

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

**BETWEEN:-**

**ALI ZAKI MOUSA**

**Claimant**

**- and -**

**THE SECRETARY OF STATE FOR DEFENCE**

**Defendant**

**EQUALITY AND HUMAN RIGHTS COMMISSION**

**Intervener**

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**CLAIMANT'S SKELETON ARGUMENT  
FOR HEARING 5, 8, & 9 NOVEMBER 2010**

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**INTRODUCTION**

1. The Claimants<sup>1</sup> issued judicial review proceedings on 5 February 2010 seeking a single public inquiry into the allegations that they, and other Iraqis, were mistreated by British Forces in British-controlled detention facilities in Iraq between April 2003 and December 2008. When proceedings were issued there were 65 Claimants. Since issuing these proceedings further allegations of mistreatment raising further arguable breaches of Art 3 of the European Convention of Human Rights ("ECHR") have been made by an additional 60 Claimants (see first and fifth witness statements of Mr Shiner).<sup>2</sup> There are presently 125 Claimants in 114 unresolved claims. Additionally information has entered the public domain relating to deaths in custody. These suggest arguable breaches of Art 2 as well as Art 3 ECHR (see first and third statements of Mr Shiner).
2. It is the Claimants' case that a public inquiry is necessary to discharge the Defendant's obligation to conduct an independent and effective investigation into their allegations of

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<sup>1</sup> Strictly speaking there is only one Claimant, Mr Mousa, but as was made clear in the Grounds for Judicial Review, the claim was brought on behalf of 65 other Iraqis mistreated in UK detention facilities in Iraq. They will be referred to below as "the Claimants."

<sup>2</sup> Mr Shiner's five witness statements are referred to below as "PS1" "PS2" etc.

mistreatment pursuant to ECHR Arts 2 and 3, and that the Defendant's ongoing failure to discharge that obligation is unlawful.

3. At the time the Claimants issued proceedings no investigation was being undertaken into the vast majority of their allegations of mistreatment. In the Defendant's Acknowledgement of Service of 26 February 2010, he set out, for the first time, a "new approach" that would be taken to allegations of abuse in Iraq. All of the claims, he stated, would be investigated by a "new team of investigators". It was indicated in Parliament on 1 March 2010 that this team would be "the Iraq Historical Allegations Team" ("IHAT") to be created within the Royal Military Police ("the RMP").<sup>3</sup> IHAT was to commence investigation in Autumn 2010, to be completed by Autumn 2012.
4. The Defendant accepts that the Claimants have put forward sufficient evidence that they suffered "torture or ... inhuman or degrading treatment or punishment" at the hands of British soldiers such that pursuant to ECHR Art 3 an independent and effective investigation is required (Defendant's Detailed Grounds ("DDG") §13). He contends, however, that IHAT is the appropriate body to conduct such an investigation (DDG §7(a)). He accepts the "possibility that, in due course, the individual criminal investigations will highlight common or wider issues which should properly form the subject of a single public inquiry" (DDG §8) but contends that it is not appropriate now to set up such an inquiry (DDG §9). Much of the Defendant's Grounds, however, argue that even if it became apparent that "common or wider" or "systemic" issues arise in the instant case, it would only be "exceptionally" that anything other than the IHAT investigation will be required (DDG §§37(b) and (c)) though it is not stated when those exceptional circumstances might arise. It would appear, therefore, that the Defendant's primary position is that the IHAT investigation, along with the possibility of civil proceedings, will suffice in this case and that that is so irrespective of whether there are systemic explanations of the abuse the Claimants suffered. His primary case is that a public inquiry will never be required, but that if that is wrong any such inquiry should not be set up until all criminal investigations and processes are complete (DDG §§9b, 35).

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<sup>3</sup> Peter Ryan statement 1 July 2010 at §5.

5. The Defendant's case requires the court to accept the following propositions:
- (1) either
    - (a) IHAT's investigation (in combination with the availability of civil proceedings) will discharge his investigative obligations because investigation of systemic issues (which the Defendant accepts IHAT will not investigate) is not necessary as a matter of law and so a public inquiry will never be required in these cases;
    - or
    - (b) if that is wrong, it is lawful for the Defendant to await the end of the IHAT investigation before commencing an inquiry that will consider systemic issues.
  - (2) and

the IHAT investigation is sufficiently "independent" for the purposes of ECHR standards and discharging the Defendant's ECHR Art 3 obligations.
6. It is the Claimants' case that the Defendant has misdirected himself in law and that he cannot establish any of the propositions above. The Claimants' case, in summary, is as follows.
- (1) The combination of a criminal investigation with civil proceedings cannot discharge the Defendant's investigatory obligation such that no public inquiry is required. The allegations in the instant case indicate systemic abuse of detainees which reflect policies of the Armed Forces or at least tolerated and widespread practices. These matters require investigation pursuant to ECHR Arts 2/3 and will not be investigated by IHAT or in civil proceedings.
  - (2) This means a public inquiry is inevitable, leaving only the question of timing. The Defendant's decision is to await the conclusion of IHAT's investigations and any prosecution flowing from it before taking any

steps to set up an Inquiry. That is unlawful. Such a delay, which is likely to mean that the Claimants' allegations are not examined for many years, offends against the requirement that ECHR Art 2/3 investigations must be conducted "promptly." There is no justification for delaying the inevitable. The delay is not justified by the practical concerns raised by the Defendant. Indeed, the Defendant's approach in delaying the inevitable public inquiry is likely to lead to more significant practical difficulties as well as requiring the expenditure of far greater resources than if the inquiry is commenced now and begins preliminary work in tandem with IHAT.

(3) In any event there is a separate problem. IHAT is not sufficiently independent of the Armed Forces it is tasked to investigate for the purposes of ECHR Art 2/3 standards. It cannot, therefore, discharge the Defendant's investigatory obligations even if (which is not correct) the sole purpose of an ECHR Art 2/3 investigation were to identify wrongdoing and punish perpetrators.

7. Since December 2004, when the extent of the evidence of abuse in detention practices began to emerge, Public Interest Lawyers (PIL) have written to the Defendant on numerous occasions putting to him what appears to be the obvious response to the emerging evidence: that he should establish a single comprehensive inquiry to ascertain what happened to each individual who made plausible allegations of mistreatment and determine what went so badly and consistently wrong across so many facilities throughout the 2003-2008 period (see Grounds of Judicial Review §§13-22).
8. Two judicial review cases have already led to the establishment of inquiries with specific remits to consider the particular time periods and locations of the individual allegations following from the Baha Mousa case and the Al-Sweady incident which led to the setting up of the Baha Mousa Inquiry ("the BMI") and the Al Sweady Inquiry ("the ASI") (and were the Defendant to lose the further 114 cases, multiple further Inquiries would be expected.) Nevertheless, until these proceedings were issued the Defendant had chosen to rely on past RMP investigations and fight each and every case

individually objecting to any further public inquiries. The implications of that approach (both practically and legally) were highlighted by Mr Justice Silber on 15 October 2009 when he called upon the parties to respond to his preliminary view that an order for an immediate comprehensive investigation was “desirable” and that there appeared little to be gained from the Defendant’s stance of litigating each individual Iraq case. On 15 January 2010, PIL wrote to the Defendant formally challenging in a letter before claim the ongoing refusal to order a single public inquiry. No substantive response was received and on 5 February 2010 these proceedings were commenced. At the time proceedings were issued, a hearing to determine a number of preliminary issues of law (dealing with matters such as jurisdiction and applicability of Article 5 ECHR) had been discussed by the parties and canvassed with the court in the cases awaiting trial at that time.<sup>4</sup>

9. On 26 February 2010, and for the first time, the Defendant, in his Acknowledgment of Service and some six years from the first issued claim, recognised that there were “difficulties” with the existing RMP investigations (where investigations had occurred at all) (Summary Grounds of Resistance (“SGR”) at §5). His summary grounds of resistance, as explained above, indicated the establishment of what became IHAT. This would have a “firm timetable” of two years to investigate all of the claims (with a likely cut off date for new cases), during which investigations the Defendant would “keep under review” whether a public inquiry into broader or systemic issues might be needed if common issues were to come to light (SGR §6). By the permission hearing on 6 July 2010, the Defendant had served further evidence that IHAT would now be accompanied by a panel of senior civil servants (IHAP) whose functions would include determining whether any wider issues were raised by the investigation as well as playing a role in responding to personal injury claims (p112 of Exhibit PR1). The Court was told that IHAT would be at full capability by 31 October 2010 and have concluded all appropriate investigations and reported to the Provost Marshall by 1 November 2012 (see Permission Judgment at §12). In evidence served on 15 October 2010, it became clear that IHAT will not, in fact, be at “optimum operational capacity” until (it is said) the end of November 2010 (Mr White’s witness statement at §17).

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<sup>4</sup> These remain unresolved and will require determination irrespective of the outcome of this judicial review.

10. On 16 July 2010 following a contested hearing, the Court granted permission for judicial review.
11. As at 28 May 2010 (since when the number of issued cases has risen by more than 50%), 2,193 allegations had been made of serious ill treatment occurring across several<sup>5</sup> locations from 1 May 2003 to 31 August 2008 (PS1 §29). The most striking feature of those allegations is the extent to which they appear to “form a clear pattern of systemic abuse”, as was set out in Mr Shiner’s first witness statement to the court (PS1 §31). In that statement, he drew attention to the “ample and voluminous evidence” (PS1 §41) from the issued claims of alarming practices that appear to have been “pervasive...with the same techniques being used at the same places and for the same purposes” across the range of detention facilities in Iraq (PS1 §9).
12. That what happened to the individual victims cannot be explained by references to rogue soldiers disobeying orders can readily be seen by, for example, reading the Claimants’ draft head note summaries of each case and the tables exhibited to PS1. A clear pattern suggestive of a “deliberate policy of abuse being used to assist interrogation” (PS1 §38) emerges: beginning on arrest, continuing in transit and maintained on arrival and tactical questioning, it continued into solitary confinement and the control of the Joint Forward Interrogation Team (JFIT) who were responsible for interrogation of detainees once their initial tactical questioning was complete. Patterns of similar techniques and practices emerge. Sensory deprivation, for example, can be seen across all facilities and time periods, with 160 allegations made of sight deprivation (including 117 allegations of the use of blackened goggles), 122 of sound deprivation (usually ear muffs) and 59 of hooding (Exhibit PJS1). Similarly, a clear practice of placing detainees in stress positions can be seen, with 132 allegations ranging from prolonged kneeling to prolonged standing with arms lifted (PS1 §35, Exhibit PJS1). Obvious questions arise as to the provenance and prevalence of these and other practices as described by the Claimants, as well as the environment in which

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<sup>5</sup> Exhibit PJS8 identifies 14 “facilities” but some refer to facilities within facilities. For example, both the Temporary Holding Facility and Divisional Temporary Detention Facility are within Shaibah Logistics Base. It also refers only to the bases which the Claimants have been able to identify – there may well be other locations which have not been identified because the victims were held there while sight deprived or only temporarily (see PS3 §40).

they appear to have taken hold. What is clear is that this evidence is not indicative of individual unconnected acts of abuse, but of widely accepted policies and practices used in interrogation and questioning of detainees. Mr Shiner's Fifth Statement also explains how every one of the 31 cases added since May this year fits the pattern of treatment of detainees from arrest and transit onwards and into detention seen in the earlier cases.

13. Among the allegations can be seen the sheer number that relate to the practices of the JFIT, a self-contained unit designed to control and interrogate detainees. Indeed the bulk of the alleged abuse suffered by the Claimants appears to have occurred within JFIT's control. Very little information is currently available about JFIT. Until 16 December 2003 the Claimants understand that JFIT were based at the TIF at Camp Bucca, after which they moved to the Divisional Temporary Detention Facility ("DTDF") Northern compound at Shaibah Logistics Base ("SLB"), and then from mid-April 2007 to the Divisional Internment Facility ("DIF") at Basra International Airport (PJS1 §12). Patterns can be seen from the evidence of those detained by JFIT. For example, of the 58 victims who at the time of PS1 had been interned and/or interrogated by the JFIT at the DTDF at SLB, 42 allege sleep deprivation practices, including from July 2004 the emergence of the use of loud pornography on laptops with 19 victims making such allegations (PS1 §31).
  
14. In Mr Shiner's witness statements he refers to materials not previously shown to this Court which support the picture of themes of systemic issues (PS3 §5), and, in particular, the role of JFIT. In relation to JFIT, the material makes clear that the regime was "effectively a black hole, a segregated and tightly controlled environment operating under a separate chain of command with its own guards, practices and procedures." (PJS3 §§10-11, 13). There appears to have been minimal if any oversight of JFIT's operations, with little evidence that the Provost Marshall (Army) or Military Provost Staff properly discharged what appears to have been their monitoring function. The BMI has heard very little evidence as to JFIT's activities, and none at all from those it is alleged to have mistreated (because JFIT's treatment of the detainees is not

the focus of the events of 2003 under consideration.<sup>6</sup>) However, on what little was considered, it was accepted by the MOD in its closing submissions that JFIT, at least in its early days, gave “cause for concern” (p.109 of closing submissions).

15. The significant unanswered questions and unexamined issues in relation to JFIT are all reflected in the sheer number of allegations throughout the relevant period which have not been investigated (and are not being investigated by the BMI or ASI (see further §§48-52 below). Video evidence which has been provided in other issued cases corroborates the Claimants’ allegations of “harshing” practices and vividly demonstrates what was plainly considered acceptable interrogation practice by JFIT. Documents indicate such practices may have been trained or encouraged in order to “maintain the shock of capture”, as well as describing (among other systemic matters) the existence of sleep deprivation as part of procedure for interrogation, and the official authorisation of sensory deprivation techniques.
16. The Claimants’ submissions are divided into three areas, namely (1) whether the availability of civil and criminal proceedings can discharge the Defendant’s ECHR Art 2/3 obligations in this case, (2) if not, whether it is lawful to delay setting up the inevitable public inquiry, and (3) whether IHAT is sufficiently independent.

#### **(1) CRIMINAL/CIVIL PROCEEDINGS AS A COMPLETE ANSWER**

17. The following section responds to the Defendant’s suggestion that the availability of criminal and civil proceedings is the complete answer to the obligations imposed by ECHR Art 2/3.
18. In his Case Management Submissions of 5 November 2009 §7, the Defendant conceded that in the nine claims that had been issued at that stage, there were arguable breaches of ECHR Art 3 in all of them). The Defendant does not (and could not properly) assert that the same does not apply to the subsequent issued and unissued claims. The Defendant states at DDG §13 that he “accepts that some of the allegations made in some individual cases raise an arguable case of breach of Art 3 substantive.” It is not

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<sup>6</sup> The ASI will consider some events in JFIT in the summer of 2004 but to a very limited extent. See further below.

clear which “individual cases” the Defendant is referring to, but given that the Defendant has chosen to provide no disclosure in relation to the vast majority of the cases he is in no position to counter the Claimants’ evidence or dispute the claim that all their cases involve treatment that arguably falls within ECHR Art 3.

19. This means that in relation to all 125 Iraqis who have brought complaints of ill-treatment, the Defendant has a duty to conduct an independent and effective investigation. As the Claimants understand it, the Defendant’s position is that the availability of criminal and civil proceedings (with any criminal process being conducted through the IHAT pursuant to the Armed Forces Act 2006) will discharge his investigative obligations (DDG §37). He accepts that “exceptionally” something beyond civil and criminal proceedings may be required in some cases (ibid §37(c)), but does not explain what would render a case “exceptional” and appears to suggest that nothing here is “exceptional” and that IHAT’s investigation will be the end of the matter.
20. The Defendant has misdirected himself in law as to the purposes of an ECHR Art 3 investigation and whether a combination of civil and criminal proceedings can suffice to discharge his investigatory obligations. Given the nature of the alleged mistreatment and the systemic issues which arise in the instant cases, it is plain that criminal and civil proceedings are not sufficient. Determination of this issue of law should not await IHAT’s investigation (and the contrary is not now suggested by the Defendant). All parties need to know whether, as the Defendant asserts, as a matter of principle a combination of civil and criminal proceedings will suffice in this case or whether the Claimants are correct that a public inquiry is, at some point, inevitable.
21. It is explained at §67(a) of the Claimants’ Statement of Grounds that substantial evidence has already emerged of “systemic abuse” by British soldiers in Iraq, and it was submitted that this question of systemic issues could only be properly investigated by a public inquiry.
22. It is important to understand what is meant by phrases such as “systemic abuse” or “systemic issues.” The Defendant appears to use the phrases as connoting “wider policy

issues” (DDG §37) which, on his argument, are distinct from the explanation of abuse in individual cases. For the Defendant, systemic issues are “essentially matters for public and political debate which fall outside the scope of Art 3” (DDG §37). That is not what the Claimants mean when they refer to “systemic” breaches of ECHR Art 3 and nor is it the way the phrase is used in the caselaw (see *AM v Secretary of State for the Home Department* [2009] EWCA Civ 219 §§33,59,104,117). Systemic ill-treatment is apt to describe mistreatment that is not simply the result of rogue officials, but of abuse that has some common or underlying cause which requires investigation. In this case it would include mistreatment (such as the use of sexual humiliation, harsh interrogation techniques, sleep deprivation, long periods of solitary confinement) which reflects policies adopted by the Armed Forces. It would also include mistreatment that is so pervasive and tolerated (including by turning a “blind eye” rather than conducting a proper investigation) that it can be regarded as implicitly sanctioned. It is to be contrasted with ill-treatment by individual soldiers which has merely “occurred fortuitously in a particular place or at a particular time” (*R (Evans) v SSHD* [2010] EWHC 1445 at §245) and which does not have common causes. None of this is political debate.

23. Systemic issues are not matters of “politics” separate from the allegations that are made and outside the scope of an ECHR Art 3 investigation. On the contrary, as the authorities make clear, investigation of systemic issues will be integral to any meaningful inquiry into why individuals suffered the ill-treatment they did where the ill-treatment has common or underlying causes. As indicated below, the purpose of an ECHR Art 3 investigation is to bring the full facts of a case to light so as to enable relevant practices and procedures to be rectified and lessons learned for the future. If it is the case that there is arguable evidence that the mistreatment the Claimants suffered was not simply the coincidental result of rogue soldiers disobeying orders, but that the abuse has some underlying and systemic causes, then any attempt to bring the full facts to light and understand why the Claimants suffered ill-treatment and to ensure it does not recur, inevitably requires consideration of policies and practices and other systemic questions. Those questions fall squarely within an ECHR Arts 2/3 investigation, and any investigation which did not grapple with them could not satisfy the Convention.

24. The Defendant does not contend that IHAT is investigating systemic issues or is capable of doing so. He states that if “common or systemic issues” are brought to light, this might “require further investigation or public scrutiny – including, specifically a public inquiry into broader systemic matters” (SGR §§6 and 17.3 and see similar points made in DDG at §8). The Defendant accepts that IHAT neither will, nor indeed can, consider the role played by systemic issues in the abuse suffered by the Claimants. IHAT’s role is to investigate allegations of criminal misconduct against individual soldiers to determine if there is sufficient evidence to prosecute them. If investigation is required of the Army’s policies, practices and training and other potential systemic causes of the Claimants’ mistreatment to satisfy ECHR Arts 2/3, the Defendant does not dispute that a public inquiry would inevitably be required.
25. The Defendant’s position on whether there is a systemic cause is not clear. In his SGR the Defendant appeared to assert that there was no evidence of “the systemic use of coercive interrogation techniques which resulted in the Claimants’ ill treatment” (§17.2.2) and that the ill-treatment the Claimants alleged that they suffered was “a matter of dispute” (ibid). The Defendant’s position is not explained further in his Detailed Grounds. In the Grounds he neither accepts, nor apparently disputes, that there is currently evidence of systemic ill-treatment. In his further evidence from the head of IHAT submitted on 15 October 2010, he refers again only to the “potential identification of any systemic issues” (Mr White’s statement §28) and an upcoming review of the video evidence to report to IHAP on any “trends in behaviour or conduct that might be indicative of any systemic issues” (§30). However, the Defendant has already accepted that the cases individually raise arguable instances of mistreatment requiring ECHR-compliant investigations, meaning that he accepts that the allegations are at least arguably true. This means he must also accept the arguability of the cause of that mistreatment being systemic, given that that too is readily apparent from the Claimants’ undisputed evidence.
26. The Claimants have submitted compelling evidence that mistreatment is arguably attributable to systemic causes and was the result of Army policy or of tolerated practices. That evidence is described briefly in the factual background above, and in detail in the first, third and fifth witness statements of Mr Shiner. The Claimants’

factual assertions, coupled with the evidence that has emerged from the BMI and the cases in which some, albeit incomplete, disclosure has been received, point irrefutably towards systemic causes of ill-treatment which requires investigation. Numerous individuals complain of particular interrogation practices and techniques being used at specific detention facilities between specific dates. It is inconceivable that this was the coincidental result of actions by rogue soldiers, rather than trained and authorised practices and techniques. Direct evidence exists that the practices and techniques used reflected Army policy. For example, the Draft Field Exploitation Team Standard Operating Procedures for JFIT make clear that a particular (harsh) approach was taken by interrogators to “maintain the shock of capture” (PS3 §33), and the video evidence from Mr Ramzi Sagar Hassan’s interrogation vividly illustrates what that meant. The Defendant has failed to file any evidence to refute these conclusions, let alone established that Claimants have not satisfied the minimum requirement of arguability. The writing is on the wall.

27. If there is (arguable) evidence of systemic abuse in the instant case, what are the consequences for the Defendant’s investigative obligations? The Defendant’s case is that the primary purpose of an ECHR Art 3 investigation is identifying and bringing to justice those who are involved in the ill-treatment (DDG §17(a)). In the Defendant’s Acknowledgement of Service it was said that “in the context of claims of Article 3 ill-treatment a combination of independent and effective criminal and/or disciplinary investigation and the availability of civil proceedings for damages is in principle sufficient to satisfy the Article 3 investigative obligation: see eg *Banks v UK* App No 21387/05, Admissibility Decision of 6 February 2007” §10. It is said in the Defendant’s Detailed Grounds that “given the very similar factual background to the current claims [*Banks*] provides compelling and clear authority in the present context” (DDG §31(b)). It is further stated in the Defendant’s Detailed Grounds that “in the ordinary course of events, a properly conducted criminal process is the most effective way of discharging the state’s investigative obligation” (DDG §19) and that it is only “exceptionally” that further investigation is required (DDG §37(c)). It is not clear what, in the Defendant’s view, takes a case out of the “ordinary course of events” so as to require anything beyond a criminal investigation, and it is not suggested the instant case falls outside the “ordinary course.” It appears to be the Defendant’s case, therefore, that an inquiry into

systemic issues is not necessary. His case is that civil and criminal proceedings will suffice.

28. Domestic authority has made clear that the purposes of Art 2/3 investigations are not simply to bring perpetrators of abuses to justice. A core purpose is to “maximise future compliance” with the continuing substantive obligations imposed by the Articles (per Jackson J in *R(Wright) v SSHD* [2001] EWHC Admin 520 at §43). As Sedley LJ held in *AM v Secretary of State for the Home Department* [2009] EWCA Civ 219 referring to Jackson J’s judgment at §§57-58:

*the purpose, in other words, is neither purely compensatory nor purely retributive; nor is it necessarily restricted to what has happened to the particular victim. Nor, however, is it to usurp the role of government. It is to inform the public and its government about what may have gone wrong in relation to an important civic and international obligation and about what can be done to stop it happening again.*

*This was unmistakably the view of the House of Lords in R (Amin) v Home Secretary [2003] UKHL 51, [2004] 1 AC 653. ... Lord Bingham, giving the leading speech, accepted that there was no single model of Convention-compliant investigation but accepted too that there were minimum standards of compliance. He endorsed what Jackson J had said in Wright and formulated his conclusion, derived from the Strasbourg jurisprudence, in the terms set out in § 3 of this judgment.*

The passage from Lord Bingham’s speech in *R(Amin) v SSHD* [2004] 1 AC 653 at §31 to which Sedley LJ referred is the following:

*The purposes of ... 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.*

Sedley LJ continued in *AM* to explain why the identification and punishment of wrongdoers does not suffice. He held at §§59-60:

*It is significant, in the light of the foregoing discussion, that that formulation includes ensuring, so far as possible, that the full facts are brought to light and that lessons will be learned and implemented. Both of these objectives go markedly beyond the identification and punishment of those responsible....*

*For reasons I have given, there is no reason in principle to draw a line in this regard between art. 2 and art. 3. So long as the minimum requirements are met, the distinction between a need for an independent ad hoc inquiry and the satisfaction of the investigative obligation through existing procedures is a fact-sensitive and pragmatic one. But our domestic jurisprudence, including the binding decision of*

*the House of Lords in Amin, makes it clear that the investigative obligation of the state may - depending on what facts are at issue - go well beyond the ascertainment of individual fault and reach questions of system, management and institutional culture. Insofar as this goes beyond the jurisprudence of the Strasbourg court (and I am not persuaded that it does), it is domestic authority which we are bound to follow: see [Kay v Lambeth LBC [2006] 2 AC 465] §43.*

29. The Defendant in the instant case relies on jurisprudence of the European Court of Human Rights (“ECtHR”) and contends that the purpose of ECHR Art 2 and 3 investigations is that of identifying and punishing those responsible, and that “lesson learning” is not one of the purposes (DDG esp §§15-19 and §37(a)). The same submission was made by the Secretary of State for the Home Department in *AM* (and many of the same cases which the Defendant now relies on appear to have been cited to the Court of Appeal in *AM*: compare *AM* §51 and DDG §17). The Secretary of State’s argument was rejected by Sedley LJ. As indicated above, Sedley LJ concluded that even if (which he did not accept) the ECtHR jurisprudence suggested that the purpose of an ECHR Art 2/3 investigation is limited to the finding of fault and punishment, binding authority in the House of Lords makes clear that ECHR Art 2/3 investigations may need to go well beyond that. The same conclusion was reached in *AM* by Elias LJ. He held at §§105-106:

*In my judgment an important factor in helping to determine what investigation is required is to ask for what purpose it is being conducted. The appellants say that the purpose is precisely as expressed by the judge, Mitting J, who simply took the analysis adopted by Lord Bingham of Cornhill in the Amin case at para.31 and applied it with suitable modifications to take account of the specific interests which Article 3 is designed to protect. The resulting formulation is as follows:*

*The purposes of ... 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 importance of this formulation is that the purpose is not limited, as it is in many of the ECHR cases, to finding the facts so that potential wrongdoers may be brought to book, and so that appropriate redress might be provided. (Sedley LJ has identified some of these cases at para. 51; and a more recent case of Makaratzis v Greece (2005) 41 EHRR 49 [GC], para. 74 is to the same effect.) Later decisions of their Lordships’ House have also emphasised the importance that may be attached to the need to learn lessons for the future which a careful examination of the facts will disclose. Indeed, in *L*, which concerned a case of near suicide in prison, the Secretary of State contended that the obligation to conduct an inquiry arose only if there was evidence to suggest that state agents had been at fault. Their Lordships*

*did not accept this submission principally because holding officers to account would not be the only purpose of an investigation.*

30. The Defendant quotes extensively from the judgment of Longmore LJ in *AM* and makes no reference to the judgment of Sedley LJ. Longmore LJ dissented in *AM*, and his judgment cannot be regarded as the *ratio* of the case. Sedley and Elias LJ were in the majority. Both concluded that the Secretary of State for the Home Department should have conducted an independent and effective investigation and that the availability of criminal and civil proceedings would not suffice. While there is a difference in emphasis on certain points, there are key aspects of their reasoning which is shared and which forms the *ratio* of the case. As indicated above, both Sedley and Elias LJ concluded that the purposes of an ECHR Art 2/3 investigation require more than identifying and punishing wrongdoers and require the full facts being brought to light and lessons learned for the future. In such circumstances, they held, a combination of civil and criminal proceedings will not suffice. If the Defendant wishes to argue that the purpose of ECHR Art 2/3 investigations is limited to identification of wrongdoing and punishment, as the Secretary of State did in *AM*, he needs to reserve and make that argument on appeal.
  
31. Both Sedley LJ and Elias LJ also reached similar conclusions as to when civil and criminal proceedings might suffice to discharge the state's investigatory obligation and when they would not. Applying their analysis to the instant case provides a complete answer to the Defendant's submissions. *AM* focused on a disturbance at an immigration detention centre on 28-29 November 2006 during which the Claimants alleged that they were locked in their cells while water from sprinklers entered, that they were left for over 12 hours in these conditions, and two allegations were made of assaults by detention officers (*AM* §7.2). It was said that such ill-treatment had occurred previously and reflected underlying systemic problems. The Claimants sought a public inquiry pursuant to ECHR Art 2. The Secretary of State for the Home Department, as he does here, argued that following the case of *Banks*, the availability of civil and criminal proceedings would suffice to discharge his investigatory obligations. This was accepted by Longmore LJ in his dissenting judgment. It was, however, rejected by Sedley and Elias LJ on similar grounds.

32. Sedley LJ recognised that there may be cases involving “isolated instances of inhuman or degrading treatment” in which the availability of civil and criminal proceedings would discharge the state’s investigatory obligation (§33). He concluded that that was not the case in *AM* because the allegations were of “systemic and multiple breaches of art 3” (ibid). He continued at §33:

*The reason [the combination of civil and criminal proceedings will not suffice into allegations of systemic and multiple breaches of Art 3] is obvious: litigation is designed to secure individual redress, prosecution to establish individual culpability. Neither is in the ordinary way equipped to make the appraisal of culture and system which ... would be an essential part of any [ECHR Art 3 complaint inquiry] ... It is essential because the art. 3 case advanced on behalf of the three claimants is not simply about what happened to them: it is about why it happened, and about why what happened was in their submission not accidental – a contention to which the inspection report gives substance. These issues, all ... lie potentially within the investigative ambit of art. 3.*

Sedley LJ concluded at §67 that there had arguably been “systemic ... inhuman and degrading treatment” in *AM* and that in those circumstances “neither the possibility of a criminal investigation, nor the bringing of civil proceedings, nor the conduct of an internal Home Office inquiry, nor any combination of these, had satisfied the state’s [ECHR Art 3 investigative] duty.”

33. Elias LJ reached a similar conclusion. He held that the availability of civil and criminal proceedings did not suffice in *AM* for three reasons (see §§114-118): firstly, the Claimants were in custody and it is “particularly important that the authorities must be alive to the very real potential for abusive behaviour towards such inmates” (§116); secondly, the allegations made included “systemic ill treatment” and an investigation would require consideration of “established policies and procedures” (§117) which are not matters that are likely to be investigated in civil or criminal claims; thirdly, it would be difficult for the claimants to identify the officers who had taken the action alleged to constitute a breach of ECHR Art 3 (§118).
34. All three of the factors identified by Elias LJ are present in the instant cases. The Claimants were in detention at the material time, there was systemic ill-treatment requiring considerations of policies and practices, and it would be difficult for the Claimants to identify individual wrongdoers in many cases (identification of potential offenders is particularly difficult if, as here, the victims were often deliberately

deprived of sight at the material time). The allegations made are also those which Sedley LJ describes as being of “systemic and multiple breaches of art 3.”<sup>7</sup> Applying Sedley and Elias LJ’s approach, it is evident that in the instant case the availability of criminal and civil proceedings is even less capable of discharging the state’s investigative obligation than it was in *AM*. The evidence of systemic failure is far stronger in the instant case than in *AM*, which concerned the events of a single night and where no allegations were made that the infliction of ill-treatment was the result of a deliberate policy.

35. The Defendant invites the court not to apply *AM* because it “related to a single incident over a very narrow period of time” (DDG §33(a)). This involves arguing that because the instant case involves a large number of incidents over a long period of time, the availability of civil and criminal proceedings will suffice to discharge the state’s investigative obligations here when it did not in *AM*. In truth the present case is stronger than *AM*. It cannot be seriously suggested that where there is a single incident giving rise to allegations of mistreatment (albeit suggesting underlying systemic causes) the maintenance of public confidence in the rule of law requires a public inquiry, but that where the UK’s detention policy in Iraq over almost a six year period arguably resulted in (and indeed permitted) the systemic infliction of degrading and inhuman treatment on 100s of detainees as an interrogation strategy, no public inquiry is necessary. The stronger the evidence of long term systemic failure to comply with ECHR Art 3, as reflected in numerous incidents over many years, the greater is the need for a public inquiry that can get to the bottom of the failures and ensure they do not recur. In the context of British complicity in mistreatment of detainees at Guantanamo Bay, and torture and abuse by other intelligence agencies elsewhere in the world, the UK Government publicly announced a judge led inquiry, to take place once civil claims have been disposed of.<sup>8</sup>

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<sup>7</sup> *AM* was applied in *Morrison v IPCC* [2009] EWHC 2589, where the Court recognised that criminal proceedings would not suffice where “wider matters” required investigation §43. The Court also held that *Banks* did not alter the position on the weight of European cases which made clear that in cases of allegations of “intentional violence”, the availability of civil proceedings will not satisfy Art 3 §§66-69.

<sup>8</sup> See David Cameron’s announcement of 6 July 2010 to the House of Commons at <http://www.number10.gov.uk/news/statements-and-articles/2010/07/statement-on-detainees-52943> .

36. A core purpose of an ECHR Art 2/3 inquiry is to uncover the full facts of a case and understand whether, and if so how, the state was responsible for ill-treatment or death so that lessons can be learned. No investigation which sought to uncover the full facts that explain why the Claimants were subjected to sleep deprivation, hooding, or humiliating interrogation could reach any meaningful conclusion without examination of the policies that were in force and how they were being applied. That is recognised by the BMI. Its remit is (see Claimant's Grounds at §7):

*[t]o investigate and report on the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him, taking account of the investigations which have already taken place, in particular where responsibility lay for approving the practice of conditioning detainees<sup>9</sup> by any members of the 1st Battalion, The Queen's Lancashire Regiment in Iraq in 2003, and to make recommendations.*

Any attempt to understand the circumstance of Baha Mousa's death and the mistreatment of those detained with him would have to grapple with who was responsible for the conditioning techniques that were being used. That is the same in the instant cases. The Claimants are simply seeking the application and extension of the BMI's approach to other time periods and other facilities (including JFIT) and other forms of ill-treatment. The availability of civil and criminal proceedings will not lead to a proper understanding of the interrogation techniques and detention practices adopted in Iraq in the Claimants' cases any more than it would have done so in relation to the individuals considered by the BMI.

37. The Defendant suggests that in seeking such an examination of policies and practices the Claimants are requesting some wider investigation into matters that are outside the scope of ECHR Art 2/3 and that are suitable for political debate only (DDG §§31-32). The Defendant's submissions are misconceived. They are based upon conflating systemic issues, which it is plain from *Amin* and *AM* may require investigation under ECHR Arts 2/3, with wider political questions, which will generally fall outside the scope of the Convention. The difference is illustrated by the cases relied upon by the Defendant at DDG §31. The Defendant refers to cases in which an inquiry was being sought into:

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<sup>9</sup> Underlined passages here and below are emphasis added.

- (1) “the organisation and funding of the NHS as a whole or the pressures which led to the shortcoming in the hospital” (DDG §31) in which Beverley Allitt, a trainee psychiatric nurse, committed four murders (*Taylor v UK* no 23412/94 Comm Dec 30.8.94 DR 79);
- (2) “the whole culture of violence at Wormwood Scrubs throughout the 1990s” which had existed in the decade prior to prisoners suffering assaults by prison guards (see *AM* §110 per Elias LJ discussing *Banks*); and
- (3) “the relationship between sentencing policy and placement policy” (DDG §31) in connection with a young offender who hung himself in prison (*Bailey v United Kingdom* no 39953/07 19 January 2010).

One can see why these matters could be regarded as being outside the scope of an ECHR Art 2/3 investigation, particularly where inquiries had already been conducted into the abuses complained of (as there had been in *Taylor* and *Bailey*). In relation to *Banks* it should also be noted that Sedley LJ in *AM* found it a “surprising proposition, in the light of the [ECtHR’s] own jurisprudence and in the light of the United Kingdom authority derived from it” that it was suggested that “the background of the assaults and the remedial nature apt to prevent any recurrence ... fall outside the scope of Article 3” (§47). Even if one accepts that an inquiry concerned with examining whether there was a “culture of violence” in Wormwood Scrubs in the 1990s or the funding of the NHS falls outside ECHR Art 2/3, that is a far cry from the instant case. There is no authority which suggests that wider systemic issues, covering policies and practice which may have directly caused or permitted deliberate abuse, do not require investigation alongside investigation of the incidents themselves. Indeed, as *AM* makes clear, it is precisely such systemic issues which indicate that civil and criminal proceedings will not suffice and that a further inquiry is needed.

38. The Defendant also makes detailed submissions on the apparent difference between investigations pursuant to ECHR Arts 2 and 3 (DDG §§22-30). These do not take matters any further. In fact, there is here a pattern of suspicious deaths in custody as well as mistreatment raising issues regarding compliance with ECHR Art 2. In his first witness statement Mr Shiner raised the prospect of further Art 2 cases (§§15(e) and

16(e)), this is repeated in Mr Shiner's Third Witness Statement at §§63-76 where other cases are referred to that give rise to significant questions as to whether an open and honest account has been given of the numbers of deaths in custody in the relevant period. These matters will not be considered by the BMI or ASI and are plainly apt for resolution by a single inquiry.

39. In any event, the suggestion by the Defendant that there is some relevant key difference in principle between Arts 2 and 3 is misconceived. The underlying purpose of the investigation under both Articles is the same, namely to maximise future compliance by ensuring that the full facts of a case can be brought to light, and, where necessary, lessons can be learned. As Sedley LJ held in *AM* "there is no reason in principle to draw a line in this regard between art 2 and art 3" (§60). Elias LJ agreed "that there is not a formal distinction between the requirements of the two articles" (§103). As Elias LJ observed, the nature of any investigation required depends on the facts. That a case involves a death is, of course, a relevant factor, but does not mean that the purpose of the investigation is different in Art 2 and 3 cases.
  
40. In *AM* Elias LJ identified at §104 four factors which "typically" (§103) differentiate ECHR Art 2 and 3 cases on their facts. The Defendant suggests these are an "accurate... summary..." (DDG §30(b)). Once Elias LJ's factors are applied to the instant case, however, rather than assisting the Defendant, they strongly support the Claimants' submission that civil and criminal proceedings will not suffice. One of the reasons, on Elias LJ's approach, that civil and criminal proceedings are more likely to suffice in ECHR Art 3 cases than Art 2 cases is that "there are likely to be far fewer Article 3 breaches resulting from systemic wrongdoing" (§104). As indicated above, and as in *AM*, the instant case plainly does involve systemic wrongdoing. Elias LJ also noted that ECHR Art 3 requires "an arguable breach of substantive rights" whereas Art 2 cases may not. As indicated above, the Defendant has conceded an arguable breach in the instant case so this too does not assist him. A third difference identified by Elias LJ is that "death is always treated as a matter of particularly grave concern". That is true, but the instant case is plainly of grave concern. It cannot be said that allegations of apparently deliberate and systematic inhuman and degrading treatment of hundreds of

detainees by British soldiers do not raise issues of “grave concern.” The Defendant himself accepts it is a “serious” matter (see DDG §6(a)).

41. The only factor identified by Elias LJ that might appear to assist the Defendant is the observation that in ECHR Art 3 cases the victim is alive and better able to take civil proceedings. That, however, also applied in *AM* and did not prevent Elias LJ from holding that civil/criminal proceedings would not suffice because of the systemic issues raised which would not be dealt with in criminal or civil proceedings. It also did not prevent an inquiry being required in relation to the Art 3 allegations made by the living detainees considered by the BMI and ASI. Furthermore, if the Defendant’s submissions are correct, the discharge of his investigative obligation will require each Claimant to pursue to contested hearings a civil claim in tort and pursuant to the Human Rights Act 1998. That may or may not involve hearings in the Administrative Court, but it requires no less court time and public funding than fighting every claim seeking a public inquiry. The Divisional Court in *Al Sweady v SSD* [2009] EWHC 2387 (§66) expressed significant concerns as to the burdens imposed by such litigation and it is precisely to avoid such an outcome that the single inquiry is sought.
  
42. The power to hold a public inquiry is not disputed. The Inquiries Act 2005 provides for an inquiry to be held where it appears to a Minister that “particular events have caused, or are capable of causing, public concern” or “there is particular concern that particular events may have occurred” (Inquiries Act 2005 section 1). These cases perfectly illustrate that test being satisfied and that a public inquiry, and not just the possibility of civil and criminal proceedings, is required. If the UK was, indeed, applying an interrogation and detention policy in Iraq which flagrantly and systemically subjected detainees to cruel, inhuman and degrading treatment, it is a matter of the utmost public concern that the full facts be brought to light and that mechanisms are in place to ensure that such practices do not recur. The Defendant does not suggest that IHAT is capable of conducting such an exercise and nor can it seriously be suggested that that is the role of a court determining civil proceedings. Unless (which the Defendant has never suggested) all of the Claimants are simply lying and none of the abuse they allege, in fact, occurred, it is inevitable that a public inquiry will at some point be required into the issues the Claimants’ cases raise.

## (2) TIMING AND PROPORTIONALITY

43. If the Claimants are correct so far, the remaining question is one of timing: should the setting up of the inevitable public inquiry await the completion of IHAT's investigations currently estimated for October 2012 and subsequent prosecutions?
44. The starting point on timing is that it is well established that an investigation pursuant to ECHR Art 3 must be carried out promptly once the state has sufficient evidence that mistreatment or torture might have occurred. That is so regardless of whether the requisite knowledge comes because the victim makes a complaint or the state uncovers the abuse through other means. The ECtHR thus held in *Members of the Gldani Congregation of Jehovah's Witnesses v Georgia* (2008) 46 EHRR 313 at §97:
- the authorities have an obligation to take action as soon as an official complaint has been lodged. Even in the absence of an express complaint, an investigation should be undertaken if there are other sufficiently clear indications that torture or ill-treatment might have occurred. A requirement of promptness and reasonable expedition is implicit in this context. A prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. Tolerance by the authorities towards such acts cannot but undermine public confidence in the principle of lawfulness and the State's maintenance of the rule of law...*
45. In the instant case the Defendant knew, or ought to have known, of much of the ill-treatment complained of by these Claimants at the time it occurred. In particular, many of the Claimants give uncontradicted evidence that doctors or medical personnel treated their injuries (often inadequately), or examined them (or were otherwise present) in circumstances where it must have been plain that there was at the very least a suspicion of ill-treatment. That is evidence which was or should have been known to the Defendant. Furthermore, in those cases where abuse was the result of interrogation and detention policies adopted by the UK's Armed Forces, the treatment to which detainees were being subjected was well known to the Defendant. The Defendant's current position is that, despite overwhelming evidence of systemic mistreatment, no efforts should be made to begin or even prepare to examine such systemic issues for at least another 2 years, at which stage the Defendant may reconsider the matter. This raises serious practical problems that are reflected in the promptness requirements, namely that witnesses may not be available, may be unable to recall events and evidence

becomes harder collect. Such a delay also hardly inspires confidence in the “principle of lawfulness and the State’s maintenance of the rule of law” as required by the *Gldani Congregation* case.<sup>10</sup> Instead it suggests a willingness to tolerate inertia. If there are plausible allegations that British soldiers were routinely using unlawful methods in interrogation and detention as a result of policies and practices of the Armed Forces, or because such methods were implicitly sanctioned by those at senior levels, these should be brought to light and lessons learned now. It is unsatisfactory and unlawful to wait for at least another 2 years before the holding of the inevitable public inquiry will even be considered.

46. It is not an answer that the Defendant has given an assurance that he will not “seek to argue [following the results of the IHAT investigation] that it is not feasible to conduct a public inquiry into any wider/systemic issues simply because of the passage of time” (DDG §91(c)). Feasibility is a practical fact not just a legal argument. It can also be a matter of degree. It would be disastrous for human rights accountability in this most anxious context if the court was to accede to the Defendant’s suggestion for a further delay of at least 2 years before a public inquiry is considered, and then to discover that so much time has passed that a comprehensive and effective inquiry is, to any extent, not possible.
47. To set up a public inquiry after IHAT completed its investigations, as indicated below, means the inquiry would not begin for a number of years. Some very good reason would be required for this kind of delay in the investigation of the Army’s policies and practices. The Defendant contends that the delay is justified for two reasons: (i) any inquiry should await the outcome of the BMI and ASI to ensure that resources are not wasted covering the same ground as those inquiries (see DDG §9(d) and §96), and (ii) there would be practical difficulties with any work at all being conducted by an inquiry until IHAT’s criminal investigations are complete (ibid §§9(b) and (c) and §§38-49). Neither are convincing reasons for a delay.

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<sup>10</sup> See further *Aydin v Turkey* 25 EHRR 251

*(i) the BMI and ASI*

48. The BMI and ASI's remit is limited by their terms of reference to specific events at specific locations. The focus of the BMI is the circumstances surrounding Baha Mousa's death and the treatment of others detained with him between 14-16 September 2003 at the Temporary Detention Facility ("TDF") at Battle Group Main, where the detainees were tactically questioned following their capture. The wider policy issues which the BMI is examining follow from that focus. The court's attention is invited to Annex A exhibited as "PJS3" to the first witness statement of Mr Shiner which summarises the systemic issues examined by the BMI in the light of its Terms of Reference. The BMI is examining the policies on hooding, stress positions, deprivation of sleep, deprivation of food and water, but only insofar as they were applied in the TDF at the material time by the 1st Battalion the Queen's Lancashire Regiment (1QLR). The Defendant in his submissions to the BMI has specifically cautioned the inquiry against drawing any inference about any other practices by other battlegroups. He has submitted (MOD Corporate Closing Submissions, Chapt 6, at §1):

***The MOD accepts that there is some evidence that some of the prohibited techniques were used by other battlegroups as an aid to interrogation. Of course, this evidence is not as central to the Inquiry's terms of reference as evidence which relates to 1QLR. Moreover, the evidence which the Inquiry has heard has necessarily been piecemeal and has not attempted to provide any complete overview of practice in the Army. The MOD would therefore caution against any inference about broader use of the prohibited techniques which goes beyond the limited evidence which the Inquiry has heard.***

49. Furthermore, the BMI has not examined the practices applied during interrogation at other facilities and in particular by JFIT. The allegations considered by the BMI concern abuse during and surrounding the tactical questioning of a group of Iraqis immediately following capture at battle group level. The general practice was for a battle group to detain Iraqis for a number of hours and subject them to tactical questioning. Thereafter, if a decision was made that they should be held for further internment, they were transferred to JFIT to be interrogated by specialist interrogators. JFIT was a "compound within a compound"<sup>11</sup> at TIF/DIF/DTDF (see §13 above on the different locations of JFIT). The BMI has heard little evidence on JFIT.<sup>12</sup> It is

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<sup>11</sup> Shiner 4 at §11

<sup>12</sup> The Defendant's submissions to the BMI, which heard evidence of hooding and sleep deprivation at JFIT, dealt very briefly with JFIT (Closing Submissions pp109-111) he "accepts that the evidence in respect of the JFIT in the early days of its operation gives a cause for concern" (p109), that the use of sleep deprivation at JFIT

understood that the BMI will not make substantive findings about JFIT, certainly not about extensive allegations of abuse by JFIT.

50. As to the ASI, its focus is on the killing of Iraqis on 14-15 May 2004 and what occurred at Camp Abu Naji (“CAN”) over that period. It will also examine a limited number of allegations concerning treatment in JFIT in the following months. The allegations cover nothing like the range of dates, places and practices covered in the instant case.
51. There is certainly some overlap between the current allegations and the BMI and ASI, but that is all the more reason for an integrated composite third and final inquiry. The position is that the BMI and ASI are limited to a small number of incidents at a limited number of facilities in limited time frame. Absent a further inquiry the many locations and time periods raised in the instant case will remain unexplored. Indeed, the gaps in the picture will be substantially larger than those parts filled in. The BMI or ASI will also not consider numerous practices which appear from the Claimants’ evidence to have been adopted in Iraq but which were not inflicted on the detainees in the BMI and ASI cases (see, for example, sexual humiliation, forced nakedness, the use of pornography, long periods of solitary confinement, “harshing”, disorientation and sustained food deprivation as a tool during interrogation processes and the role that abuse upon arrest played in those processes). These are not raised by the Baha Mousa or Al Sweady detainees and are not before these inquiries. There are also at least ten facilities and numerous interrogation and detention practices that the BMI and ASI are not considering. And even in relation to those facilities and techniques that are being examined, they will only relate to the time-scales relevant to those inquiries. The matters left unresolved are, therefore, significant, and, at some stage, will require a public inquiry to comply with ECHR Arts 2/3. The Claimants accept the overlap and the need to avoid duplication with the BMI and ASI. However, just as the ASI and BMI overlap, and ASI is able to follow on, so the third inquiry overlaps and follows from them both. There is an opportunity to build on the earlier work, and with appropriate liaison and co-operation it should not be difficult to ensure matters considered by the

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as an aide to interrogation was “totally unacceptable” (ibid) and that he does not seek to “defend what occurred at JFIT” (p110).

BMI or ASI are not unnecessarily re-examined while at the same time obvious gaps left by the BMI and ASI can be filled.

52. It should also be noted that insofar as this issue poses a problem at all, it is of the Defendant's own making. Indeed his stance in these proceedings, if accepted, will perpetuate the problem rather than solve it. The Claimants' solicitors have, since December 2004, been calling on the Defendant to hold an inquiry into all the allegations of mistreatment in Iraq. This has been, and continues to be, strenuously resisted. Instead the Defendant has chosen to contest each claim separately through the courts with the result that two different inquiries have been set up at different times to examine specific allegations of abuse when the Claimants have won individual cases. As indicated below, if the Defendant's arguments in the instant case are accepted, the likely result will be numerous further individual cases being brought in the High Court followed by individual public inquiries. That is inefficient and unsatisfactory. It is to avoid these practical difficulties and cost implications that a single inquiry is sought.

*(ii) practical difficulties*

53. The Defendant's approach means that a single public inquiry will not be considered until IHAT's investigation (and presumably any prosecutions following from it) have been completed. The Defendant makes detailed submissions about what he says are the practical problems of commencing even the preliminary stages of a public inquiry at any earlier stage (DDG §§38-49). It is notable, however, that the Defendant has not disclosed anything suggesting that consideration has been given to the ways such practical problems might be overcome. Nor does he appear to have considered the practical problems of his proposed course of action so as to weigh them against the alternative.
54. The Claimants recognise that thought would be required as to how IHAT investigations and a public inquiry could proceed in tandem. But it is not difficult to see how such a procedure could work effectively, and, indeed, how it could have significant advantages for IHAT's investigation as well as ensuring matters could be dealt with expeditiously.

55. The experience of the BMI, and now the ASI, provide helpful lessons. They suggest that the initial process of setting up an inquiry and disclosure and consideration of materials is very time consuming. For example, the BMI was announced in Parliament on 14 May 2008, Sir William Gage was appointed two months later on 21 July 2008 and the inquiry formally set up on 1 August 2008. No live evidence was heard, however, until 21 September 2009, more than 16 months after the inquiry was announced. Evidence was then heard for 25 weeks, normally on 3-4 days per week, and the inquiry is due to hear closing submissions shortly. In the 16 months after the announcement of the inquiry the BMI undertook a disclosure exercise and numerous documents were read by counsel to the inquiry. If a single Iraq inquiry were now set up, there would initially need to be consideration of the kinds of issues that will require examination. A significant disclosure exercise will then be required in relation to Army policy documents, training manuals and videos etc. This would no doubt use the disclosure made to the BMI as its starting point but a significant amount of further material would need to be considered. IHAT will not be considering this material and there could be no prejudice to any criminal investigation of individual soldiers if policy documents began to be collated, read and considered. Indeed, if at any stage concerns arise as to prejudice of criminal investigations there is no difficulty in ensuring that documents are not made public. Inquiries, including the BMI and ASI, routinely adopt processes limiting publication of material that is not in the public interest. There is no reason why commencing that work needs to be delayed by years pending completion of IHAT's investigations.
56. In the meantime IHAT could conduct its investigations into the individual facts of cases to determine if there is evidence that could give rise to a prosecution. Not only would the existence of the inquiry not prevent such an investigation, but it could be a positive benefit to have an integrated approach and ongoing liaison and dialogue. Under the Defendant's approach, given that there would be no coordination between the IHAT investigation and an inquiry later set up, and that IHAT will be asking questions pertinent only to criminal prosecutions, there is the prospect that IHAT will have failed to obtain information that the inquiry might have needed, giving rise to further duplication of work. The approach suggested by the Claimant permits a significantly greater degree of coordination. If the Chair of the Inquiry and the head of IHAT liaised,

IHAT could be obtaining the kinds of information that would later be helpful to an inquiry or at least limitations in the fact-finding by IHAT would be known and understood at an early stage. The ability of the inquiry to work in tandem with IHAT would thus be expected to significantly reduce the burden of the primary fact-finding the inquiry would need to undertake. The evidence would have been gathered.

57. What of the practicalities of the Defendant's approach? The Defendant has stated that IHAT will finish its investigations in October 2012. Given the court's experience, for example in *Al Sweady* and *Kammash*, with assurances repeatedly given as to how long RMP investigations would take, the court is entitled to a degree of scepticism as to that date. Even if investigations are entirely concluded in October 2012, there may then follow prosecutions. On the Defendant's case, no single inquiry should commence until such prosecutions are completed. It is clear, if one considers the timescale of the BMI, that if a single public inquiry was then created it would be very unlikely to begin to hear evidence for at least 5 years from today. What happens in the interim?
  
58. The Defendant evidently envisages that IHAT will complete its various investigations sequentially and the victims will be told on completion what is being done in their particular case. If IHAT begins investigating in December 2010 after it has reached full capacity, within a few months IHAT will begin to (and certainly could) conclude individual cases. It is said that a triage has already been undertaken. The latest evidence from the defendant suggests that *Kammash* and *Fartoosi* are nearing completion and will be concluded by November 2010 (WS GW §§33, 36). In any case, as soon as it is decided that no prosecution should be brought, the individual Claimant would then be entitled to seek an Art 3 compliant investigation in his case. It would be no answer to say that IHAT was conducting investigations in other cases involving other Iraqis which might or might not lead to prosecution. The Claimant in any particular case would be entitled to return to the Administrative Court in their individual case, as occurred following RMP investigations in both *Baha Mousa* and *Al Sweady*, and bring judicial review proceedings against the Defendant. If they were successful, another public inquiry would be ordered into their case, and the same in the next case, and so on.

59. If, as the Claimants submit, the Defendant is under a duty to conduct an effective investigation into detention practices in Iraq between 2003 and 2008, and that the availability of civil/criminal proceedings will not suffice, such an investigation must be undertaken “promptly.” There may be cases in which there is a balance to be struck between promptness and effectiveness. There would, however, need to be some overwhelming practical reason why the inevitable inquiry into the Army’s procedures and practices and other systemic issues raised by the instant cases and which require lessons to be learned will not begin to be heard for perhaps 5 or more years. It is submitted that the Defendant’s practical concerns come nowhere near such a threshold. For the reasons set out above, solutions would not be difficult to craft which would enable an inquiry to begin work and operate in a coordinated manner with IHAT in a way that not only minimises delay, but, in fact, has less practical difficulties than the Defendant’s proposed course of action and certainly need not prejudice any prosecutions that are brought. The Defendant’s proposed course of action, by contrast, simply defers having to bite the bullet in the very short term. Once IHAT commences its work and begins to conclude in particular cases that no prosecution is to follow, but without being able to prove conclusively that the Claimant’s allegations have simply been fabricated, numerous individual cases will be back before the Administrative Court, followed by further uncoordinated individual public inquiries if the Claimants are successful. It is impossible to see how that is an effective way to discharge the Defendant’s ECHR Art 3 obligations and certainly is not a proportionate means of expending public resources.

### **(3) IHAT’s INDEPENDENCE**

60. It is common ground between the parties that in order to discharge the Defendant’s ECHR Art 2/3 investigatory obligations, the individuals that are relied on as being responsible for any investigation must be independent from the person or body implicated in the events under investigation in terms of hierarchy and institutional connection and as a matter of practice (see DDG §51). This is well-established in the ECtHR caselaw (see, for example, *Jordan v UK* (2003) 37 EHRR 2 §106, *Sahin v Turkey* App No 7928/02 §43; *Ozkan v Turkey* [2004] ECHR (21689/93, 6th April 2004) §311).

61. It is, therefore, critical to the Defendant's case – in positing IHAT as key to the solution - that IHAT is sufficiently independent. If IHAT is not independent it cannot, moreover, be seriously suggested that it is lawful for the Defendant to await the outcome of the IHAT investigation before discharging his ECHR Art 3 obligations. If IHAT is not sufficiently independent given that the Defendant accepts that the Claimants' cases raise arguable breaches of ECHR Art 3 and that an independent and effective investigation is thus required, a public inquiry now is all the more inevitable. IHAT's independence, or lack thereof, should therefore be determined. This appears to be common ground between the parties. As the Claimants stated in their skeleton for the permission hearing at §41:

*it would be disastrous in terms of the investigative process if the question of IHAT's status in terms of Art 3 was ventilated in more than 2 years' time only to discover at that stage that IHAT is insufficiently independent to satisfy ECHR Art 3.*

Similar views were expressed by counsel for the Defendant orally at the permission hearing. He accepted that if there was a threshold problem with independence of IHAT it would need to be addressed as (transcript page 13):

*it would ... be deeply unfortunate to spend £6 million worth of public money to get to the end of IHAT investigations only to be told that it was useless on a point of principle.*

62. It is the Claimants' case that IHAT is not sufficiently independent for Art 3 purposes and thus could not satisfy the Defendant's Art 3 obligations for three separate reasons:

- (i) Military investigators, who are part of the Armed Forces, are not sufficiently independent of the Army for the purposes of discharging ECHR Art 3 investigative obligations (*a fortiori* where the causes of the alleged ill treatment are systemic policies and practices);
- (ii) The particular structure in which IHAT operates pursuant to the Armed Forces Act 2006 renders it insufficiently independent in the vast majority of the present cases, in any event, because the decision on whether to bring charges and the conduct of a prosecution will be in the hands of commanding officers and not IHAT or the Director of Service Prosecution.

(iii) On the facts of the instant case the RMP is insufficiently independent to examine what occurred in Iraq between 2003 and 2008. RMP personnel and the Provost Marshall (Army) are themselves likely to be implicated to a significant extent, directly or indirectly, in all, or in almost all, of the alleged abuse. RMP personnel are either perpetrators of the abuse, witnesses of it and/or failed to prevent it. The RMP is, therefore, insufficiently independent of the events in question to conduct an ECHR Art 2/3 compliant inquiry.

63. None of this is to say that the RMP cannot or should not investigate allegations of offending by members of the Armed Forces in other contexts. The vast majority of allegations of service offences which are investigated by the RMP have nothing to do with the discharge of the Defendant's ECHR Art 2/3 duties. If one examines the offences which the RMP investigates pursuant to the Armed Forces Act 2006 (see further below) it is apparent that of the well over 100 offences listed in Part 1 and Schedule 1 and 2 of the Act, only a very small fraction could, even in theory, have anything to do with ECHR Art 3. In other cases an RMP investigation followed by a prosecution pursuant to the Armed Forces Act 2006 will be perfectly lawful. The issue in the instant case is not, therefore, the general role of the RMP in investigating criminal or other service offences. It is the narrow question of whether the RMP can discharge the Defendant's ECHR Art 2/3 investigative obligations (or, to put it more narrowly still, whether the RMP can satisfy ECHR Art 2/3 where systemic issues arise).

*(i) Structural independence and the Army investigating itself*

64. The Defendant accepts that whether or not IHAT is independent of the Armed Forces depends on whether or not the RMP is hierarchically and institutionally independent for the purposes of ECHR Art 3 (see DDG §57). It is, quite properly, not suggested that the fact that IHAT includes a minority of civilian investigators and a civilian head means that it should be treated differently from the rest of the RMP. It is the RMP soldiers who have the statutory policing powers necessary to carry out IHAT's investigation, and IHAT will remain within the RMP chain of command. The RMP are serving soldiers and are subject to military discipline and command. They report on the conduct of their investigations to the Provost Marshall (Army) ("the PM(A)"). The PM(A) is

also a serving soldier. He is responsible for RMP investigations, and thus for IHAT, and in the conduct of those investigations he answers to the Army Board of the Defence Council (ibid). The chain of command above the PM(A) runs through the Assistant Chief of the General Staff to the Chief of the General Staff (see DDG §56). In addition, other than in the conduct of investigations, the RMP are subject to the “military command” not of the PM(A) but of the Army’s Commander-in-Chief and General Officers Commanding (see DDG §55).

65. The RMP is, on any analysis, a part of the Armed Forces. It is the Defendant’s case that the RMP is, nevertheless, sufficiently independent for the purposes of ECHR Art 3 because the PM(A) “operates outside and separately from the main operational chain of command, namely in a separate chain of command leading up to the Chief of the General Staff” (see DDG §57(a)). The fact that there is a separate chain-of-command for the RMP’s investigative functions (though not, it should be noted, in relation to the RMP’s military command) is not, however, sufficient. The ECtHR has held in a number of cases that members of the Armed Forces are not sufficiently independent for the purposes of conducting an Art 3 compliant investigation into misconduct by the Army. Nor do they become sufficiently independent simply because they are placed outside the normal chain of command. The fact that they are servicemen and are subject to military discipline and command prevents them having the requisite institutional and hierarchical independence for the purpose of ECHR Art 2/3.
  
66. In *Shevchenko v Ukraine* (2006) 45 EHRR 642, the ECtHR considered a claim brought by the father of a lieutenant in the Ukrainian Air Force who was found dead while on guard duty. The Military Prosecutor’s Office (“the MPO”) investigated the death and concluded that the son had committed suicide. It appears that the MPO operates in a similar manner to the RMP (following the reforms of the Armed Forces Act 2006) in that it is a specialist body within the army which investigates crimes committed by military servicemen. Like the RMP, the MPO operates outside the chain of command of the units it investigates, but its members remain serving soldiers (see §§46, 71). In *Shevchenko* the lieutenant’s father brought a claim for breach of ECHR Art 2 and argued, inter alia, that the MPO investigation was not sufficiently independent to

discharge the state's adjectival obligation. The ECtHR accepted this argument. It held at §71:

*As regards the investigators from the MPO, the Court finds that their independence was also not ensured. While not being a part of the chain of command of the Unit, they nevertheless remained servicemen, subject to military discipline (mutatis mutandis, Ari v Turkey [2001] ECHR 29281/95 at para 46).*

67. In a similar vein in *Kallis v Turkey* [2009] ECHR 45388/99 the Applicants argued that no independent investigation had been carried on into the circumstances of their son's death. They argued that an inquiry relied on by the Government "had been carried out by members of the Turkish armed forces into the actions of other members of the same armed forces" (§48) and was thus not independent. The ECtHR agreed. It concluded that "an investigation carried out by the same body to which those implicated in the events belong can hardly be described as 'independent' and does not satisfy the requirements of art 2" (§72). In *Jordan v UK* (2003) 37 EHRR 2 the ECtHR held that an investigation into a killing by a RUC police officers, which was headed and carried out by other RUC officers, was not sufficiently independent because the officers who conducted the investigation and those that were subject to it were ultimately under the responsibility of the Chief Constable (§128). The fact that the investigation was supervised by an independent police monitoring authority did not alter that conclusion. See also *McKerr v UK* (2002) 34 EHRR 20 at §128.

68. In *Shevchenko* the ECtHR applied jurisprudence on the meaning of "independence" for the purposes of ECHR Art 6. Art 6 provides that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The Court relied, in particular, on its earlier decision in *Ari v Turkey* [2001] ECHR 29281/95. *Ari* concerned whether a Military Court, made up of military and civilian judges, was sufficiently independent for the purposes of Art 6. The ECtHR held that there was no doubt about the independence of the civilian judges. The Government pointed out that the military judges underwent the same training and enjoyed the same constitutional safeguards as their civilian counterparts (they could not be removed from office or made to retire early without their consent and were career members of the Military Legal Service) (§45). Further, according to the Constitution, military judges had to be independent and no public authority could give them

instructions concerning their judicial activities or influence them in the performance of their duties. The ECtHR in *Ari* held that the military judges, nevertheless, were not institutionally “independent” of the army. In the passage relied upon in *Shevchenko* the court held, having set out the indicators of independence relied on by the Government, (§46):

*However, other aspects of their status call into question their independence and impartiality. Firstly, the military judges are servicemen who still belong to the army, which in turn takes orders from the executive. Secondly, as the applicant rightly pointed out, they remain subject to military discipline and assessment reports are compiled on them for that purpose. They therefore need favourable reports both from their administrative superiors and their judicial superiors in order to obtain promotion .... Lastly, decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army.*

69. While both the military judges in *Ari*, and the MPO in *Shevchenko*, were subject to a separate chain-of-command, the fact that they were subject to military discipline and were servicemen who still belonged to the Army, and were under its ultimate command, meant that they were not hierarchically and institutionally separate for the purposes of ECHR Arts 2/3 or Art 6. The RMP is indistinguishable. Its members are servicemen subject to military discipline and to the military command of the Army’s Commander-in-Chief. They are no more independent than the MPO or the military judges.
70. The Defendant has pointed to no Strasbourg authority in which it has been suggested that members of the Armed Forces are sufficiently independent when conducting an investigation into other members of the Armed Forces so as to ensure compatibility with ECHR Arts 2/3. There are many further instances in which such investigations have been held by the ECtHR, for a variety of reasons, to be insufficiently independent (see eg *Güleç v Turkey* (1999) 28 EHRR 121; *Ogur v Turkey* [1999] ECHR 21954/93 at §§91–92; and *Ergi v Turkey* [1998] ECHR 23818/94 at §§83–84)).
71. The Defendant relies on dicta from the judgment of Brooke LJ in *R (Al Skeini) v SSD* [2007] 1 QB 140 in support of his contention that the RMP is sufficiently independent for the purposes of ECHR Art 2/3 (DDG §§52-53). Brooke LJ stated as follows at 287 (§§139-140):

*the obligation to comply with these well-established international human rights standards would require, among other things, a far greater investment in the*

*resources available to the Royal Military Police than was available to them in Iraq, and a complete severance of their investigations from the military chain of command.*

*In other words, if international standards are to be observed, the task of investigating incidents in which a human life is taken by British forces must be completely taken away from the military chain of command and vested in the RMP. It contains the requisite independence so long as it is free to decide for itself when to start and when to cease an investigation, and so long as it reports in the first instance to the APA [Army Prosecution Authority] and not to the military chain of command. It must then conduct an effective investigation, and it will be helped in this regard by the passages from ECHR case-law I have quoted. Many of the deficiencies highlighted by the evidence in this case will be remedied if the RMP perform this role, and if they are also properly trained and properly resourced to conduct their investigations with the requisite degree of thoroughness.*

72. Brooke LJ's observation that, under the circumstances he set out, the RMP would have the requisite independence for the purposes of ECHR Art 2/3 is, however, plainly not binding in the instant case. Brooke LJ was commenting *obiter* as to the circumstances in which the RMP would be sufficiently independent, but, in fact, concluded that the investigations conducted to date were ineffective and insufficiently independent. Neither Richards nor Sedley LJ considered the independence of the RMP in *Al Skeini*. Observations on what might be required for an investigation to be independent were plainly not part of the ratio of the case. Secondly, *Al Skeini* was appealed to the House of Lords and the case was decided without reference to the independence of the RMP. The decision of the Court of Appeal on this matter (even if it were not dicta) would not, therefore, be binding. Pursuant to the rule in *Balabel v Air-India* [1988] Ch 317 at 325-326, a decision of the Court of Appeal is not binding where that decision is appealed to the House of Lords, and is decided on a different point (see the application of the rule in *Balabel*, in *Al-Mehdawi v SSHD* [1990] 1 AC 876, 881-882, 883C).
73. The position, therefore, is that the court in the instant case is faced with jurisprudence of the ECtHR in *Shevchenko* which makes clear that current members of the Armed Forces subject to military discipline are not sufficiently independent of the Army for the purposes of ECHR Art 2/3, and dicta of the Court of Appeal that suggests that the RMP might be sufficiently independent. In those circumstances it is submitted that the court should follow the later ruling of the ECtHR. It is well established that domestic courts should follow Strasbourg jurisprudence unless there is some "strong reason" not to do so (see *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 at

§20). The dicta of Brooke LJ does not, with respect, constitute a “strong reason” (and it should be observed that *Shevchenko* was decided some months after *Al Skeini*).

74. It is not surprising that internal army investigations such as those by the MPO and the RMP are not sufficiently independent for the purposes of the ECHR Arts 2/3, and that that is so even if Army investigators are not in the same chain of command as the soldiers directly implicated in the abuse. The RMP are servicemen subject to military discipline and to the military command of the Army’s Commander-in-Chief. Furthermore, in the instant case the explanation for much of the ill-treatment the Claimants suffered is likely to be systemic, and, in particular, rooted in the interrogation and detention policies and practices adopted by the Armed Forces in Iraq at the material time. In those circumstances it is even clearer that members of the Armed Forces, whatever their chain-of-command, will not have the requisite independence to make critical findings which implicate the policies and practices adopted and approved by senior members of the Army.
75. IHAT cannot be said to be sufficient to “maintain... public confidence in the maintenance of the rule of law and ... prevent... any appearance of collusion in or tolerance of unlawful acts” so as to satisfy ECHR Arts 2/3 (see *Members of the Gldani Congregation of Jehovah’s Witnesses v Georgia* (2008) 46 EHRR 313 at §97). Nor could it seriously be suggested that if the Defendant had appointed a member of the Armed Forces to Chair the BMI or the ASI that the inquiries would have satisfied ECHR Art 2/3. A body existing within the Armed Forces is not sufficiently independent when examining whether there was systemic abuse of detainees in Iraq by the Army. If that is right, it is a complete answer to the Defendant’s case. His “new approach” to the allegations of mistreatment cannot satisfy ECHR Art 2/3. A public inquiry, as the only alternative, is therefore required.

***(ii) The role of the Commanding Officer pursuant to the Armed Forces Act 2006***

76. Even if, contrary to the above, members of the Armed Forces could, in principle, be sufficiently independent for the purposes of conducting ECHR Art 2/3 compliant investigations of abuse perpetrated by other soldiers because they are in a separate

chain of command, the current structure of the Armed Forces Act 2006 (“the AFA”) does not, in any event, ensure independence.

77. The Defendant accepts that in order to ensure independence, at a minimum, the RMP must be entirely separate from the military chain of command and any decision as to how a case will proceed must be taken outside of that chain of command (see the Defendant’s reliance at DDG §§52-53 on the views of Brooke LJ in *Al Skeini* (§§139, 140). Pursuant to the AFA, however, in relation to the vast majority of the allegations that the Claimants have raised, decisions on prosecutions and on cases proceeding are ultimately taken within the chain of command. Even if the RMP decided that there was sufficient evidence to bring a charge against a soldier, the RMP will report not to the Director of Service Prosecutions (“the DSP”) (as Brooke LJ envisaged, when the same function was fulfilled by the APA) but to the soldier’s Commanding Officer. The Commanding Officer can then decide whether to bring charges or drop the case. Even on the application of Brooke LJ’s dicta, therefore, the RMP’s structure is insufficiently independent to satisfy arts 2/3 ECHR.
78. The material statutory provisions are as follows. AFA creates a “two tier” system for investigation and prosecution (see Service Prosecuting Authority Report and Business Plan (2010) page 11). Serious offences are referred to the DSP and may end in a Court Martial. Less serious offences are referred to a soldier’s commanding officer and dealt with by him. The RMP are required to refer a case to the DSP where “the service policeman considers that there is sufficient evidence to charge a person with a Schedule 2 offence” (see AFA 116(2)(a)).<sup>13</sup> AFA Schedule 2 lists serious criminal offences such as murder, manslaughter, inflicting of grievous bodily harm. All other offences are dealt with differently. Where a service policeman considers that there is sufficient evidence to charge a soldier with a “service offence” which does not fall within Schedule 2, he “must” refer the case not to the DSP but to the commanding officer of

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<sup>13</sup> There is also an obligation to refer cases to the DSP that are covered by the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009 (SI 2009/2055) (see AFA s 116(2)(b)). The only parts of the Regulations potentially relevant to the instant case is the obligation to refer cases involving the infliction of “serious injury” (s 5(c)) defined as cases involving “a fracture, a deep cut, a deep laceration or an injury causing damage to an internal organ or the impairment of a bodily function” which occur in a British Army facility. Almost all such cases will, however, be cases concerning wounding or infliction of grievous bodily harm and so will fall within Schedule 2 in any event. The discussion below refers to Schedule 2 but applies equally to the small number of cases that do not fall within Schedule 2 but do fall within the 2009 Regulations.

the soldier concerned (see AFA s 116(3)). The RMP has no power to refer the matter to the DSP. There is, indeed, no obligation in such circumstances for the RMP even to consult the DSP (contrast s 116(4) which applies to Schedule 2 offences).

79. Those offences which do not fall within Schedule 2 are less serious criminal offences and other “service offences,” which may or may not otherwise be criminal offences, listed in AFA Part 1 (see the definition of “service offence” in AFA s 374 and 50). Non-Schedule 2 offences include assault occasioning actual bodily harm, conduct prejudicial to order and discipline, threatening behaviour, disgraceful conduct of a cruel or indecent kind as well as many others. If a Commanding Officer is aware that one of his subordinates has committed a non-Schedule 2 offence he may choose to investigate the matter himself or he may refer it to the RMP (see AFA s 115(4)). If he deals with the matter himself the Commanding Officer has the power to decide whether to charge the soldier (AFA s 120(2)) and conduct a summary hearing pursuant to AFA s 52 and 53. If a non-Schedule 2 case is referred to the RMP, or if it is investigated on the RMP’s own motion, if there is sufficient evidence to charge, the RMP must refer the case back to the relevant Commanding Officer (AFA s 116(3)). It is then within the discretion of the Commanding Officer whether any proceedings are brought against the soldier or whether the matter is referred to the DSP or whether the matter is simply dropped (see AFA s 120).
80. The Defendant’s case that the possibility of criminal investigation and prosecution is sufficient for the purposes of ECHR Art 2/3, because the RMP and DSP are independent of the chain of command, therefore does not assist him in relation to non-Schedule 2 offences. The Commanding Officer is the crucial decision maker. For a non-Schedule 2 offence, even if the RMP were itself sufficiently independent, any investigation it conducted pursuant to the AFA would fail to satisfy ECHR Art 2/3. It is well established that a Commanding Officer who is the hierarchical superior of a soldier accused of misconduct is not sufficiently independent for the purposes of any investigation into the alleged misconduct (see *Ozkan v Turkey* [2004] ECHR (21689/93, 6th April 2004) §311 and *Gulec* §§81-82). That is so, plainly, where the allegations concern systemic failures in which those in positions of command are almost certain to be in some way implicated (even if only in their failure to prevent the

abuse). Nor would it matter for these purposes if the officer in question is or is not in command of the unit in which the soldiers served, the fact that he is a part of the chain-of-command and the soldier's superior prevents him being sufficiently independent.

81. It appears, indeed, to have been recognised in the past by the Defendant's own lawyers that the role of the Commanding Officer in determining summary offences could potentially render the RMP's investigative process and any subsequent prosecution insufficiently "independent". The matter was considered in relation to ECHR Art 6 by the House of Commons Defence Committee on 27 October 2004, and concerns were expressed as to whether a soldier being charged and tried by a Commanding Officer for a service offence would receive a hearing before an "independent" body. Mr Morrison, the Defendant's legal adviser, apparently accepted that if consideration by a Commanding Officer was the end of the process, there would be a lack of independence. He explained that this was remedied, however:

*... because of the existence of the two factors which are regarded as the essential safeguard, which make the summary system compliant overall: the right to elect and the right of appeal to a compliant court called the summary appeal court. It is those two factors which are regarded as making a system which is, if you like, rough and ready at first hearings, overall compliant with Article 6 of the ECHR (see response to question 31)*

As Mr Morrison recognised: if it were not for the fact that soldiers are able to elect to be tried by a court martial rather than by a commanding officer (see AFA s 129) and could appeal against a summary finding of guilt or against punishment to the Summary Appeal Court (see AFA s 141) the summary offence process would infringe ECHR Art 6 because the critical role of the Commanding Officer would not permit sufficient independence.

82. In relation to the rights of individuals affected by arguable breaches ECHR Arts 2/3, however, the "essential safeguards" to which Mr Morrison referred do not apply. There is no mechanism for the victims of arguable breaches of arts 2/3 to avoid the determinative role played by the Commanding Officer. The summary process does not, therefore, ensure sufficient independence. The fact that accused soldiers may elect trial by court martial or can appeal is irrelevant to the question of independence in this context.

83. Prior to the AFA coming into force 95% of service discipline cases were decided through the summary process (see Select Committee on Armed Forces Bill, Special Report of Session 2005-6 §43). The intention of the AFA was to maintain the “Commanding Officer at the centre of this process” (ibid). While some of the allegations made by the Claimants are of grievous bodily harm and serious sexual assault and rape, and thus potentially fall within AFA Schedule 2, the vast majority (perhaps 90% of the 150 techniques recorded in table Exhibit PJS1) of the mistreatment in detention does not. Allegations of sleep deprivation, forced watching of pornography, deprivation of food, harsh interrogation, solitary confinement, the making of threats etc arguably fall within ECHR Art 3 and may constitute “disgraceful conduct of a cruel or indecent kind,” but would not easily fall within any Schedule 2 offence.
84. The RMP’s investigation will not, therefore, satisfy ECHR Art 3 even on Brooke LJ’s interpretation of the requirements of independence set out in *Al Skeini*. There is not a “complete severance of [RMP] investigations from the military chain of command.” In fact, on the contrary, the role of a Commanding Officer remains absolutely central: he would be the relevant and determinative decision-maker in relation to the vast majority of the Claimants’ allegations.

***(iii) Involvement of PM(A) in the matters under investigation***

85. Even if investigation by the RMP and application of the AFA process could, in principle or in some instances, deliver the requisite independence for the purpose of ECHR Art 2/3, it cannot do so in the instant cases in any event. That is because of the role played by RMP personnel in Iraq at the material times. RMP personnel stand to be directly and indirectly implicated in the abuses, and failure of protection from abuses, which are the subject of the investigation IHAT is to conduct. In these circumstances IHAT, on any view, cannot be regarded as independent.
86. It is correctly recognised by the Defendant that if RMP members are implicated in the allegations that are being investigated, the IHAT process will not be sufficiently independent (see DDG page 24 footnote 28). In the case of four of the Claimants, *Hamid-Lazim v SSD CO/9719/2009*, the Defendant has accepted that IHAT should not conduct the investigation and has moved the case to MoD police because “RMP may

have had personnel at the scene of the incident” (see letter of 27 September 2010). The Defendant deals with this problem as far as other cases are concerned, in passing, in his Grounds by asserting that such cases are “exceptional” (see DDG page 24 footnote 28). It is not clear, however, on what basis such an assertion is made. No evidence is provided or referred to by the Defendant in support. In fact, it is apparent from the small amount of disclosure provided by the Defendant in a handful of the Claimants’ cases, that both as a matter of institutional structure and as a matter of practice, the RMP and the PM(A)’s involvement in the conditions of the Claimants’ detention and abuse was far from “exceptional,” and, indeed, is likely to arise in every, or almost every, case. This relevant evidence is set out in Mr Shiner’s 4<sup>th</sup> Witness Statement. It is summarised below.

87. The PM(A) not only heads the RMP, he is also in charge of the Military Provost Staff (MPS). The role of the MPS is described on the Defendant’s website as follows:

*The Military Provost Staff are the Army's specialists in Custody and Detention, providing advice, inspection and surety within custodial establishments. They are under direct command of Provost Marshal (Army) and are based primarily at the Military Corrective Training Centre (MCTC) at Colchester from where they deploy regularly in support of British Military operations.*

The MPS’ role as detention specialists meant they were responsible for ensuring safety and humane treatment of detainees in Iraq through inspection and the provision of advice. That this was their duty, even if it was not properly carried out, is borne out by disclosure in individual cases. Among the disclosure provided in *Fartoosi v SSD CO/11442/2008* was a statement from SSgt Mepsted who was a member of the MPS between September 2005 and January 2006. He states that the MPS would visit the “North Compound” (the area of JFIT containing the solitary confinement cells and interrogation rooms) to check on the detainees twice daily. SSgt Cooke, a member of the MPS between July 2007 and January 2008 and based at DIF, provided a statement in which he explained:

*MPS were not responsible for the actions and behaviour of JFIT, only the well being of the detainee. To that end, if a detainee was placed in the JFIT holding area MPS would ensure his welfare and fundamental human rights.*

88. So, if abuse and the compromise of welfare and human rights occurred, it occurred on the MPS’s watch. The PM(A) himself was also tasked with inspecting the detention facilities in which the alleged abuse took place to ensure the detainees’ human rights

and welfare were protected. The PM(A), or a nominated representative, were to conduct advisory visits or inspections within 1 month of a facility becoming operational, every 12 months thereafter, and whenever there was an adjustment to the facility (see the introduction to the PM(A) report of his visit to the DTDF, 5-6 April 2006 – disclosed in *Kammash v Secretary of State for Defence* CO/6345/2008). The purpose of the PM(A) inspections is made clear in the opening to his report on the DTDF at SLB on 5-6 April 2006, namely to ensure compliance with the standards set out in the Geneva Convention and to “minimise the physical and psychological risks to Internees and Staff.” The PM(A) confirmed in his report of a visit to the DIF of 24-28 Jun 2007 that: “since 2004 PM(A) and his custodial staff have observed and assessed internment through inspections, visits and other regular contact with Theatre and PJHQ [Permanent Joint Headquarters].” The PM(A) also had a role in the formulation of prisoner handling policy: his evidence to the BMI suggests that he reviewed and commented upon policy as it was developed (PS4 §14). This is of obvious serious concern if (as it appears) such policies may have resulted in ill-treatment the PM(A) and those under his command are now to investigate.

89. The role of the PM(A) and RMP went significantly beyond inspection of detention facilities. RMP officers were present in detention facilities on a daily basis and played a direct and integral role in the handling and treatment of detainees. In disclosure provided in *Fartoosi v SSD* evidence was provided from SSgt Carey, an RMP Officer, who stated that he assisted with audio tape recording during tactical questioning at SLB. Following an inspection of the Brigade Processing Facility (BPF) on 24-27 June 2007 by the PM(A), he notes in his report that:

***RMP personnel are present at the BPF during the time that it is open which adds surety to the handling process, albeit their primary task is that of continuity of evidence.***

It will also be recalled that in *Al Sweady*, it was two RMP officers at CAN, Sgt Everett and L Cpl Higson, who were responsible for the reception of prisoners. They were key members of the prisoner handling team and were the ones who would physically handle prisoners during reception prior to tactical questioning (including forcibly stripping

detainees).<sup>14</sup> In the BMI, evidence emerged that RMP soldiers were present at the material time. Serious criticisms are made of various RMP soldiers in the victims' closing submissions regarding the abuse meted out to Baha Mousa and other detainees, including that two named soldiers gave oral evidence that at least one of the RMP soldiers struck detainees and that RMP officers were involved in "exercising" Baha Mousa and other detainees.

90. RMP personnel also accompanied the Armed Forces on "strike operations" (i.e. house raids). Sgt [redacted]'s evidence to RMP investigators in *Kammash* was that on "strike ops" he would "normally...have a member of the RMP with me, which was common". WO2 [redacted], a tactical questioner, confirmed "once the orders for the op are given, I will assemble my team, if not already to go, which consisted of me, an interpreter, a female searcher and a member of the RMP." In "Guidance on Strike Operations" for 20 Armoured Brigade in Iraq it is stated that evidence obtained in the raid should be collated "where applicable under the supervision of the RMP who participated in the strike."
91. RMP personnel can be seen to have been involved, directly and indirectly, in the detention of the vast majority of the Claimants. It was the responsibility of the PM(A) and his staff at the material time to inspect detention facilities and check on the welfare and human rights protection of detainees, and, furthermore, it appears to have been the Army's policy to have members of the RMP present during interrogation. If there was widespread abuse in detention facilities in Iraq, that will suggest a very significant failure by the RMP. As noted above, the PM(A) was also responsible for the MPS, the Army's "specialists" in custody and detention, whose role was to inspect detention facilities and ensure that the welfare of detainees was properly protected. It also appears that in each case in which disclosure has been provided that RMP officers also played a direct role in detention, being present during tactical questioning and interrogation, restraining detainees, removing clothing and were therefore either involved in abuse or at least present when it was taking place. RMP personnel could have intervened to

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<sup>14</sup> It will be recalled that forced nakedness, ostensibly for medical examination purposes, often in front of women appeared to be Standard Operating Procedure within UK detention facilities. This had particularly serious consequences for male Muslim detainees (see para 27(e) of the first witness statement of Mr Shiner in these proceedings, para 19 of the third and paras 26 and 39 of the fifth).

protect detainees from abuse. It was open to those personnel to report any concerns that detainees might have been, or were being, subjected to ill-treatment to the Commanding Officer or even to the PM(A). If the RMP now finds evidence of widespread abuse this will be indicative of very significant failure by the RMP itself and the PM(A). Under these circumstances it is impossible to see how the RMP could be relied on to conduct an ECHR compliant “independent” investigation of detention in Iraq for the reasons above.

92. In the Claimants’ permission skeleton argument of 28 June 2010 it was pointed out that a potential problem with the asserted independence of the RMP was its “intrinsic involvement” in the allegations it was tasked to investigate (§40). Reference was made to the evidence that had emerged in the BMI and *Al-Sweady* case of the involvement of RMP officers directly in the detention of Iraqis and of potential wrongdoing. Since then, ongoing analysis has been undertaken on the disclosure provided in the *Kammash* and *Fartoosi* cases. As suggested above, this supports the Claimants’ earlier submissions. There has been no evidence provided by the Defendant on this issue and it is not clear what his position is. The Defendant is entitled to accept that RMP personnel played a key role in the Claimants’ detention and the manner in which they were treated, but to attempt to argue that, nevertheless, the RMP is still somehow sufficiently “independent” as a matter of law. Alternatively he can provide full disclosure and attempt to establish that (despite the evidence) RMP officers were not involved in the detention process and that any such involvement was, in fact, genuinely “exceptional”. It is not, however, open to the Defendant to assert in this case that RMP involvement was exceptional without providing full disclosure relevant to the role the RMP and PM(A) played in Iraq at the material time.

## **CONCLUSION**

93. For all the reasons set out above, it is submitted that the Claimants’ judicial review should be allowed.

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**22 October 2010**