002) 24 EHRR 20 (134).

ii) If prosecution is a realistic possibility, then account must be taken of the risk of the fairness of a subsequent criminal trial being prejudiced by disclosures during an Article 2-compliant investigation. In many cases, this will mean delaying the public part of the investigation until it has been determined whether prosecution is a realistic possibility.

iii) The prospect of a prosecution might enable relevant witnesses to refuse to testify because of the privilege against self–incrimination and so impede an investigation with the consequence that an effective inquiry must therefore await the end of a prosecution or a decision not to prosecute.

152. The cases to which we have specifically referred at paragraphs 134 and 135 can be analysed into three categories which will no doubt apply to all the other cases that may call for investigation:

i) Cases where there will be no IHAT investigation and so no prospect of any further prosecution ("Category 1 cases").

ii) Cases where there has been a previous prosecution and IHAT is now investigating or about to investigate with a view to considering whether there should be a prosecution ("Category 2 cases").

iii) Cases where there has been no previous prosecution and IHAT is now investigating or about to investigate whether there should be a prosecution ("Category 3 cases").

Each requires separate consideration.

(i) Category 1 cases

153. Two of the cases identified to us fall, in our judgment, into the first category. The absence of any investigation by IHAT or by any other body into criminal responsibility for the death of the person concerned shows in the absence of evidence to the contrary that there is no prospect of further prosecutions in those cases. There is therefore no impediment to further investigations by an inquiry or otherwise in pursuance of the Secretary of State's Article 2 duties.

154. **Hassan Abbad Said**:

i) He died on 2 August 2003 when he was among a group stopped by British forces because they were accompanying a car carrying what was perceived to be mines. Mr Said ran off and he was then pursued by two soldiers, Trooper Williams and Corporal Blair, before being shot dead by Trooper Williams. Following a Royal Military Police investigation, Trooper Williams' commanding officer dismissed a charge of murder against Trooper Williams and in consequence it was not possible for allegations against him to be dealt with by Court Martial.

ii) The matter was, however, referred to the CPS. After the case had been reviewed by the Metropolitan Police, a decision was made by the CPS to prosecute Trooper Williams on the charge of murder. The case against Trooper Williams depended on whether he had an actual perception of danger at the time when he shot Mr Said and caused his death. Trooper Williams had consistently maintained that in the moment of crisis he believed that Corporal Blair's life and his own life were at risk. The CPS considered that there was no realistic prospect of conviction. The Crown offered no evidence and a formal verdict of not guilty was returned.

155. **Naheem Abdullah** : He died in custody on 11 May 2003. Seven soldiers were charged with his murder. At a Court Martial on 3 November 2005, the Judge Advocate General dismissed the charges. He concluded in a clear and careful ruling that the evidence established that death was a result of an assault by the section to which the soldiers belonged, but the evidence did not permit a conclusion to be drawn on the individual responsibility of each defendant.

156. Mr. Ryan explains in his witness statement why there will be no further criminal investigation of those cases. In the case of Hassan Abbad Said's death, it is said that the matter has been fully investigated and that there was no basis for conducting a further investigation. Naheem Abdullah's death is being further investigated, not as a basis for any further prosecution of those responsible for his death, but in Mr. Ryan's words in his witness statement "so that a systemic review can be conducted into how the incident occurred and what lessons can be learned". In these cases, there is no impediment to starting an inquiry into the death of the person concerned.

157. In our view, the Article 2 duties have not been complied with in these cases as there has been no inquiry of the type we have outlined at paragraphs 146-148 above. Thus further examination of these deaths is required. We will return to consider how this can be achieved at paragraphs 212 and following.

(ii) Category 2 cases

158. These are cases where there have been previous prosecutions and IHAT is continuing to investigate and might well bring a further prosecution. There are three cases of those identified to us which fall within this category. There may well be others.

159. **Ahmed Jabber Kareem Ali:** He was a 15 year old boy who, as we have explained at paragraph 134.iv), while he was detained, was alleged to have been transported by the British armed forces to a canal where he was forced into the canal and drowned. At a subsequent Court Martial held in 2006, all four soldiers were acquitted. The matter is still being reviewed by IHAT.

160. **Sayeed Shabram (Shabrab)**: He was an 18 year old Iraqi who was apprehended by UK forces on 23 May 2003; to whom we have briefly referred at paragraph 134.iii) above. It is said that he was pushed into the river by British soldiers and drowned. An initial Royal Military Police investigation was carried out in 2003. Three soldiers were reported for manslaughter. In 2006, following a Formal Preliminary Examination conducted in Basra, which included the hearing of live evidence from Iraqi witnesses, it was decided the matter should not proceed to a Court Martial

because the witnesses had colluded and lacked credibility. The matter is being reviewed by IHAT and it is expected that a final report will be produced shortly.

161. **Baha Mous a**: His death whilst in the custody of British forces in Basra on 15 September 2003 has been the subject of a Court Martial presided over by MacKinnon J and the subject of a public inquiry conducted by Sir William Gage, who reported on 8 September 2011, as we set out at paragraphs 14 and 15. IHAT is re-investigating the circumstances as we explained at paragraph 134.ix).

162. In each of these cases, much information must have been obtained. There plainly is a pressing need for a decision to be made very soon as to whether any prosecutions are to be brought. That must be particularly true of Baha Mousa, whose death was the subject of a detailed and thorough investigation by Sir William Gage which concluded in September 2011, over a year and a half ago.

163. It appears on the materials before us to be highly unlikely that there will be any criminal trials of those responsible for those deaths, but that is a decision for the prosecutor, not us. We would simply observe, first, about ten years has now elapsed since many of the Iraqis have died. Second none of those present at the time of death are likely to give evidence because of what McKinnon J described at the end of the criminal trial of Baha Mousa as "a more or less obvious closing of ranks". Third there is unlikely to be any forensic evidence now available to support a prosecution case.

164. We acknowledge and pay tribute to the conscientious way in which IHAT has approached its task in these cases. Nonetheless, given the time that has elapsed and the other difficulties to which we have referred in the preceding paragraphs, we consider that an Order should now be made that the Secretary of State should state either through an official or the head of IHAT within 6 weeks:

i) what further progress has been made in investigating the death of each of those who fall in this category;

ii) when a decision will be made as to whether a prosecution will be brought in respect of each of these cases.

Plainly, for reasons which we explain at paragraph 182, the Director of Service Prosecutions ought to have the determinative role; the court therefore would be grateful for his views.

165. It is necessary for us to stress that the delay in making decisions in respect of prosecutions concerning those responsible for the Iraqis who died in custody is a source of increasing concern, because the Article 2 investigative duty requires speedy action.

(iii) Category 3 cases

166. These are cases where there has been no criminal process, but IHAT is now investigating them. The cases identified to us which fall into this category are the deaths of Tanik Mahmud (see paragraph 134.i)), Uday Kareem Khalif (see paragraph 134.ii)), Abdul Jabbar Mossa Ali (see paragraphs 128.i) and 134.v)), Rhadi Nama (see

paragraphs128.i) and 134.vi)) , Naytham Jabir Ati Al-Mayahi (see paragraph 134.vii)), AJ Khalif (see paragraph 134.viii)) and Sabiha Khudur Talib (see paragraph 134.x)).

167. For the reasons set out in paragraph 163 above, we consider that it is very unlikely that there will be a criminal prosecution. We consider that, as in the Category 2 cases, an order should now be made that the Secretary of State should state within 6 weeks first, what progress has been made in investigating the death of each of those who fall in this category and second, when a decision will be made as to whether a prosecution will be brought in respect of each of these cases. We would also be grateful for the views of the Director of Service Prosecutions.

(iv) The situation if there is no prosecution

168. In cases in which there will not be a prosecution, consideration has to be given as to how the article 2 duty should be complied with. As we have already explained, if the deaths had occurred within the United Kingdom, the Article 2 duty would have been complied with by having an inquest. The duties of the coroner have been extended in the light of Article 2 of the Convention. In *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, it was decided that the duty of Coroners in the 1988 Act and the Coroners Rules 1984 of ascertaining the identity of the deceased as well as how, when and where he died should be extended so as to comply with the United Kingdom's obligations under the Convention. This could be achieved by ensuring the word "how" in section 11(5) (b) (i) and (ii) of the 1988 Act and Rule 36(1) (b) of the Coroners Rules should be extended to mean "by what means and in what circumstances".

169. In cases (such as those in category 1 and 2 cases) where there are no prospects of a prosecution, a major impediment against a further inquiry is removed. In the usual case if the death had occurred in the United Kingdom, there would be a coroner's inquest, but it is not possible for that to occur in these cases because the coronial jurisdiction does not extend to cases where deaths occur abroad and the bodies are not within the jurisdiction. The fact that there has been a ruling, as in the case of Naheem Abdullah, finding no case to answer makes no difference. Although there has been an investigation, the full Article 2 duties have not been performed.

170. We therefore turn next to consider how that duty should be discharged.

(5) Discharging the duty under Article 2

(i) The nature of the task in the present cases.

171. It is common ground that the form of the inquiry needed depends on the circumstances of the case. As the Strasbourg Court said in *Al Skeini*, it may vary with the circumstances of the case, just as the degree of public scrutiny may vary. (See paragraphs 165 and 166 of the judgment of the Grand Chamber). In *R (JL) v Secretary of State for Justice* [2009] 1 AC 588 Lord Phillips explained at paragraph 31 that "the Strasbourg Court has emphasised the need for flexibility and the fact that it is for the individual State to decide how to give effect to the positive obligations imposed by Article 2".

172. The type of investigation will depend on many factors. We identify the principal factors material to the deaths in Iraq which fall within the territorial scope of the Convention in the following paragraphs.

(a) Establishing the facts

173. The facts relating to the deaths in custody of the relatives of the claimants (taking these cases by way of example) are by no means clear. It does not appear that a proper form of detailed inquiry was carried out shortly after the deaths concerned or subsequently.

(b) The very serious nature of the allegations

174. There has been extremely serious criticism of many members of the armed forces' conduct. This can be illustrated by reference to the death of Baha Mousa contained in Sir William Gage's report of the Baha Mousa Inquiry. He concluded in Volume 3 that:

> "143… I find that there were two main causes of death. Firstly, Baha Mousa had been made vulnerable by a range of factors, namely: lack of food and water, the heat, rhabdomyolysis, acute renal failure, exertion, exhaustion, fear and multiple injuries. Both stress positions, which are a form of exertion, and hooding, which obviously must have increased Baha Mousa's body temperature, contributed to these factors. Secondly, against the background of this vulnerability, the trigger for his death was a violent assault consisting of punches, being thrown across the room and possibly also of kicks. It also involved an unsafe method of restraint, in particular by being held to the ground in an attempt to re-apply plasticuffs. The combination of both causes was necessary to bring about Baha Mousa's death; neither was alone sufficient to kill him"

175. It is clear that the allegations in respect of the other deaths in the cases before us contain allegations of very serious misconduct by members of the British armed forces.

(c) Systemic abuse and lack of training

176. In this judicial review application, there are claims of nine other deaths of Iraqis in custody in a period of 11 months starting in May 2003. On the basis of the evidence, it is suggested that there might have been systemic abuses and that such abuses may have been attributable to a lack of appropriate training.

(d) The responsibility of the command

177. If, as there is some evidence to suggest, there was a lack of training and a failure to investigate early misconduct promptly, the question arises as to whether any responsibility for that arises in the higher ranks of the armed forces and in Government.

(ii) Is IHAT discharging that task?

178. Mr Eadie QC contended on behalf of the Secretary of State that the present process involving IHAT and the associated arrangements satisfied in the circumstances of these cases the State's obligation under Article 2. Mr Fordham QC disagreed not merely because of IHAT's alleged lack of independence, but also because even if it is held to be independent, IHAT had failed, and will continue to fail, to carry out the stringent investigation required in all the circumstances.

179. We accept that the Secretary of State and his officials in the Ministry of Defence have assiduously and conscientiously attempted to discharge the obligations to carry out an article 2-compliant investigation and inquiry in the unprecedented circumstances of the invasion and occupation of Iraq over a period of about six years. However, we have reached the conclusion in relation to cases where deaths have occurred that the establishment of IHAT and the arrangements associated with it are not sufficient to discharge the duty imposed on the State. Our reasons are as follows.

(a) Failure to deal with the decision to prosecute

180. It is, of course, of the highest priority as we have made clear at paragraph 151 above that where there is a realistic prospect that persons can be held criminally responsible for the deaths of Iraqis that they be prosecuted and punished. However, we regret to conclude that IHAT is not best structured to make such decisions promptly and efficiently.

181. First, we are concerned that there is no evidence that the case of Naheem Abdullah has been taken forward by reference to IHAT or otherwise, even though a decision was made in that case by the Judge Advocate General as long ago as 3 November 2005 to dismiss the charges when he found there was evidence that the death was a result of an assault by the section to which the soldiers belonged. As we have set out at paragraphs 153-157, this case and that of Hassan Abbad Said are what we have identified as category 1 cases where the article 2 duty is not being discharged. Nothing is being done.

182. Second, in respect of what we have described as the category 2 and 3 cases (see paragraphs 158-169 above), IHAT is not structured so that decisions can be effectively and promptly taken as to whether there is a realistic prospect of prosecution. The Director of Service Prosecutions is a lawyer of very considerable distinction and experience. He should have been involved in making a decision at the outset of each case involving death referred to IHAT as to whether prosecution was a realistic prospect and, if there was something to suggest it might be, in directing the way that the inquiry was to be conducted and in a regular review of each case to see if a prosecution remained a realistic possibility. On the evidence before us, he had not been involved in this way, although Mr Ryan made clear in his statement of 20 March 2013 that it was planned to involve him much more and additional staff had been recruited for that purpose. In consequence, despite the conscientious way IHAT has operated, we regret to observe that the investigations lacked the necessary focus and drive which this unprecedented situation requires.

183. Five of the deaths occurred as long ago as May 2003, two further deaths in custody occurred also in August 2003 while in each of the months of September 2003, April 2004 and November 2006, there was a single death in custody. With one exception

(which was a plea of guilty in the Baha Mousa Court Martial), there have been no convictions arising out of these deaths.

184. On the evidence before us it would appear there are no immediate prospects of any further prosecutions, even though the deaths occurred more than nine years ago. The decision to continue investigations without the necessary expertise, focus and direction of the Director of Service Prosecutions as to whether prosecution was a realistic prospect, was a serious failure.

(b) Delay

185. It is plainly necessary to discharge the investigative duty without delay. Some of the considerations were summarised by the Strasbourg court in *Edwards v United Kingdom* [2002] EHRR487 at paragraph 86:

> "it is crucial in cases of deaths in contentious situations for the investigation to be prompt. The passage of time will inevitably erode the amount and quality of the evidence available and the appearance of a lack of diligence will cast doubt on the good faith of the investigative efforts, as well as drag out the ordeal for the members of the family".

and in *Al-Skeini* at paragraph 167:

> "While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts".

186. The delay in relation to the cases of those who died in custody is such that, in our view, it amounts to a failure to discharge the duty, quite apart from being a source of great and increasing concern. As we have set out at paragraph 13 above, in January 2008, the Ministry of Defence published a report produced by Brigadier Robert Aitken concerning six cases of alleged deliberate abuse and killing of Iraqi citizens, including the death of Ahmed Jabbar Kareem Ali to whom we referred in paragraph 134.iv) above. The Report stated, under the heading "Delay":

> "The amount of time taken to resolve some of the cases with which this report is concerned has been unacceptable. ... The court martial in connection with the death of Ahmed Jabber Kareem did not convene until September 2005, 28 months after he died; by that time, three of the seven soldiers who had been accused of his murder had left the Army, and a further two were absent without leave. In most cases, it is inappropriate for the Army to take administrative action against any officer or soldier until the disciplinary process has been completed, because of the risk of prejudicing the trial. When that disciplinary process takes as long as it has taken in most of these cases, then the impact of any subsequent administrative sanctions is significantly reduced – indeed, such sanctions are likely to be counterproductive.

> Moreover, the longer the disciplinary process takes, the less likely it is that the chain of command will take proactive measures to rectify the matters that contributed to the commission of the crimes in the first place."

187. A further failing of the present investigation is that there seems to be recurring slippage. We are driven to the conclusion that there are likely to be further long delays before IHAT finishes its work. Indeed, there is little which shows that they have been given sufficient resources to accord priority to dealing with the death in custody cases and in particular ascertaining whether there will be a criminal prosecution of those responsible for the deaths of those claimants who died in custody.

(c) Accessibility to the public

188. Because of the focus on investigation for the purposes of prosecution, the IHAT inquiry, like a police inquiry, has not been an inquiry accessible to the public of the broader issues of State responsibility for the death, including the instruction, training and supervision given to soldiers undertaking such tasks.

189. There are cases where there will be no prosecution, for the reasons we have given, and it is therefore necessary that there be an inquiry accessible to the public. IHAT is neither structured nor staffed to do this.

(d) Accessibility to the family of the deceased

190. IHAT does not provide an inquiry "accessible to the victim's family". For example, in the case of Ahmet Jabbar Kareem Ali we have noted that in his witness statement Mr Warwick explained that there had been no contact with the next of kin, but that once additional resources are available this will be a priority.

191. No cogent submission was made that a similar requirement should not be met in the case of the other relatives of claimants who died in custody. We have explained at paragraph 147.i) why this requirement of accessibility to the public and to the relatives is so important to protect the Article 2 procedural rights of the relatives.

(e) Examination of systemic abuse and training

192. There is no evidence that the IHAT inquiry has considered or will consider with the appropriate level of detail "*the instructions, training and supervision given to soldiers undertaking tasks such as this in the aftermath of the invasion*". This would entail obtaining evidence given from the soldiers and from those responsible for devising and organising the training. It would also be necessary for there to be effective testing of the evidence so as to check its reliability.

193. IHAT is neither structured nor staffed to perform these functions. The absence of this capability is particularly significant because in this case the case for a public investigation becomes greater when there is: -

> "an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to

> isolated incidents or exceptions but a pattern or system". (*Ireland v United Kingdom* (1979-1980 2 EHRR 25 at paragraph 159).

194. We have set out the steps taken in the Ministry of Defence to deal with wider and systemic issues, but these are not public or subject to independent scrutiny, though we note the steps the Ministry is going to take as we have set out at paragraph 94 above.

(f) General

195. All we know about the investigation of the individuals who died in custody is that IHAT is reviewing the case in respect of four of them and is also to review the cases in respect of the remaining five individuals. With the exception of the Baha Mousa Inquiry, there have been no Article 2-compliant inquiries into any of these deaths, which have involved the relatives of the deceased or the public.

196. Indeed, as we have explained the Grand Chamber held in *Al Skeini* in relation to the case of one of the five applicants (the father of Ahmed Jabbar Kareem Ali) that there should be an inquiry that met the standards set out in the passage we have cited at paragraph 147.i) above. We cannot see any reason why anything less than the same approach should be adopted in respect of all the death in custody cases with a public examination of the responsibility of the British armed forces for the deaths.

197. Against that background, we conclude that the present IHAT investigation does not fulfill the Article 2 obligations of the United Kingdom. We therefore next turn to consider whether, as Mr Fordham QC contends, there should be a single overarching public inquiry.

(iii) Should a single and overarching public inquiry be ordered?

198. There are in the circumstances only two realistic alternative ways in which the Secretary of State can comply with the State's Article 2 duties. The first is that he should set up an overarching public inquiry, which would look into all the Article 2 (as well as the Article 3 claims to which we refer later). This is strongly and cogently opposed by the Secretary of State who objects to an overarching public inquiry dealing with Article 2 issues and contends that the decision of the Secretary of State cannot be impugned.

199. The second and alternative way of dealing with the Article 2 claims is we think by developing a procedure based on Coroner's inquests. This is a relevant model as, although the 1988 Act does not apply to the deaths covered in these proceedings as they occurred abroad and the bodies are not in this country, nevertheless, if the deaths had occurred in this country, an inquest would have been the appropriate and perfectly acceptable way of discharging the Article 2 duty.

200. The coronial regime has been used to inquire into many deaths in which allegations have been made of State involvement or its failings. Examples have been the Inquests into the death of the Princess of Wales, the shooting of De Menezes, the 7th July bombings in which senior or retired judges were specially appointed to perform the coronial duties. Arrangements are at present being arranged for senior judges to conduct inquests into the deaths at Hillsborough and into the death of Alexander Litvinenko on 23 November 2006. In our view, a procedure based on a coroner's

inquest is a viable way of discharging the Article 2 duty. We first, however, must consider the claimants' contention that there should be a single overarching inquiry.

(a) Should there be a single public inquiry?

201. The case advanced by Mr Fordham QC is that the only way in which the Article 2 duty can be satisfied in this case is by holding an overarching public inquiry. The Secretary of State disputes this, contending that it would neither be necessary nor proportionate to order such an inquiry in this case. Mr Eadie QC stresses that there is no need for a public inquiry in every case. In support of that contention, he relies on the statement of Lord Rodger in *R (JL) v Secretary of State for Home Department* [2009] 1AC 588 where he concluded that: -

> "56. The authorities' obligation is not, of course, absolute: it is not indeed to be interpreted as imposing an impossible or disproportionate burden, bearing in mind, among other factors, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources: *Keenan v United Kingdom* 35 EHRR 913, 957-958, para 89; *Akdogdu v Turkey*, para 45; *Renolde v France*, para 82" and later
>
> "77 The Secretary of State is concerned about the financial implications of having to hold an independent investigation in cases of attempted suicide. His concern is entirely proper, as the European Court has recognized in the judgments cited in para 56 above. His anxieties may have been fuelled, however, by an impression that, whenever article 2 requires an independent investigation to be set up, that investigation has to have all the bells and whistles of the full-blown public inquiry described by the Court of Appeal in *R (on the application of D) v Secretary of State for the Home Department* [2006] 3 All ER 946 - sometimes called a "type D inquiry". Nothing could be further from the truth."

202. In those circumstances, it is necessary to consider whether exceptionally a public inquiry is called for. There are a number of models that traditionally could be followed from a "full-blown" public inquiry such as the inquiry by Lord Saville into "*Bloody Sunday"* or the more modest and streamlined model of inquiry such as that conducted by Mr Nicholas Blake QC, as he then was, entitled *The Deepcut Review, a review of the circumstances surrounding the deaths of soldiers in Deepcut between 1995 and 2002*. There are a number of important factors to bear in mind.

(b) Length

203. First, it is inevitable that any single overarching public inquiry looking at all the Article 2 and 3 claims, or even just the Article 2 claims, would last for many years. The *Bloody Sunday Inquiry* took 12 years to complete its work in relation to one incident. The Shipman Inquiry, which had to consider a series of specific factual incidents all relating to the activities of one man and all occurring in England, took a total of 4 years, even though it took place after a lengthy criminal trial in which Dr Shipman's activities were carefully scrutinised. The *Baha Mousa Inquiry*, which only related to one death and followed a full-scale and very lengthy Court Martial, took 3

years at a total cost of £25 million as we have set out at paragraphs 14 and 15. The Al Sweady Inquiry was established in October 2009. As we have set out at paragraphs 16 and 17, it started oral hearings in March 2013 and it had already cost £17.1 million by the end of April 2013. It will continue for a substantial period but it was set up following a lengthy judicial review hearing, which took 15 days during which much evidence had been adduced, and many witnesses had been cross-examined.

204. A single inquiry as sought by the claimants in this case, even if of the more streamlined and modest kind, would be far more complex and much lengthier than any of these. It relates to very many more incidents than any of these inquiries. It is likely to involve many different alleged perpetrators. It would be conducted without the benefit in many cases of full investigations having been conducted.

205. Based on previous experience of the problems encountered by IHAT, we fear that it will take a long time before many parts of the inquiry can start.

(c) The person who would conduct the inquiry

206. That leads on to the second factor of importance in deciding whether there can be an overarching inquiry – finding the right tribunal. It is difficult to see how such an inquiry could be conducted by anyone other than a judge, a retired judge or a very experienced practitioner. The length of the proposed public inquiry would mean that it would be extremely difficult to find a person with the necessary experience and capability who would be ready, able and willing to take on this extremely lengthy and open-ended responsibility.

(d) Cost

207. A third factor of great importance is the cost. As Lord Rodger explained, this is a factor of importance in the light of the potential great length of the inquiry. We have already set out the costs of previous inquiries but the present proposed inquiry will, because of its length, take very much longer. The burden on the public purse would be immense, particularly as it would be impossible to conduct such an inquiry without large teams of lawyers.

(e) Implementation of lessons learnt

208. A fourth factor militating against ordering a public inquiry is, as Mr Eadie QC correctly submits, that considerable changes have already taken place in relation to policies relating to detention and questioning since the deaths covered by this application occurred. Sir William Gage made many recommendations in his report after conducting the Baha Mousa Inquiry; the great majority of these have now been implemented. They relate to very many basic issues which will ensure better and clearer accountability for the welfare of captured personnel by reference to (i) training the soldiers who deal with detainees; (ii) the proper recording of events during detention; and (iii) who in the chain of command has responsibilities for prisoners.

209. Moreover, Sir Thayne Forbes has been conducting the Al Sweady inquiry and its terms of reference relate to allegations of an unlawful killing and ill-treatment of five Iraqi nationals in 2004. We would anticipate that the report of that Inquiry would make recommendations if there are issues on which recommendations are required.

Much information will therefore be available relating to matters relevant to determining whether there has been systemic abuse.

(f) Margin of appreciation

210. As we have stated at paragraph 171, it was common ground that the form of investigation required to comply with Article 2 may vary with the circumstances. It is a necessary corollary of this that the Secretary of State has some discretion, which as Longmore LJ described in *AM v Secretary of State for Home Department* [2009] EWCA Civ 219 at paragraph 83:

> "There must also be a margin of appreciation for the Secretary of State to decide when to hold and when not to hold a public inquiry. The resource implications can be considerable"

(g) Conclusion

211. In the light of factors to which we have referred, the decision of the Secretary of State in refusing to order an overarching public inquiry cannot in our judgment be impugned. We therefore do not order an overarching public inquiry into the deaths.

(iv) Should there be an investiga tion into the deaths by a process based on a coroner's inquest?

212. In the light of our conclusion on the inadequacy of the IHAT model and our rejection of the challenge to the Secretary of State's decision not to order an overarching inquiry, how should the State discharge its duties? As we have made clear, the task facing the Secretary of State is unprecedented. We therefore set out our views simply as an outline of what we consider the Secretary of State should consider doing and on which we would welcome the further observations of the parties.

(a) Material considerations

213. In considering the type of inquiry, we have had regard to the need for expedition, the practicality of what can be done in one inquiry and the proportionate cost as highly material considerations. In addressing the last, we have taken cognisance of the fact that the extensive deployment of teams of lawyers at inquiries has added significantly to the cost and length of inquiries.

214. We therefore take as our starting point the way in which at common law and under ancient statute there evolved the inquiry into deaths by the coroner which over the centuries has proved effective. It is noteworthy that Coroners can make recommendations as well as dealing with all relevant factual matters.

(b) A case by case approach

215. Suitably adapted, a form of inquisitorial inquiry derived from the model used by coroners would have many advantages over an overarching public inquiry. The task can be broken down into different inquiries conducted by differently appointed persons for different deaths. One person could be appointed soon to deal with the category 1 cases. The other cases could be considered by others as and when decisions are taken as to whether a prosecution could be brought. We would envisage

the decision on whether to investigate, how to progress the investigation and whether a prosecution should be brought being made with the direct involvement of the Director of Service Prosecutions in the manner we suggested at paragraph 182 and, which, it is now accepted, is necessary and appropriate. We would again emphasise that the skill and experience of the Director of Service Prosecutions must be utilized to the full as the scale of the task is unprecedented and too difficult to be left to investigators alone to make decisions, particularly as to the way in which the investigation should be conducted.

(c) The inquisitorial process

216. The inquiries would have to grapple with the unprecedented nature of what was involved, but would be able to build on the investigatory work done by IHAT. They would have to be thorough and expeditious.

217. Both of these objectives can in our view be achieved by an inquisitorial approach. There is no reason why the burden undertaken by those appointed should not include an obligation to conduct his or her own searching examination of the witnesses; some assistance would be required. This form of inquisitorial inquiry has worked effectively in many forms of inquiry, such as Department of Trade Inspections. There is no need for examination or cross examination by separate counsel to the inquiry or by parties who might be interested.

218. We would envisage the first of these inquiries establishing the detail of the inquisitorial procedure by publishing proposals, including publication on the Internet, and inviting written and, if necessary, oral submissions on the proposed procedure.

(d) Legal representation

219. As such an inquiry would only be held once it was determined that there was no realistic possibility of a prosecution, the legal assistance to those being asked to give evidence could be calibrated accordingly. For example, there would be no reason for the families of those whose deaths were being investigated to have extensive legal representation. The examination of witnesses would be conducted entirely by the person conducting the inquiry. The families would simply require some legal help in understanding the procedure and when giving their evidence; such help would, we envisage, be provided in Iraq.

(e) Accessibility

220. We would envisage that each such inquiry would satisfy the requirements of accessibility to the family of the deceased and to the public. It would:

i) Enable the families and friends of the deceased Iraqis to watch the hearings by video link.

ii) Permit evidence to be given by Iraqis by video link; we can see no reason for bringing such witnesses to the UK.

iii) Have hearings open to anybody who wishes to watch developments.

(f) The report provided

221. The inquiry would produce a narrative account of the facts relating to the death, so far as could be ascertained, and any other matters (such as lack of training) material to the death. If criticism arose in respect of an individual or institution, then that could be put in writing to that person in the usual way and any representations taken into account before a conclusion was reached. The person conducting the inquiry would also be able to set out any recommendations, taking into account the huge amount already done by the Ministry of Defence. We would not envisage the burden of making recommendations to be a heavy one.

(g) Supervision of the process and accountability

222. Proceeding in this way would, we accept, mean that there was no independent person who could give the inquiries overarching direction or who could provide a comprehensive overview of the recommendations that should be made. However, we see no reason why the Secretary of State through his senior civil servants such as Mr Ryan cannot ensure that the necessary overarching momentum is maintained so that inquiries are commenced as soon as permissible and are completed as swiftly as possible. Furthermore, as we have set out, considerable work has been done to ensure that recommendations are reviewed and implemented; this process necessarily involves maintaining an overview.

223. As an additional guard against the risks of delay and a lack of direction and to deal with unresolved issues such as those relating to whether any death is within the territorial scope of the Convention, the court would envisage appointing a designated judge. The judge would be provided with regular information as to progress of each inquisitorial inquiry. He would hear applications if there was undue delay or other issues arose. We would so provide in any Order we make.

224. The Secretary of State is also accountable to Parliament. We can see no reason why a Parliamentary Committee cannot scrutinise the wider or systemic issues and the recommendations made; whether it does so or how it does so must be a matter for Parliament, whether it be through the Select Committee on Defence or another Committee or Parliamentary Commission.

225. The lack therefore of these benefits which could be derived from an overarching single inquiry can be met in this way. It is more than a sufficient counterbalance to the real difficulties relating to time, cost and manageability which would necessarily be inherent in the establishment of an overarching single inquiry.

ISSUE 3: ARE THE ARRANGE MENTS M ADE BY IHAT IN RESPECT O F THE CASES RELATING TO ALLEGED VI OLATIONS OF ARTICLE 3 COMPLIANT WITH THE INVESTIGATIVE DUTIES OF THE STATE?

226. As we have explained, there are presently 135 cases in which allegations are being made of serious mistreatment in breach of the Article 3 rights of the claimants. There are probably a considerably greater number of other similar cases where such

allegations also arise; these have been estimated at 700-800 as we have set out at paragraph 3. This is the task on which IHAT has concentrated.

227. In setting out our reasons why we concluded that IHAT was sufficiently independent, we have described what has been done to review the way in which detainees were treated when interrogated. It seems to us that the procedure adopted by IHAT for the purpose of ascertaining what happened is a more than proportionate performance of the State's duties, subject not only to making the inquiry accessible to the family and the public, but also to the issues of timeliness and delay.

228. The matters now being investigated are taking a period of time that is hard to reconcile with the proportionate nature of the task and the duty to act with promptitude in investigating events that happened so many years ago. As the importance of investigating the Article 2 cases must take priority, we would hope that once those cases are dealt with in the manner we have suggested, IHAT would be able to adopt an approach to making decisions on investigation and prosecution on Article 3 cases so as to involve the Director of Service Prosecutions in the manner we have suggested for the Article 2 cases. It must surely now be possible to make a realistic appraisal in a number of cases whether prosecution is a realistic possibility and use that as a basis for future decision-making, given the volume of cases that arise.

229. We are impressed with the decision of the Secretary of State (which we have set out at paragraph 94) to make publicly available information about IHAT's work so that information is available to the public and to the person who has been the subject of the alleged wrongdoing.

230. Once it is determined that there are cases in which there will be no prosecution, the procedure for Article 3 cases should be reviewed by the Secretary of State in the light of the experience in the Article 2 cases; it may well be possible to conduct the inquisitorial inquiry into these cases by taking a sample of the more serious cases.

231. If the procedure cannot be agreed, then the court will have to consider these issues further under the provision we propose making in the formal order of the court.

Overall Conclusion

232. We reject the contention that IHAT is not independent. We will consider ordering that the Article 2 claims should be inquired into through the form of inquiry we have outlined, once decisions on prosecution have been made.

233. We would therefore be grateful for submissions on what we have proposed and how it should be taken forward.

234. There is no reason why the direction we have made at paragraph 164 and 167 cannot be complied with in the meantime.