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Case No: CO/1684/2010

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/12/2010

**Before :**

**LORD JUSTICE RICHARDS**  
**MR JUSTICE SILBER**

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**Between :**

<b>The Queen (on the application of Ali Zaki Mousa)</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>Secretary of State for Defence</b>	<b><u>Defendant</u></b>
<b>and</b>	
<b>Equality and Human Rights Commission</b>	<b><u>Intervener</u></b>

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**Michael Fordham QC, Dan Squires, Rachel Logan** (instructed by **Public Interest Lawyers**)  
for the **Claimant**

**James Eadie QC, Philip Havers QC, Kate Grange** (instructed by the **Treasury Solicitor**) for  
the **Defendant**

**David Wolfe** (instructed by Equality and Human Rights Commission) **for the Intervener**

Hearing dates: 5, 8 and 9 November 2010  
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**Approved Judgment**

**Lord Justice Richards :**

***Introduction***

1. This is the judgment of the court, to which both members have contributed. The court has before it an application for judicial review of the Secretary of State's refusal to order an immediate public inquiry into allegations that persons detained in Iraq at various times between 2003 and 2008 were ill-treated in breach of article 3 of the European Convention on Human Rights by members of the British Armed Forces. The claimant is representative of a group of over 140 Iraqis who have brought civil claims for personal injury and/or have made judicial review applications alleging that they suffered such ill-treatment.
2. The claimant's case is that the obligation under article 3 ECHR to conduct an independent and effective investigation into the allegations, including arguable systemic issues arising out of the individual allegations, can only be met by the Secretary of State's use of his powers under the Inquiries Act 2005 to order a public inquiry now and that his failure to order such an inquiry is therefore unlawful. Specifically, it is said in the claimant's grounds that such an inquiry should consist of "a comprehensive and single public inquiry that will cover the UK's detention policy in South East Iraq, examining in particular the systemic use of coercive interrogation techniques which resulted in the Claimants' ill-treatment and which makes it possible to learn lessons for the future action of the British military".
3. The Secretary of State has made clear that he is very concerned about the allegations and extremely anxious to establish whether they are well founded and, if they are, to ensure that lessons are learned for the future. He does not seek to defend article 3 ill-treatment of detainees. He has set up a team, the Iraq Historic Allegations Team ("IHAT"), to investigate the allegations with a view to the identification and punishment of anyone responsible for wrongdoing. He has also set up a separate panel, the Iraq Historic Allegations Panel ("IHAP"), to ensure proper and effective handling of information concerning cases subject to investigation by IHAT and to consider the results of IHAT's investigations, any criminal or disciplinary proceedings brought in any of the cases, and any other judicial decisions concerning the cases, with a view to identifying any wider issues which should be brought to the attention of the Ministry or of Ministers personally. He points, in addition, to the fact that there already exist two significant public inquiries into specific allegations of ill-treatment of detainees in Iraq, namely the Baha Mousa Inquiry and the Al Sweady Inquiry: the former is due to report in early 2011, whereas the latter is still at an early stage. He has not ruled out the possibility that, in the light of IHAT's investigations and the outcome of the existing public inquiries, a public inquiry into systemic issues may be required in due course. He does not consider it appropriate, however, to set up such an inquiry now and he does not accept that it is unlawful for him to wait.
4. Permission to apply for judicial review was granted by the Divisional Court (Sir Anthony May, PQBD, and Silber J) on 16 July 2010, in a reasoned judgment which has been of considerable assistance in putting the case into focus and identifying matters that needed to be addressed for the purposes of the substantive hearing.
5. There is no dispute as to the existence of an investigative obligation under article 3 or as to the basic principles governing such an obligation, including that the

investigation must be independent, effective and reasonably prompt. As the case has developed, the arguments have crystallised into two main points of dispute:

- (1) whether IHAT is sufficiently independent for the purposes of an article 3 investigation into the individual allegations – if it is not, it is accepted that a public inquiry providing the requisite degree of independence may be needed now;
  - (2) whether in any event article 3 requires a public inquiry to be established now because of the existence of arguable systemic issues which will not or may not be covered by IHAT’s investigation of the individual allegations.
6. In addition to the extensive written submissions received, we heard oral submissions from Mr Michael Fordham QC on behalf of the claimant and from Mr James Eadie QC and (on the issue of IHAT’s independence) from Mr Philip Havers QC on behalf of the Secretary of State. We also had written submissions and short oral submissions from Mr David Wolfe on behalf of the intervener, the Equality and Human Rights Commission: those submissions were directed to the principles to be applied in determining whether a public inquiry is required in respect of systemic issues. We are grateful to all counsel and their instructing solicitors for the way in which the case has been prepared and presented.
7. In what follows we will consider the case under the following main headings: (1) the allegations themselves; (2) the establishment of IHAT and IHAP; (3) the existing public inquiries; (4) whether IHAT is sufficiently independent; (5) whether the systemic issues fall within the scope of article 3; (6) the issue of timing; and (7) conclusion.

### *The allegations*

8. As already indicated, the present claim is brought on behalf of a large number of claimants who have made allegations that they were ill-treated by members of the British Armed Forces while in detention in Iraq. The number of claims has grown substantially since the commencement of these proceedings and continues to grow. As at 22 June 2010, the date of the first witness statement of Mr Philip Shiner, the claimant’s solicitor, there were 85 different claims involving 110 different claimants. As at 21 October 2010, the date of Mr Shiner’s fifth witness statement, there was a total of 116 claims involving 141 different claimants. Those figures include claimants whose cases are the subject of the Baha Mousa Inquiry and the Al Sweady Inquiry but whose claims have been included here because of their relevance to the allegations of systemic abuse. If they are excluded, the number of claimants as at 21 October seeking a public inquiry was 127.
9. The material before the court includes summaries of the individual claims. In the course of his submissions Mr Fordham drew our specific attention to 10 of those summaries as providing a cross-section of the allegations that have been made. For illustrative purposes, however, it is sufficient to quote the summary relating to the lead claimant, Ali Zaki Mousa, as was done in the permission judgment:

“The Claimant, an Iraqi citizen, was arrested on 16 November 2006 by British soldiers. They beat him severely, slammed him

against a wall and forced him into a stress position in which they stood on his knees and back. His 11 month old son's arm was stamped on and broken, and his father had to urinate on himself. The soldiers removed business documents, computers, mobile telephones, licensed guns and 40 million Iraqi dinars. They hooded and handcuffed the claimant. He was transported to the BPF at COB. They beat and sat on him, then dragged him, scarring his feet. At the BPF the Claimant was initially hooded and ear muffled, then goggled. He was interrogated aggressively, struck with a stick and threatened with Guantanamo. In between sessions he was forced into a stress position in the cold for 30 hours and stoned and beaten. He was twice taken to medics, but not to the toilet, so he urinated on himself. Transported to al-Shaibah DTDF in a helicopter, cold water was poured over his head and he was kicked. On arrival he was goggled and earmuffed, forced to undress in public and examined by a medic while naked. A female saw him nude. He spent 36 days in solitary confinement in a tiny freezing cell with restricted bedding, food and water. Soldiers beat him, prevented him sleeping by banging his door and shouting insults, restricted his privacy in toileting and showering and twice had sexual intercourse in front of him. Pornographic movies were played loudly and pornographic magazines left in sight. Soldiers exposed themselves, groped each other and masturbated in front of him. Repeated interrogations involved forced standing for hours and interrogators threatening to attack his family and himself. Humiliations continued at Camp B with poor conditions, beatings, food deprivation, threats, intimate searches and intimidation with dogs. In mid 2007 the Claimant was moved to Basra airport DIF, beaten, goggled, earmuffed and cuffed, then kept in a boiling hot cell with no food or water the first day. He was released in November 2007 having had no explanation for his detention. His property was never returned."

10. The evidence also includes a number of tables analysing the claims by reference to categories of ill-treatment alleged, the dates of ill-treatment and the British military facilities or other locations where the ill-treatment occurred. Further tables handed to us at the hearing show which claimants were present at each location during each 6-month period from 2003 to the end of 2008, and the number of allegations (by category) made in relation to each location during each such period.
11. The range of ill-treatment alleged is apparent from the headings under which the allegations are listed in the first table: (1) techniques on sensory deprivation (including hooding, sight deprivation by the wearing of blackened goggles or other means, forced silence, sound deprivation by the use of ear muffs, and prolonged solitary confinement); (2) techniques on debility (including food or water deprivation, sleep deprivation, stress techniques such as prolonged kneeling, forced exertion such as forced running, temperature manipulation such as detention in unbearably hot

locations or dousing with cold water, and sensory bombardment or use of noise); (3) other coercive techniques (including forced nakedness or exposure of genitals, threats or rape/violence, running/dragging in a zigzag, prolonged and direct shouting, other “harshing” techniques, restrictions on access to toilets, and prolonged cuffing); (4) sexual acts (including forced watching/listening of pornographic videos, sexual intercourse or other sexual acts between soldiers in front of detainees, masturbation by soldiers in front of detainees, attempted sexual seduction of detainees, and no privacy on toilet or in shower); (5) religious/cultural humiliation (including urinating on detainees, not allowing detainees to pray, and taunting at prayer or other interferences); (6) other abuse (including mock executions, beatings with weapons or fists or feet, punching, slapping, kicking, spitting, and dragging along the ground).

12. The allegations span the whole period 2003 to 2008, though there are relatively few dating from the second half of 2007 and thereafter. They relate to 14 British military facilities (or facilities within facilities) and a number of other locations, with the main concentration at facilities at Shaibah Logistics Base and Basra Air Station.
13. The claimant says that the expression “systemic abuse” is apt to describe ill-treatment that is not merely fortuitous or the result of rogue officials but that has some common or underlying cause which requires investigation. Points made in support of the case of systemic abuse include the following submissions. The ill-treatment alleged is of its nature pervasive and fits clear patterns, with the same techniques being used at the same places and for the same purposes, a principal suggestion being that there was a deliberate policy of abuse to assist interrogation. The military facilities were under the command of a commanding officer who was expected to know what those under his command were doing. Each detainee was medically examined at various points by doctors and medical operatives under a duty to report ill-treatment. Many of the allegations relate to facilities at which the Joint Forward Interrogation Team (“JFIT”) was based, and JFIT had a separate officer commanding who was responsible for a relatively small number of personnel operating within a tightly confined space. Much of the ill-treatment alleged took place in areas within facilities where it is inconceivable that senior officers did not witness, or were not aware of, what was happening. On many occasions the claimants made contemporaneous complaints about their ill-treatment, and in certain cases Royal Military Police (“RMP”) investigations were commenced in theatre but without any accountability being achieved. A series of events and incidents must have, or should have, alerted those in senior positions of command as to the need for investigative and transformative action, but such action was not taken.
14. We stress that the court is concerned at this stage only with *allegations*. It is accepted on behalf of the Secretary of State that the individual allegations raise an arguable case of breach of article 3 (in some cases there may be a question whether the incident alleged falls within the jurisdictional scope of the Human Rights Act 1998, but that is of no materiality for present purposes). It is also accepted that the allegations in their present form raise arguable systemic issues, but one of the submissions made is that such issues may change or fall away in the light of IHAT’s detailed factual investigation of the allegations and the reports of the two existing public inquiries.

*The establishment of IHAT and IHAP*

15. The establishment of IHAT was announced to Parliament on 1 March 2010. IHAT's written terms of reference provide that it is to investigate within a reasonable time allegations of mistreatment of individuals by British forces in Iraq during the period March 2003 to July 2009, in order to ensure that those allegations are, or have been, investigated appropriately. It is to be led by a civilian, described as the IHAT Head, who is to report directly to the Provost Marshal (Army) ("the PM(A)"), the head of the RMP. It is to be structured into a number of functional sub-teams staffed by a combination of RMP and civilian staff: the Command Team, the Case Review Team, Investigation Teams, a Major Incident Room, and Admin Support. All elements of IHAT will ultimately report to the IHAT Head, who is solely responsible to the PM(A) for the effective and efficient running of IHAT and the achievement of its objectives. IHAT is separate from the service chain of command. All work undertaken by IHAT must be in accordance with the requirements of the Armed Forces Act 2006 and be carried out in accordance with RMP practice and such strategies and policies, agreed with the PM(A) and consistent with legal advice, as are put in place by the IHAT Head. Provision is made for review and investigation of cases. Once the IHAT Head is satisfied that a case has been investigated appropriately, he is to make a written report of the investigation promptly to the PM(A) along with a recommendation on what action should follow. The final decision will be for the PM(A). IHAT is to provide a regular report on the process and status of each case to IHAP. It is to have concluded all appropriate investigations and to have reported to the PM(A) by 1 November 2012, though we were told that the number of additional claims since IHAT was established may push back that deadline. We were also told that IHAT has been allocated a budget of £6 million.
16. IHAT's work of investigation can be expected to lead to prosecutions and/or disciplinary action in appropriate cases: the relationship between an investigator's functions and the charging functions of the Director of Services Prosecutions ("the DSP") and of commanding officers under the Armed Forces Act 2006 is considered later in this judgment. The work of investigation will also feed into existing civil proceedings, not only by facilitating the disclosure exercise where cases are fought but also by enabling settlements to be agreed where appropriate.
17. IHAP has separate terms of reference which state that it has been established (1) to ensure proper and effective handling of information concerning cases subject to investigation by IHAT, and (2) to consider the results of investigations by IHAT, any criminal or disciplinary proceedings brought in any of the cases, and any other judicial decisions concerning the cases, with a view to identifying any wider issues which should be brought to the attention of any part of the Ministry and of Ministers personally. Its tasks in carrying out those functions include the making of referrals to authorities within the Ministry of Defence to consider settlement of personal injury claims in appropriate cases (para 3.2.2); "drawing attention to trends or wider issues which the IHAP considers are emerging from the investigations, decisions of the RMP, decisions of the DSP, judicial decisions, and decisions on administrative action or decisions on payment of compensation" (para 3.3.2); and "consider the cases with a view to identifying and recommending any improvements IHAP consider should be made to MOD processes" (para 3.4).

18. Further detailed information concerning IHAT and IHAP is given in the witness statements of Mr Peter Ryan, Director of Judicial Engagement Policy at the Ministry of Defence and the Chair of IHAP. There is also a witness statement of Mr Geoff White who took up post as Head of IHAT in September 2010. He is a retired senior police officer, whose last appointment within the police service was Head of the Criminal Investigation Department of Staffordshire Police, with the rank of Detective Chief Superintendent. IHAT is to have over 80 staff, including almost 50 personnel transferred from the RMP and 31 civilian investigation staff recruited through a competitive tendering process. It is also to have an experienced legal adviser, in the form of a Royal Navy lawyer with no previous involvement in issues arising from operations in Iraq. Our understanding is that the recruitment process is by now complete or nearly complete and that IHAT is fully operational.
19. As to the staff transferred from the RMP, we should make clear that investigations into many of the allegations had already been commenced by the RMP prior to the establishment of IHAT and that IHAT will build on that work and will continue the process on a broadened and accelerated basis. The RMP investigators transferred to IHAT are within the Special Investigation Branch (“the SIB”) of the RMP. Details of the progress made by the RMP up to August 2010 are given in the witness statement of Colonel Jeremy Green, Deputy Provost Marshal (Historic Inquiries). Mr White, as Head of IHAT, takes over the story thereafter in his own statement. He envisages that the character of investigations by IHAT will move within four categories: initial assessment and review, complainant interview, mature assessment, and, where directed and practicable, further investigation leading to referrals to the DSP, the nominated commanding officer or IHAP. The timing of interviews with complainants will be key. At this stage he thinks it feasible, with the complainants’ consent, that the complainants (numbering 128 at the date of his statement) could be interviewed over a period of six months in Beirut, where the Al Sweady Inquiry has already established interviewing procedures. As to the sequence of investigations, his current intention is to select a representative cross-section of cases based on different factors including date and place of the incident and the seriousness of the allegation. He states that this will assist in the potential identification of any systemic issues. He concludes by an update on two investigations previously mentioned by Colonel Green. In one of them a referral has now been made in respect of three soldiers to the Service Prosecuting Authority, though investigations are still in progress in relation to further aspects of the complaint.

### ***The existing public inquiries***

#### *The Baha Mousa Inquiry*

20. The establishment of the Baha Mousa Inquiry, under the chairmanship of The Rt Hon Sir William Gage, was announced to Parliament on 14 May 2008. The terms of reference are:

“To 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 by any

members of the 1<sup>st</sup> Battalion, The Queen's Lancashire Regiment in Iraq in 2003, and to make recommendations”.

21. The Inquiry has been divided into four Modules, described as follows in an issues list published by the Inquiry itself:

“Module 1: The History of what has been labelled ‘conditioning techniques’.

This will entail consideration of the Government, Ministry of Defence and Army approaches to such techniques from the time of internment in Northern Ireland in the early 1970s up to and including March 2003 – the date of the invasion of Iraq.

...

Module 2: Baha Mousa and the other detainees

To examine the circumstances of their arrest and subsequent detention and seek to ascertain what happened to them and who was involved on 14-16 September 2003.

...

Module 3: Training and the chain of command

To examine what training and guidance was given and what orders were issued to those in 1 QLR involved in the detention, and to follow the chain of command upwards in relation to these matters.

...

Module 4: The future

To consider what has happened since 2003 in relation to ‘conditioning techniques’ and to examine any appropriate recommendations for the future.

....”

22. The Inquiry is at an advanced stage, having received closing submissions on Module 4. The topic list for Module 4 is wide-ranging, listing 32 topics. We give no more than a flavour of them:

“Doctrine and policy generally

(1) How does MoD’s current policy for Captured Personnel of all categories (‘CPERS’) address sight deprivation, sleep deprivation, stress positions, deprivation of food and water, and subjection to noise?

...

(3) To what extent is prohibition on the use of these 5 techniques now entrenched in military doctrine? ...

(4) Does the prohibition on the use of the 5 techniques extend adequately to all those under the control of the MoD? ...

Prisoner handling in practice on operations

...

(12) Once CPERS are transported to an initial detention centre at company or battlegroup level:

(a) What arrangements are provided for checks on the physical welfare of CPERS?

(b) To what extent is access to CPERS now limited to those who have a proper need to visit them?

(c) What arrangements are provided to ensure that CPERS are provided with adequate food and water taking account of the climatic conditions?

(d) What protections are in place to ensure that tactical questioning does not extend beyond the obtaining of time-sensitive tactical intelligence?

...

(20) Where deaths, serious injury or injuries suggestive of abuse occur in military custody on operations, is adequate provision made to ensure the retention of evidence and prompt investigation in theatre?

...

Defence intelligence: tactical questioning and interrogation

(22) In relation to the 5 techniques and in respect of the physical handling of CPERS including aspects such as the use of the 'harsh technique', is the current teaching on tactical questioning and interrogation courses adequate in terms of ensuring compliance with the Geneva Convention and other applicable standards on the treatment of CPERS?

...

(25) Is there sufficient legal advice and oversight of training in TQ&I?

(26) Is TQ&I doctrine adequately visible to commanders at company and battlegroup level so that they understand what is permissible and what is prohibited in the physical handling of CPERS during, or as an aid to, tactical questioning of CPERS held by their units or sub-units?

Other training

(27) To what extent is the proper treatment and handling of CPERS now covered in ...?

...

Record management

(31) Are sufficient records of operations being kept to ensure that relevant personnel and orders can be traced where subsequent investigations are required? ....

(32) Are there sufficient measures in place to ensure the safe retention of medical/internment documentation during and after retention?"

23. It is plain from the third and fourth Modules, in particular, that the Inquiry will be reporting not only on what happened in September 2003 but also on current practice and policy, as well as making recommendations for the future; and that, although the focus is on five specific conditioning techniques, the review of practice and policy has gone much wider. As part of its work on Module 4, the Inquiry has considered evidence from seven experts retained by the Inquiry, encompassing a wide range of relevant expertise. Until the report comes out in the course of 2011, however, one cannot be sure how much will be covered in it or how far the recommendations will extend.

*The Al Sweady Inquiry*

24. The Al Sweady Inquiry was established following judicial review proceedings in which the need for an inquiry was eventually conceded (see *R (Al-Sweady and Others) v Secretary of State for Defence* [2009] EWHC 2387 (Admin), [2010] HRLR 2). The Inquiry, to be chaired by Sir Thyne Forbes, was announced to Parliament on 25 November 2009 and is still at an early stage. Its terms of reference are:

“To investigate and report on the allegations made by the claimants in the Al Sweady judicial review proceedings against British soldiers of (1) unlawful killing at Camp Abu Naji on 14 and 15 May 2004, and (2) the ill-treatment of five Iraqi nationals detained at Camp Abu Naji and subsequently at the divisional temporary detention facility at Shaibah Logistics Base between 14 May and 23 September 2004, taking account of the investigations which have already taken place, and to make recommendations.”

25. The list of issues published by the Inquiry has 75 items under 5 broad headings. They include consideration of how the five Iraqi nationals were treated during their detention and questioning at Camp Abu Naji and, if there was mistreatment, who was responsible for it (issues 56-57); whether any of them were subjected to “conditioning techniques” and, if so, who was responsible for their use (issue 58). There are corresponding issues in respect of the subsequent detention and questioning of the five at the Shaibah Logistics Base (issues 62-64). The Inquiry will consider what recommendations are appropriate given its findings (issue 75).
26. The main hearings are not expected to start until May 2011 at the earliest. It is not possible at this stage to predict when the Inquiry’s report will be available.

***Whether IHAT is sufficiently independent***

27. It is common ground between the parties that the case law of the ECtHR establishes first that the investigation into whether the Secretary of State has complied with his investigative obligations under articles 2 and 3 has to be conducted by persons who are independent of the people implicated in the events under investigation, and second that independence in this context means not only a lack of hierarchical or institutional connections but also a practical independence: see, for example, *Jordan v United Kingdom* (2003) 37 EHRR 2 at [106], and *Sahin v Turkey* (Application no. 7928/02, decision of 25 September 2007) at para 43.
28. The Secretary of State relies on the process of investigation by IHAT as a key part of his case that he is under no obligation to establish a public inquiry into the allegations at this stage at least. The claimant contends, however, that IHAT is not sufficiently independent for article 3 purposes and that an investigation by that body cannot therefore satisfy the investigative obligation under article 3, for three separate reasons:-
  - (1) Military investigators for the Armed Forces are not sufficiently independent of the Army for the purpose of discharging the article 3 investigative obligation, especially where the causes of the alleged ill-treatment are systemic policies and practices (“the structural independence issue”).
  - (2) The particular structure in which IHAT operates pursuant to the Armed Forces Act 2006 (“the 2006 Act”) renders it insufficiently independent in the vast majority of the present cases because the decision on whether to bring charges and the conduct of the prosecution will be in the hands of commanding officers and not IHAT or the DSP (“the charging/prosecution issue”).
  - (3) On the particular facts of this case the RMP is insufficiently independent to examine what occurred in Iraq between 2003 and 2008 because RMP personnel and the PM(A) are themselves likely to be implicated to a significant extent, directly or indirectly, in almost all of the alleged abuse: in particular, RMP personnel were perpetrators of the abuse or witnesses of it or failed to prevent it (“the direct/indirect involvement issue”).
29. The claimant does not object to the RMP investigating allegations of offending by members of the Armed Forces in other contexts, where the investigative obligations under articles 2 and 3 are not in play, but it is submitted that investigations by the

RMP, or by IHAT utilising RMP investigators, cannot discharge the state's obligations under those articles without the additional and essential benefit of a public inquiry. Notwithstanding that limitation on the case advanced, it has important implications for the regime established by the 2006 Act.

30. Before we turn to consider each of the three ways in which the claimant's case on independence is put, we recall that IHAT is to be staffed by a combination of RMP and civilian investigators, with the RMP personnel coming from the investigatory (SIB) branch of the RMP; that the Head of IHAT is a specially appointed civilian who is to report directly to the PM(A); and that IHAT is separate from the operational chain of command.
31. The PM(A), Brigadier Edward Forster-Knight, was appointed by letter dated 1 May 2009 from General Sir Richard Dannatt. The letter stated:

“As Chief of the General Staff and Chairman of the Executive Committee of the Army Board I appoint you Provost Marshal (Army). You are to discharge the functions and responsibilities conferred on the Provost Marshal by statute, by the Queen's Regulations for the Army and other relevant orders and instructions. You are responsible for the conduct and direction of all Royal Military Police investigations, which are to be conducted independently of the chain of command. In addition, you are to implement appropriate inspection and reporting regimes, to ensure the safe and secure custody and detention of individuals that fall within the jurisdiction of the Army.

You are to appoint Deputy Provost Marshals and other Provost Marshals as are necessary and you are also to appoint provost officers, warrant officer and non-commissioned officers to exercise authority on your behalf.

Military command of the provost officers, warrant officers and non-commissioned officers exercising authority on your behalf (less those Specialist Units (the Special Investigation Branch, the Service Police Crime Bureau, the Close Protection Unit and the Military Corrective Training Centre), which remain under your direct command) will rest with the Commander-in-Chief and General Officers Commanding, but as Provost Marshal (Army) you are responsible solely to the Army Board of the Defence Council for the discharge of the duties and responsibilities set out above. Your routine point of contact in this respect will be the Adjutant General but you have direct access to me as Chief of the General Staff and to the Army Board on any matter relating to your duties which you think fit.”

32. It is noteworthy that the letter of appointment expressly states that the responsibility of the PM(A) in relation to the conduct and direction of all RMP investigations is to the Army Board of the Defence Council, which consists of Ministers, the most senior civil servants and the most senior officers directly under the Crown. In other words it goes well above the highest level of the purely military components.

*The structural independence issue*

33. The first question is whether IHAT is hierarchically and institutionally independent of the Armed Forces for the purposes of article 3. The case for the claimant is that such independence is lacking because the RMP investigators within IHAT are serving soldiers who are subject to military discipline and command, and because they report on the conduct of their investigations to the PM(A) who is himself a serving soldier answerable to the military command. That this precludes the necessary hierarchical and institutional independence is said to be supported by a number of decisions of the ECtHR.
34. The Secretary of State's response is that the RMP is sufficiently independent for the purposes of article 3 because the RMP investigators and the PM(A) operate outside and separate from the operational chain of command: they are part of a separate chain of command leading up to the Chief of the General Staff. The decisions of the ECtHR relied on by the claimant do not mean that members of the Armed Forces automatically lack sufficient independence for the purpose of conducting an article 3 compliant investigation.
35. One of the main cases to which Mr Fordham referred us is *Shevchenko v Ukraine* (2006) 45 EHRR 642, in which the issue was whether an inquiry into the death of a member of the Ukraine Air Force satisfied the minimum requirements of independence under article 2. In that case, an initial inquiry was conducted by or under the authority of the commanding officer of the unit in which the deceased served. An officer with the unit conducted a search and questioned witnesses while receiving orders from the commanding officer concerning the conduct of the proceedings as well as his day-to-day activities. The investigation appears then to have been taken over by investigators from the Military Prosecutor's Office ("the MPO").
36. The ECtHR held not only that the initial inquiry by officers within the deceased's unit lacked the requisite independence, but also that the same applied to the investigators from the MPO: "while not being a part of the chain of command of the unit, they nevertheless remained servicemen, subject to military discipline" and "[t]heir relatively low rank could have made them susceptible to pressures from superior officers" (para 71).
37. In our view, the position of IHAT is very different. No question of lack of independence can arise in relation to the civilian investigators within IHAT. As to the RMP investigators, they form no part of the operational unit under investigation and, although they remain servicemen, they are not subject to operational military discipline, and the structure within which they work insulates them from pressures that might compromise their independence. By way of expansion of those points, the following considerations are of particular relevance:
  - (1) IHAT itself is a body manifestly independent of the operational chain of command. The Head of IHAT reports to the PM(A).
  - (2) RMP investigators form part of the Special Investigation Branch (the SIB) rather than the General Police Duties (GPD) branch of the RMP. They are subject to discipline by the PM(A), not by the operational chain of command.

- (3) As his letter of appointment makes clear, the PM(A) is solely responsible to the Army Board of the Defence Council for the conduct and direction of all RMP investigations, which are to be conducted independently of the chain of command.
  - (4) The above is also reflected in the Queen's Regulations, which have been amended to provide that when members of the RMP conduct investigations they "act independently of the chain of command and are not to be subject to any undue interference or influence prior to concluding their investigation ...".
  - (5) A Protocol between the PM(A) and the Army Prosecuting Authority, though not fully up to date, emphasises that "the RMP are independent of the Chain of Command and all other agencies when conducting investigations".
  - (6) When Her Majesty's Inspectorate of Constabulary conducted an inspection of the SIB in October 2007, the matters in the preceding two sub-paragraphs were among a number of developments since the previous inspection in August 2006 which were said to "underpin the principle of investigative independence from the chain of command".
38. Those considerations point towards the structural independence of IHAT and we see nothing in the court's reasoning in *Shevchenko* to cast doubt on such independence in the very different circumstances prevailing here.
39. For similar reasons, we are satisfied that the other cases relied on by Mr Fordham do not assist the claimant on the structural independence issue. Thus, in *Jordan v United Kingdom* (2003) 37 EHRR 2 the ECtHR held that an investigation into a killing by an officer in the Royal Ulster Constabulary was not sufficiently independent because the officers who conducted the investigation and those who were subject to it were all ultimately under the responsibility of the Chief Constable and were therefore hierarchically linked. For reasons we have explained, notably because of the different chain of command, the present case is very different.
40. In *Ari v Turkey* (Application no. 29281/95, judgment of 25 September 2001) it was held by the ECtHR that there had been a violation of article 6 of the Convention because the applicant's trial by the Martial Law Court lacked independence. The court in that case consisted of two civilian judges, two military judges and an army officer. Although the military judges underwent the same professional training as their civil counterparts and enjoyed identical constitutional safeguards, they were servicemen who belonged to the army, which in turn took orders from the executive. They were also subject to military discipline, and assessment reports were compiled on them for the purpose. The officer serving on the Martial Law Court was a subordinate in the hierarchy to the commander of the martial law and/or the commander of the army corps concerned and was not independent of those authorities. The ECtHR noted that the Martial Law Courts were set up to deal with offences aimed at undermining the constitutional order and its democratic regime. In all these circumstances the ECtHR took the view that the applicant had a legitimate ground to fear being tried by a bench which included two military judges and an army officer acting under the authority of the officer commanding the state of martial law.

41. We do not need to consider whether article 6 imposes any more onerous a requirement of independence than article 3. It suffices that the present case is again readily distinguishable from *Ari*, given that the RMP investigators are under a completely different chain of command from the operational side, with a mandate to act independently, and that the PM(A), although responsible to the Army Board of the Defence Council, does not “take orders” from the executive.
42. Another case under article 6 is *Cooper v United Kingdom* (2004) 39 EHRR 2, in which the applicant was convicted by a court martial which consisted of a permanent president and two officers of a lower rank. The ECtHR held that the article 6 rights of the applicant were not infringed bearing in mind that there were sufficient safeguards to prevent outside pressure being brought on the officers who were members of the court martial. Those safeguards included the right of the accused to object to any member sitting on the court martial, the confidentiality of the deliberations, the protection offered by the judge advocate, and the fact that it was not possible to ascertain what opinions had been expressed or what votes had been cast by any individual member of the court martial. The only observation we would make about the case is that if members of the army can be independent for the purposes of article 6, the mere fact that RMP investigators are servicemen cannot of itself prevent IHAT being independent for the purposes of article 3. Everything comes down to the specific features of the case under examination; and, for the reasons already given, we do not accept there is a lack of structural independence on the particular facts of this case.
43. We should mention that the Secretary of State placed some, albeit limited, reliance on comments of Brooke LJ in *R (Al Skeini) v Secretary of State* [2007] 1 QB 140, at 287:

“139. ... 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.

140. 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 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.”
44. For our part, we place no weight on that passage in reaching our conclusion on this issue. First, the comments relate to the circumstances prevailing at the time of that

judgment, whereas we need to focus on the position as it is now. Secondly, the comments were *obiter*, were not (so far as we are aware) the subject of submissions by counsel and were not considered or adopted by the other members of the court. Thirdly, *Al Skeini* was appealed to the House of Lords where the case was decided without reference to the independence of the RMP; and it is settled law that a decision of the Court of Appeal is not binding, albeit it can be of strong persuasive authority, where the appeal is decided by the House of Lords on a different point (see *Balabel v Air India* [1988] Ch 317 at 325-6 per Taylor LJ and the application of that principle in *Al-Mehdawi v Secretary of State* [1990] 1 AC 876, 881-883).

*The charging/prosecution issue*

45. Mr Fordham contends that even if IHAT could in principle be sufficiently independent for the purpose of conducting an article 3 compliant investigation, the provisions of the 2006 Act operate against such independence because they require some cases (and possibly a large proportion of them) to be referred to the commanding officer for a decision on whether a prosecution should be brought and on how, if at all, the case should proceed.
46. This is disputed by the Secretary of State, whose contention is that pursuant to the provisions of the 2006 Act almost all relevant cases will have to be referred for decision to the DSP, who is the Armed Forces' equivalent of the Director of Public Prosecutions and has an undisputed degree of independence; and that in the small number of cases where the decision may lie with the commanding officer, it is difficult to conceive of the commanding officer not referring the case in practice to the DSP.
47. Mr Havers also advanced a preliminary submission on behalf of the Secretary of State that this issue cannot help the claimant's case in any event, because the decision whether a prosecution is to be brought will have to be taken by the same person (be it the DSP or the commanding officer) irrespective of whether the IHAT investigation proceeds in its present form or there is a public inquiry. In other words, he submits that this issue is not relevant to the basic question of whether article 3 requires there to be a public inquiry. Whilst there is a superficial attraction to the point, we do not accept that it is a complete answer to this aspect of Mr Fordham's submissions. The existence of a discretion in the commanding officer with regard to relevant charging decisions might not affect the independence of IHAT, any more than it would affect the independence of a public inquiry, but it could support a wider argument that the existing processes are not capable of securing an effective investigation and could thereby tell in favour of a public inquiry capable of scrutinising those cases where a decision not to charge had been taken.
48. In any event, we think it right to examine Mr Fordham's case on this issue and to see in particular in what circumstances the commanding officer does have power to decide if a prosecution should be brought and what significance is to be attached to the point.
49. The key provision of the 2006 Act concerning referrals to the DSP or the commanding officer following an investigation by the RMP is section 116, which reads:

“116.(1) This section applies where—

(a) a service police force has investigated an allegation which indicates, or circumstances which indicate, that a service offence has or may have been committed ....

(2) If—

(a) a service policeman considers that there is sufficient evidence to charge a person with a Schedule 2 offence, or

(b) a service policeman considers that there is sufficient evidence to charge a person with any other service offence, and is aware of circumstances of a description prescribed by regulations under section 128 for the purposes of this paragraph,

he must refer the case to the Director of Service Prosecutions (“the Director”).

(3) If—

(a) a service policeman considers that there is sufficient evidence to charge a person with a service offence, and

(b) subsection (2) does not apply,

he must refer the case to the person's commanding officer.

(4) If—

(a) the allegation or circumstances gave rise to the duty under section 113(1) or 114(1), and

(b) a service policeman proposes not to refer the case to the Director under subsection (2),

he must consult the Director as soon as is reasonably practicable (and before any referral of the case under subsection (3)).

(5) For the purposes of subsections (2) and (3) there is sufficient evidence to charge a person with an offence if, were the evidence suggesting that the person committed the offence to be adduced in proceedings for the offence, the person could properly be convicted.”

50. It will be seen that three categories of offence need to be considered: (1) Schedule 2 offences (comprising a range of serious offences), (2) “prescribed circumstances” cases, and (3) other service offences. We will examine each in turn.

## Schedule 2 Offences

51. Section 113(1) of the 2006 Act provides:

“113.(1) If an officer becomes aware of an allegation or circumstances within subsection (2), he must, as soon as is reasonably practicable ensure that a service police force is aware of the matter.

(2) An allegation is, or circumstances are, within this subsection if it or they would indicate to a reasonable person that a Schedule 2 offence has or may have been committed by a relevant person.”

52. The term “relevant person” is defined by subsection (3) as “a person whose commanding officer is the officer mentioned in subsection (1)”. A “Schedule 2 offence” is defined by subsection (4) as a service offence listed in that schedule. The list in Schedule 2 includes murder, manslaughter, some offences under the Offences against the Person Act 1861 (such as wounding with intent, inflicting grievous bodily harm), certain sexual offences, and offences under sections 51-52 of the International Criminal Court Act 2001 which deal with genocide, crimes against humanity, war crimes. Mr Havers pointed out the range of conduct that can constitute a war crime, as set out in Schedule 8 to the 2001 Act: it includes “wilfully causing great suffering, or serious injury to body or health” against persons protected under the Geneva Convention, and “committing outrages upon personal dignity, in particular humiliating and degrading treatment” in international armed conflict or, in the case of an armed conflict not of an international character, against persons taking no active part in the hostilities.

53. Where, following investigation of an allegation, an RMP investigator considers that there is sufficient evidence to charge a person with a Schedule 2 offence, he must refer the case to the DSP pursuant to section 116(2)(a), quoted above. It will then be for the DSP to decide whether a charge should be brought and, if so, what the charge or charges should be. Section 121(1) and (2) provide that in a case which has been referred to the DSP under section 116(2) he “may direct the commanding officer of the person concerned to bring, in respect of the case, such charge or charges against him as may be specified in the direction”. Section 121(4) provides that if, but only if, the DSP has decided that it would not be appropriate to make a direction to the commanding officer under subsection (2) he may refer the matter to the commanding officer.

54. If the RMP investigator proposes not to refer the case to the DSP under section 116(2) but the allegation gave rise to the duty under section 113(1), he is required by section 116(4) to “consult the Director as soon as is reasonably practicable” and before any referral of the case to the commanding officer under section 116(3). In this way the DSP’s involvement is ensured even in cases where the evidence is not considered by the RMP to justify a charge under Schedule 2, if the allegation would indicate to a reasonable person that a Schedule 2 offence may have been committed.

55. In Schedule 2 cases, therefore, the DSP will be responsible for the charging decision whenever the RMP considers there to be sufficient evidence to charge, and he will

generally have to be consulted even in cases where the evidence is not considered sufficient to warrant a charge.

“Prescribed circumstances” cases

56. Section 114(1) provides that:

“If an officer of a prescribed description becomes aware of circumstances of a prescribed description, he must, as soon as is reasonably practicable, ensure that a service police force is aware of the matter.”

57. By regulation 4 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009 (“the 2009 Regulations”), the expression “officer of a prescribed description” means, in essence, the commanding officer of the suspected offender.

58. The expression “circumstances of a prescribed description” is defined in regulation 3, which provides, so far as relevant:

“For the purposes of section 114, the following are circumstances of a prescribed description:

...

(c) there are what appear to the prescribed officer to be reasonable grounds to believe that the death of any person, or serious injury to a relevant person, has occurred in a relevant place, unless the prescribed officer is satisfied that there is no allegation which would indicate to a reasonable person, or circumstances which would indicate to a reasonable person, that the death or injury was, or may have been, the result of a service offence committed by a person of whom he is the commanding officer.”

A “relevant person” is defined by regulation 6(1) as including “a person who is not a member of the regular or reserve forces”; and a “relevant place” is defined by regulation 6(2) as including “any premises or other place which at the time of the death or serious injury was permanently or temporarily occupied or controlled for the purposes of Her Majesty’s forces.”

59. By section 50(2) of the 2006 Act, “service offence” includes any offence under Part 1, which in turn includes disgraceful conduct of a cruel or indecent kind (section 23), doing any act which is punishable by the law of England and Wales (i.e. doing any act which corresponds to a criminal offence under the civilian law) (section 42), conduct prejudicial to good order and discipline (section 19) and contravention of standing orders (section 13).

60. By section 116(2)(b) of the 2006 Act, if an RMP investigator considers that there is sufficient evidence to charge a person with a service offence other than a Schedule 2 offence and is aware of circumstances of a description prescribed by regulations for the purposes of that paragraph, he is under a duty to refer the case to the DSP. The

circumstances prescribed for such purposes are set out in regulation 5 of the 2009 Regulations, which includes the following relevant provision:

“(c) the evidence referred to in section 116(2)(b) is evidence-

- (i) that a person (‘A’) participated (as a principal offender or as a secondary party) in the inflicting of serious injury on a relevant person in a relevant place; [or]
- (ii) that A was under a duty to safeguard a relevant person (‘B’) while B was in a relevant place and that A failed to prevent an assault inflicting serious injury on B in that place ....”

61. The terms “relevant person” and “relevant place” have the same meaning as set out above. The term “serious injury” is defined by regulation 2(1) as meaning “a fracture, a deep cut, a deep laceration or an injury causing damage to an internal organ or the impairment of a bodily function.”
62. As we have already explained, once the case is referred to the DSP, he is responsible for the decision whether to direct that charges should be preferred. Where the investigator proposes not to refer the case to the DSP, there is the same obligation to consult the DSP as has been discussed in the context of Schedule 2 offences. It follows that in this situation, too, the DSP is closely involved, ensuring independence in the charging process.

#### Other service offences

63. By sections 115(1) and (2), where a commanding officer becomes aware of an allegation or circumstances which would indicate to a reasonable person that a service offence has or may have been committed by a person of whom he is the commanding officer, and he is not required by section 113(1) or 114(1) to ensure that a service police force is aware of the matter, then by section 115(4) he must either (a) ensure that the matter is investigated in such way and to such extent as is appropriate, or (b) ensure, as soon as is reasonably practicable, that a service police force is aware of the matter. If the RMP is notified, then the provisions set out above as to its duties following investigation apply in the same way (see section 116(1)(a)).
64. If the investigating officer considers that there is sufficient evidence to charge a person with a service offence but section 116(2) does not apply, then section 116(3) provides that he must refer the case to the person’s commanding officer, subject to the duty to consult the DSP in the circumstances laid down by section 116(4). By virtue of sections 119 and 120, the commanding officer may then either bring one or more charges that are capable of being heard summarily (section 120(2)) or refer the case to the DSP (section 120(3)).
65. Whilst the commanding officer has a discretion in these cases, it is difficult to conceive of him acting in practice otherwise than in accordance with any recommendation he will have received from the RMP investigator (acting under the authority of the PM(A)) and/or with the legal advice received. The guidance issued to commanding officers in respect of offences capable of being heard summarily states that where the service police have investigated and found that there is sufficient

evidence to charge, the commanding officer should not take administrative action instead of charging without first obtaining appropriate advice, which may include staff legal advice; and it seems to us that any responsible legal advice would have to point to the implications under article 3 of not bringing a charge in these circumstances. Moreover the guidance states that any form of violence or abuse against a victim who is not a member of the UK armed forces or against a victim who was being held in any form of service custody should be recognised as having important disciplinary implications and that in such cases the commanding officer should refer the matter to the DSP unless he is completely satisfied (with legal advice) that he should bring the charge himself.

66. We were also told (and this is supported by what Colonel Green says in his witness statement about three soldiers recently charged) that all potential suspects will be under a specially nominated commanding officer who will not be the commanding officer of the unit of which they were members at the time of the events in question.

Conclusion on the charging/prosecution issue

67. In the light of the considerations discussed above, we do not accept the claimant's case that the provisions of the 2006 Act preclude an article 3 compliant investigation. In practice, to the extent that the allegations are found to be credible, the great majority of offences arising out of them are likely either to fall within Schedule 2 (especially given the range of offences under the International Criminal Court Act 2001 included in the schedule) or to be "prescribed circumstances" cases, with the consequence that referral to the DSP will be mandatory and the charging decision will be his. But even in relation to any less serious offences where a discretion lies with the commanding officer, the fact that he will not be the commanding officer of the unit where the soldiers served, and the fact that he will have no realistic option in practice but to follow the RMP's recommendations and/or legal advice, provide important safeguards. In those circumstances we do not think that the existence of this one category is sufficient to undermine the compliance of the process as a whole with the requirements of article 3.

*The direct/indirect involvement of the RMP and PM(A)*

68. The claimant's case is that, even if there is no problem as regards hierarchical and institutional independence, there is a lack of practical independence because of the role played on the ground in Iraq by the RMP and by the PM(A) and his staff. The contention is expressed as follows at para 91 of the claimant's skeleton argument:

"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 were 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 [Military Provost Staff], 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 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."

69. The Secretary of State's position is that the claimant's case proceeds on a mistaken premise concerning the role of the RMP, the PM(A) and the MPS in Iraq, and that the limited role of potentially relevant personnel would not and could not have any adverse effect on the investigation of the allegations by RMP investigators within IHAT or on the discharge of the PM(A)'s responsibilities.
70. The witness statement of Colonel Ian Prosser, Deputy Provost Marshall (Custody and Guarding), seeks to put matters in perspective. He deals first with the MPS, stating that every year since 2003 between 6 and 12 MPS personnel were deployed to Iraq. This was too few for them to have a permanent presence in every operational custody facility or place of detention. They were based at the Divisional detention facility (which was initially the Theatre Internment Facility in Camp Bucca, then the Divisional Temporary Detention Facility at the Shaibah Logistic Base, and then the Divisional Internment Facility at Basra Airport). They were under the command of the officer commanding the Divisional detention facility, not of the PM(A), and it was to the commanding officer that the MPS were responsible for ensuring that those detained were held in a safe and secure environment. They were not routinely present at the temporary holding facilities or at the Brigade Processing Facility.
71. Colonel Prosser goes on to state that it was in March 2010 that the PM(A) became responsible for the inspection and monitoring of all UK-run detention facilities within operational theatres. Guidance issued in July 2005, however, gave the PM(A) responsibility for and authority to lay down criteria and methodology for the inspection of the Divisional inspection facility and to arrange access for this purpose. His first inspection was in April 2006, when he examined the Divisional Temporary Detention Facility. He also took the opportunity on that occasion to inspect two temporary holding facilities. This role was formalised in February 2008 when he was appointed as adviser to the Chief Joint Operations on operational custody and detention practice. His responsibility remained focused on the Divisional detention facility although he did also inspect the Brigade Processing Facility.
72. As to the RMP, Colonel Prosser draws attention to the distinction between the Special Investigation Branch (the SIB) and the General Police Duties branch (the GPD),

pointing out that it is members of the SIB who are involved within IHAT in the investigation of the allegations. In relation to operations in Iraq to arrest suspected insurgents, arrests which were carried out by members of the armed forces, he states:

“It is correct that a member of the RMP (almost always a member of the uniformed GPD branch, not the SIB, unless, exceptionally, the individual arrested was suspected of serious crime and it was important to ensure very careful collection of evidence) would usually accompany the arresting force, but his/her main function was to collect and preserve evidence ... although a secondary function was to ‘add surety to the handling process’. However, the member of the RMP would not necessarily remain with the arresting force once he/she had secured the relevant evidence.”

73. Colonel Prosser deals next with the limited presence of the RMP at various facilities, stating *inter alia* that the RMP had no presence at the Divisional detention facility.
74. A description of the role of the GPD in Iraq, as distinct from that of the SIB, is also to be found in the PM(A)’s witness statement dated 26 March 2010 to the Baha Mousa Inquiry, which is included in the evidence before us:

“Traditionally the chief role of General Police Duties personnel operations was traffic control and regulations; ensuring the free movement of vehicles on military routes. Since the recent conflicts in Iraq and Afghanistan the role of General Police Duties has changed considerably and they are now more likely to find themselves in the front line in support of the fighting troops conducting close combat policing; providing surety for detention operations; close protection; host nation police monitoring; forensic and evidence gathering and acting as first responders for the investigation of attacks on British troops. In relation to investigations General Police Duties personnel both on operations and in the garrison act as a trigger for the more experienced and better equipped and trained Special Investigation Branch Investigators.”

75. The PM(A) said that the SIB conducts serious and complex investigations and is the principal investigative agency when it is alleged that criminal offences have been committed by or against British service personnel. All members of the SIB are volunteers recruited from within RMP and are specifically selected for their appointment through a rigorous and lengthy selection process, by way of transfer from the GPD.
76. We were taken by Mr Fordham to a substantial number of contemporaneous documents relied on as supporting the claimant’s contention that the RMP, PM(A) and MPS were interwoven into events on the ground in Iraq. Mr Havers went through the same documents with a view to reassuring us that the extent of any relevant involvement was very small and should not cause us to doubt the independence of the IHAT process. We do not propose to engage in an analysis of individual documents in this judgment. It will suffice to set out our conclusions on the exercise.

77. Before we do that, however, we should also refer to one other aspect of the evidence before the court. The claimant has relied on a witness statement of Mr Andre Ramsey, a former major in the RMP, which was filed in the separate judicial review proceedings of *R (Kammash & Others) v Secretary of State for Defence* (CO/6345/2008). The purpose of Mr Ramsey's statement, as declared in its first paragraph, is to give evidence "as to the systemic and competency failings of the RMP in the investigation of serious crimes committed or allegedly committed by military personnel". He gives that evidence at some length, explaining his motivation, referring to a radio interview in which he expressed his "serious concerns as to the independence, impartiality and effectiveness of the RMP", examining what he considers to be structural flaws in the RMP and detailing a number of specific cases. His evidence has not gone unchallenged by the Secretary of State. A witness statement of Lieutenant Colonel David Neal, of the RMP, provides a fuller description of the RMP and its component branches of GPD and SIB, including details of recruitment, training and reporting structures, to counter Mr Ramsey's general assertions about the independence and competence of the RMP. A witness statement by Major General David Howell, who is Director General, Army Legal Services, takes issue with Mr Ramsey's account concerning two matters of which Major General Howell has direct knowledge. A witness statement by Colonel Edward Chamberlain, who is Assistant Director Personal Services 2 (Army), provides information from Army records contradicting aspects of Mr Ramsey's account of three other matters. It is not possible for us to reach any firm conclusion on where the truth lies in these matters, but in the circumstances we feel unable to place any weight on Mr Ramsey's witness statement.
78. Returning to the documents, we see nothing in them to contradict or cast doubt on the contents of Colonel Prosser's statement concerning the RMP, the PM(A) and the MPS. On the other hand, we note that the statement, although countering the claimant's case in part, does not claim a complete insulation of the RMP (that is to say, even of the SIB branch of the RMP) or of the then PM(A) from events on the ground in Iraq.
79. Given the evidence that the MPS were responsible to the commanding officer, not to the PM(A), and the absence of anything in the documents to cast doubt on that, we do not think that the involvement of the MPS in the relevant events assists the claimant's case that IHAT lacks independence.
80. The limited involvement of the then PM(A) casts no doubt on the ability of the present PM(A) (who was appointed, as we have said, in 2009) to discharge his responsibilities in respect of the IHAT process independently, whether the matter is looked at on a personal basis or in institutional terms.
81. The position of the RMP is more difficult. Clearly the primary involvement of the RMP on the ground in Iraq was that of members of the GPD, though even in their case the number of personnel was small and they were present in only a small number of facilities. The involvement of members of the SIB was much more limited still. The GPD has no part to play now in the conduct of investigations within IHAT, and we do not think that the involvement of the SIB on the ground in Iraq was sufficient to give general cause for concern about the independence of RMP investigators within IHAT. We cannot, however, exclude the risk that an individual investigator within IHAT may have had some personal involvement in matters that are the subject of

investigation by IHAT or may have contacts with, or knowledge of, people involved in those matters.

82. Mr Fordham contends that because of that risk the IHAT investigation necessarily lacks independence and cannot discharge the state's obligations under article 3. We are unable to accept that contention. In many areas, those who have to carry out investigations or make decisions may have to recuse themselves in a particular case because of some personal knowledge of, or connection with, the matters in question. For example, potential jurors stand down if they have some knowledge of the events or people involved in a case they are due to try, and similarly judges recuse themselves where circumstances warrant it. Provided that IHAT takes action to ensure that an investigator does not investigate matters in which he has some personal involvement or with which he has some relevant connection, we do not think that the independence of IHAT will be compromised.
83. The Secretary of State is evidently alive to the general problem. In his detailed grounds he "accepts the possibility of having to arrange different investigations if (exceptionally) issues of the criminal or disciplinary culpability of RMP members themselves arose in any particular case" (para 54, fn 28). That expresses the area of potential concern somewhat too narrowly but is along the lines we have indicated to be appropriate. It will be for the Head of IHAT and the PM(A) to ensure that the necessary arrangements are made in practice. It should not be too difficult to lay down guidelines or adopt a protocol for the purposes, if this has not already been done. IHAT has at its disposal a substantial number of civilian investigators, in addition, we would surmise, to numerous RMP investigators who have never been to Iraq and have no involvement in or connection with any of the matters under investigation.
84. There is also a risk that an investigation previously carried out by the RMP was undertaken by an investigator who had a personal involvement in, or connection with, the matters under investigation, such as might have impaired or reasonably be thought to have impaired his ability to carry out a fair and objective investigation. We have no reason to believe that the Head of IHAT and the PM(A) would be unaware of this risk. We would expect them to deal with it by ensuring that, if and in so far as any investigation has been carried out by an investigator in such circumstances, the IHAT investigation will be started afresh without any reference or resort to the prior investigation. Here, too, we consider that IHAT's own independence will not be compromised provided that appropriate action is taken.
85. More generally, we agree with the submission of Mr Havers that there is no reason to believe that IHAT will investigate the allegations any less thoroughly, or will be affected in any way in the referrals and recommendations it makes, because of the limited role of RMP investigators or the PM(A) in Iraq.
86. Accordingly, we reject the claimant's contention that the ability of IHAT to carry out an article 3 compliant investigation is undermined by a lack of practical independence.

*Conclusion on IHAT independence*

87. As will be apparent from what we have said above, we do not accept any of the grounds on which the claimant contends that IHAT lacks the requisite independence for the purposes of an article 3 compliant investigation. Any problem arising out of personal involvement by members of the RMP in the events under investigation can be dealt with appropriately and will have to be so dealt with in order to avoid jeopardising the compliance of the process with article 3.

*Whether the systemic issues fall within the scope of article 3*

88. Our conclusion on the independence of IHAT makes it necessary for us to go on to consider the claimant's case that a public inquiry is needed in any event because of the wider, systemic issues raised by the allegations. The contention is that article 3 requires more than the identification and punishment of the perpetrators of the specific acts of abuse alleged: it extends to the investigation of the systemic issues to which those allegations give rise, and to the learning of lessons for the future. That wider investigation will not be achieved by the IHAT/IHAP processes or by civil and criminal proceedings. It requires a public inquiry, without which there will be an accountability gap; and if such an inquiry is required as a matter of law, the obligation under article 3 is for it to be established promptly and to proceed with reasonable expedition.
89. In support of this extended scope of the investigative obligation under article 3, Mr Fordham relied on *R (AM) v Secretary of State for the Home Department* [2009] EWCA Civ 219 as an authority binding on this court, but submitted that the same conclusion is to be derived in any event from a broader analysis of Strasbourg and domestic cases. In so far as cases such as *Banks and Others v United Kingdom* (Application no. 21387/05, decision of 6 February 2007) refer to wider questions as falling outside the scope of the investigative obligation, he suggested a threefold categorisation: (1) the identification and punishment of the perpetrators; (2) other questions crucial to state accountability, such as whether the state's actions or failures led to the ill-treatment; and (3) wider questions of policy and the like that are for public and political debate. He submitted that the first two categories fall within the scope of the investigative obligation and that only the third falls outside it, and that the systemic issues raised in this case fall within the second category and therefore require investigation.
90. The Secretary of State's position is more nuanced. Mr Eadie made clear that, whilst reserving his position on the point should the case go higher, he was not submitting before us that article 3 *never* requires an investigation of systemic issues. He submitted, however, that the proposition that article 3 *always* requires such an investigation has been rejected, both in *AM* and in *R (P) v Secretary of State for Justice* [2009] EWCA Civ 701, [2010] 2 WLR 967, and that the need for an investigation of systemic issues depends in each case on a fact-specific analysis involving consideration of, *inter alia*, whether the facts are known, the extent to which broader findings have already been made and acted upon, and the proportionality of a further inquiry in terms of a cost/benefit balance. The focus is on the individual allegations, and whether the investigation need go wider is a matter of fact and degree. The court should also accord weight to the judgment of the Secretary of State in this area. The Secretary of State has decided against a public inquiry into

systemic issues at this stage but has left open whether one will be required in the light of the investigations into the individual allegations of abuse and the outcome of the existing public inquiries. That approach is compatible with the investigative obligation under article 3.

91. We propose to concentrate first on the scope of the investigative obligation under article 3 where allegations of systemic abuse are raised, before turning to the issue of timing. The judgments in *AM* and *P* provide important guidance on both issues.
92. *AM* arose out of allegations that detainees had suffered ill-treatment contrary to article 3 during disturbances at Harmondsworth Immigration Detention Centre in late November 2006. The issue was whether article 3 required a public inquiry into the disturbances, the initial request for an inquiry having extended to the underlying reasons for the disturbances and the manner in which the disturbances were managed. Sedley LJ, giving the first judgment, opened by citing what Lord Bingham said in *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, para 31, as to the purposes of an official investigation under article 2 into a death in custody, namely –

“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 said at para 4 that it was well established that an analogous procedural duty of investigation is created by article 3 and that a major aspect of the issue before the court was whether there were differences of kind as well as of degree between the article 2 obligation and the article 3 obligation.

93. Having discussed various other aspects of the case, Sedley LJ stated at para 31 that the central issue was whether the availability of tort proceedings, the possibility of a criminal investigation and an investigation and report by a Mr Whalley, a Home Office official, either singly or in combination fulfilled the state’s investigative obligation under article 3. It was agreed that a sufficient investigation needed to be capable of leading to the identification and punishment of those responsible; should be independent in practice and without hierarchical or institutional connections; should be effective and thorough; and had to give effective access for the complainant to the investigatory process. What was in issue was the content of the investigation. In commenting on the ambit of the issues, he said this:

“33. ... There is no breach of art. 3 unless an individual is sufficiently ill-treated by or with the connivance of the state. But the nature of the state’s obligation to inquire into such possible breaches is case-specific. What will suffice for an isolated instance of inhuman or degrading treatment (which may be a prosecution or a civil action, at least if one is brought) will not necessarily suffice for systemic and multiple breaches of art. 3 such as are alleged here. The reason 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 the Inspector of Prisons and, to a limited extent, Mr Whalley undertook and which would be an essential part of any such inquiry as Mitting J was asked to order here. 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 in their submission was not accidental – a contention to which the inspection report gives substance. These issues, all of which potentially within the investigative ambit of art. 3, were in my judgment brought to life by the case put in Liberty’s letter before action ....

35. ... What matters is whether the entirety of what [the claimants] have now brought to the court’s attention requires, or at some point required, the Home Secretary to set up an inquiry.”

94. He then discussed the relevant Strasbourg case-law (expressing surprise at what was said by the court in *Banks*) and the relevant domestic case-law, coming back to *Amin* and to what Lord Bingham said in that case about the purposes of an investigation under article 2 – a formulation which included ensuring, so far as possible, that the full facts were brought to light and that lessons would be learned and implemented. Sedley LJ concluded:

“60. For the 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. In so far as this goes beyond the jurisprudence of the Strasbourg court (and I am not persuaded that it does), it is domestic authority which we are bound to follow ....”

95. He went on to say at paras 61-69 that there would be a good many cases in which a civil action for damages or a properly conducted prosecution or disciplining of the offender would achieve as much as article 3 procedurally requires, but that the issues raised by the claimants about the culture and conduct of Harmondsworth management and staff had not been, and were highly unlikely now to be, addressed in any conventional forum to which the claimants had access, and Mitting J had been right to find that the state’s duty under article 3 had not been satisfied. There was, however, a question whether it was too late to carry out an effective investigation. A full independent inquiry also had major resource implications for any state. In Sedley

LJ's view, the right course was not to make a mandatory order but to grant declaratory relief that the Secretary of State had failed to meet the state's obligation under article 3 to institute an independent inquiry.

96. Longmore LJ reached a different conclusion, that in the case before the court the allegations of breach of article 3 could properly be dealt with by a combination of criminal and civil proceedings and did not call for the wider inquiry sought by the claimants. In that conclusion he was in the minority. But on the issues of principle there was less difference between his analysis and that of other members of the court than might appear at first sight. Whilst at para 80 he stated that "[i]t cannot be right ... that merely by adding an allegation that conduct is systemic one can be entitled to a public inquiry", later in his judgment he said this:

"82. I have no quarrel with the proposition in paragraph 60 of my Lord's judgment that the investigative obligation of the state may – depending on what facts are in issue – go beyond the ascertainment of individual fault and reach questions of system management and institutional culture especially in cases of death or severe physical injury while in the custody of the state. But I regret that I cannot follow him to the conclusion in para 67 that the issues raised by the claimants were such – on the facts of this particular case – as to trigger the state's obligation under Article 3 to investigate what they assert to be inhuman or degrading treatment at Harmondsworth ....

83. There must also be a margin of appreciation for the Secretary of State to decide when to hold and when not to hold a public inquiry. The resource implications can be considerable. The Secretary of State's decision in the present case seems to me to be within the margin she must undoubtedly have.

84. I would therefore dismiss this appeal not (as the judge thought) because any inquiry would now come too late, although I can readily understand that conclusion, but rather because I see no reason why the legitimate Article 3 complaints could not be dealt with by recourse to the ordinary processes of law available in the United Kingdom ...."

97. Elias LJ agreed in the result with Sedley LJ. He said at paras 86-88 that the inquiry initially sought by Liberty went far beyond anything that article 3 would require, but that the complaints included allegations of ill treatment arising from the manner in which the disturbance was managed and controlled (being locked in a cell for hours without food or access to a toilet, etc) and that the potential breach of article 3 extended to the whole range of such alleged treatment.
98. On the question whether an inquiry was required, Elias LJ said that an important starting point, emphasised regularly in the authorities, was that the form of investigation to be adopted must depend on the particular circumstances (para 101). In his view the procedural requirement of an article 3 investigation would often be less onerous than an article 2 investigation, there being typically four differences

between the situations which would be likely to be reflected in the appropriate procedures: one of those differences was that there were likely to be far fewer article 3 breaches resulting from systemic wrongdoing (para 104).

99. In his view, an important factor in helping to determine what investigation was required was to ask for what purpose it was being conducted. But the various formulations of purpose in the case-law has to be considered in their context:

“107. ... Indeed, in my judgment it would be wholly inconsistent with the fact sensitive nature of these cases to suggest that the procedural obligations arising in this area must always achieve the full panoply of the objectives identified in *Amin*. It would also impose an impossibly onerous financial burden on the state if that were to be the case.

108. Even where the purpose is to learn lessons, there are still significant limits to the scope of any investigation. The focal point must still be the acts which allegedly gave rise to a breach of Article 2 or 3. In an Article 2 case the focus is on the death and the circumstances surrounding it, and in Article 3 on the particular acts alleged to infringe that Article. It is not the purpose of an inquiry to engage in wider issues of a political nature.”

For that proposition he cited *R (Gentle) v Prime Minister* [2008] AC 1356, at para 9. He said that it was important to read the *Amin* and *L* cases against that principle. Even given the wider purpose of the investigation required in such cases, it was still focused on the immediate circumstances surrounding the death or ill treatment. For this reason, the inquiry sought by Liberty plainly went well beyond anything that article 3 could require.

100. He agreed (at para 110) that parts of the decision in *Banks* were problematic; but in so far as the case suggested that civil or criminal proceedings would sometimes - indeed would generally - be sufficient to satisfy an article 3 procedural obligation, it was fully in line with established authorities. Similarly, the case confirmed that article 2 procedural obligations would generally be more stringent than those under article 3, not least because the victims in the latter case were alive and could pursue their own claims. Finally, it confirmed that the scope of an article 3 investigation was limited in the manner he had indicated. It was not surprising that the investigation sought by the claimants in *Banks*, into the whole culture of violence in Wormwood Scrubs which it was alleged had existed throughout the 1990s, was felt by the court to lie outside the scope of an article 3 investigation. *Banks*, and the other cases referred to by Lord Bingham in *Gentle*, strongly supported the observations of Longmore LJ that in *AM* itself it would not be appropriate for any investigation to consider the circumstances leading up to the disturbance, nor the reasons why it took place.
101. In relation to the question whether a more limited independent investigation should have been instigated in *AM*, Elias LJ observed:

“112. ... In my judgment the principles derived from the authorities clearly do not require the state to have to set up

independent inquiry whenever anyone in custody made allegations that there had been a breach of Article 3. The financial cost would be wholly disproportionate to the benefits. Furthermore, in my opinion that is not what the law in this area requires even where the claimant links such allegations of breach to the existence of alleged cultural or institutional practices or arrangements.”

102. He rejected the Secretary of State’s submissions that *Banks* dictated that no investigation at all was required in *AM*. The facts in *Banks* were quite different: there had been a range of incidents extending over many years, and in many of the incidents there had been careful criminal investigations (and in one case, convictions). As the court noted, “the purpose of the inquiry which the applicants sought was not particularly geared to finding the alleged wrongdoers but to focusing on the alleged culture of abuse that existed, and that is not the purpose of an Article 3 investigation” (para 114).
103. Elias LJ concluded by saying (in paras 115-119) that, whilst in many, perhaps most, article 3 complaints the combination of civil and criminal procedures would be enough to satisfy the article 3 procedural obligations, that was not the position in *AM*. There were features of the case which required the Secretary of State to set up an independent investigation in May 2007, even though the alleged breaches were of article 3 rather than article 2. Its focus would, however, have had to be the alleged ill treatment and not the wider cultural or institutional difficulties which brought the problems to a head in the first place. He identified three factors in particular which, considered cumulatively, led him to that conclusion: the appellants were in custody; the allegations were not just of ill treatment by specific officers but included complaints of systemic ill treatment arising from the methods of managing the disturbance; and, since there were many officers brought into the prison on the night in question to deal with the disruption, it would be particularly difficult for an inmate to be able to identify who had taken the action alleged to constitute a breach of article 3 – the Strasbourg authorities had often emphasised, as in *Banks* itself, that one of the most important functions of an article 3 investigation was to enable potential individual wrongdoers to be identified. He accepted, however, that it was now too late to carry out an effective investigation and that relief should therefore be limited to a declaration.
104. *R (P) v Secretary of State for Justice* concerned a remand prisoner who repeatedly and seriously self-harmed while in detention and on whose behalf it was contended that there was an obligation under article 2 or article 3 to hold an inquiry into the treatment and conditions experienced by him in detention. The court held that article 2 was not engaged and that there was no such obligation under article 3. Stanley Burnton LJ, with whom the other members of the court agreed, said in relation to article 3 that he would uphold the refusal to conduct an inquiry “because all the relevant facts are known” (para 43). He considered there to be no evidence of an arguable breach of article 3, and said that in any event “the state is not required to conduct an inquiry in every case in which there is an arguable breach of article 3” (para 51). He cited extensively from the decision of the Strasbourg court in *Banks*, and paras 74-80 and 83 of the judgment of Longmore LJ in *AM*. At para 54, Stanley Burnton LJ said that he respectfully agreed with what Longmore LJ said in *AM*. He also referred to the

observation of Elias LJ at para 112 of *AM* that article 3 does not impose an obligation to conduct an inquiry in every case, and said that Longmore LJ's difference with Elias LJ concerned whether the circumstances of that particular case had made an inquiry appropriate. Stanley Burnton LJ saw no need for an investigation in the case before the court, where all the facts were known. He concluded:

58. ... Where article 3 may be engaged, an inquiry is not mandatory. Whether the Secretary of State is bound to conduct an inquiry depends on the circumstances of the case, including the availability of other means of eliciting the relevant facts, such as civil proceedings and investigation by the Prisons and Probation Service Ombudsman. To impose an obligation to hold a human rights inquiry has significant resource implications, a matter of growing concern when the resources of public authorities are increasingly constrained. Good reason for an article 3 inquiry must be shown. In the present case, all the relevant facts are known ...."

105. Whilst those authorities make it unnecessary for us to engage in an extensive discussion of the Strasbourg case-law, it may nevertheless be helpful for us to refer briefly to *Banks*, which was the subject of close analysis in *AM*, and to two other decisions along similar lines.
106. The applicants in *Banks* alleged that they had been assaulted and ill-treated by prison officers while detained at HMP Wormwood Scrubs in the 1990s. There had been disciplinary proceedings and a number of officers had been prosecuted. Civil proceedings, including claims of systemic negligence, had been settled. The Secretary of State decided against a public inquiry. In their application to the Strasbourg court, the applicants contended that article 3 required him to hold a public inquiry "to establish the factual background, the full nature and extent of the culture of violence at Wormwood Scrubs in the 1990s, how this took root and prospered and the extent to which it continues and establishing responsibility for the above". The court stated that the procedural obligation under article 3 is not identical to that under article 2, in particular because in the context of article 3 the victim of any alleged ill-treatment is generally able to act on his own behalf and, since article 13 requires an effective remedy to be provided, it will not always be necessary or appropriate for the court to examine the procedural complaints under article 3: the procedural limb of article 3 principally comes into play where the court is unable to reach any conclusions as to whether there has been treatment prohibited by article 3.
107. The court noted that in the case before it there was no lack of an investigation capable of establishing the facts and attributing responsibility. It said that the complaints fell to be considered under article 13 rather than under the procedural head of article 3. But even if the procedural aspect of article 3 was engaged, there had been no failure to comply with it. The court referred to the criminal and civil proceedings which had taken place and said that there was no indication that the facts had not been sufficiently investigated and disclosed. "The wider questions raised by the case as to the background of the assaults and the remedial measures apt to prevent any recurrence in a prison in the future are, in the Court's opinion, matters for public and political debate which fall outside the scope of Article 3 of the Convention" (p.12).

108. The court referred on that point to the decision of the European Commission of Human Rights in *Taylor and Others v United Kingdom* (Application no. 23412/94, decision of 30 August 1994), which arose out of the murder of children in hospital by a nurse, Beverley Allitt. There had already been a criminal trial and an inquiry, though not a full public inquiry, into the circumstances of the deaths. The commission held that article 2 did not require a public inquiry into wider issues relating to the organisation and funding of the National Health Service as a whole or the pressures which might have led to a ward being run subject to the shortcomings identified in the inquiry which had taken place. Both *Taylor* and *Banks* have since been followed in *Bailey v United Kingdom* (Application no. 39953/07, decision of 19 January 2010), where it was held that the ordinary mechanisms of an inquest and civil proceedings had provided adequate scrutiny of a death and that there was no general requirement under article 2 to provide, in addition, a public inquiry into wider sentencing and placement policy issues which constituted the background to the death.
109. In its permission judgment in the present case the court stated:
- “The majority Court of Appeal decision [in *AM*] is thus binding to the effect that the principles discussed in *Amin* with reference to article 2 apply to article 3 cases and that *Banks* may be in conflict with *Amin*. It remains entirely possible that in particular cases the availability of criminal and civil proceedings, with or without other investigation short of a full independent public inquiry, may constitute sufficient compliance with the procedural requirements of Article 3. This may not, however, be so where there are allegations of serious systemic failure which require full public investigation.”
110. The only qualifications we would make to that passage are that, whilst the principles governing the investigative obligations under articles 2 and 3 are broadly the same, the judgment of Elias LJ in *AM* points to differences between the articles in the application of those principles and indicates, in particular, that the procedural obligation under article 3 is less onerous and will be more readily satisfied; and we also doubt whether there is any real conflict between *Banks* and *Amin*.
111. *AM* makes clear that the mere fact that systemic issues are alleged does not automatically engage an obligation to hold a public inquiry but that such an obligation can extend to systemic issues in an appropriate case. The scope of the investigation required is highly fact-sensitive. The main focus is on the particular allegations of ill-treatment and on the identification and punishment of any wrongdoers, but the investigation may also need to cover questions of system, management and institutional culture where those questions are sufficiently closely related to the ill-treatment alleged.
112. Where the line is to be drawn is a matter of fact and degree. There is no neat threefold categorisation of the kind suggested by Mr Fordham. We agree with Mr Eadie’s submission that the further away one gets from the specifics of the particular allegations of ill-treatment, the less likely it is that article 3 requires an investigation. The distinction drawn in *AM*, at least by Elias LJ, between the causes of the disturbances at Harmondsworth, which it was not necessary to investigate for the

purposes of article 3, and the manner in which the disturbances were managed and controlled, which formed part of the circumstances of the ill-treatment alleged and fell within the scope of the investigative obligation, is an example of line-drawing on particular facts rather than pigeon-holing into categories. So too, as it seems to us, is what was said in the Strasbourg decisions about the wider issues raised in those cases falling outside the scope of articles 2 and 3 or at any rate not requiring a public inquiry pursuant to articles 2 and 3.

113. We have summarised earlier in this judgment the case of systemic abuse advanced by the claimant in these proceedings. In our view it raises issues so closely related to the circumstances of the individual allegations of abuse (taking those allegations at face value, as we have to do for present purposes) as to be capable of falling within the scope of the investigative obligation under article 3. Most obviously, the prevalence of certain types of alleged abuse across a range of facilities and over a lengthy period of time raises questions as to whether such abuse, if it occurred, was the result of specific training or of deliberate policy or practice, or of a failure of supervision or inspection. An examination of training, policy etc. may indeed be relevant when determining the credibility of individual allegations, as well as being relevant to an assessment of the seriousness of any allegations found proved. In any event, such questions cannot sensibly be dismissed as matters for wider debate falling outside the scope of article 3.
114. It does not follow, however, that article 3 requires a public inquiry to be established or, in particular, that it requires a public inquiry to be established *now*. There is very considerable force in the Secretary of State's "wait and see" approach. Whether he is entitled as a matter of public law to adopt such an approach is the key remaining question in the case.

### ***The issue of timing***

115. The claimant's case is that the Secretary of State is required to act with promptness and expedition in discharging the investigative obligation under article 3 and that a "wait and see" approach is precluded. For example, in *Members of the Gldani Congregation of Jehovah's Witnesses v Georgia* (2008) 46 EHHR 313, at para 97, the ECtHR stated:

"Furthermore, Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation ....

Thus, 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 ...."

116. Reliance is also placed on *R (L) v Secretary of State for Justice* [2008] UKHL 68, [2009] 1 AC 588, at [74], where Lord Rodger of Earlsferry said that it is clear from the case-law that “if there has to be an independent investigation, then the sooner it starts work the better”, for which he cited *inter alia* a passage from *Trubnikov v Russia* (Application no. 49790/99, decision of 5 July 2005) in which the ECtHR stated that “the competent authorities must act with exemplary diligence and promptness”. In *Jordan v United Kingdom*, cited above, at para 108, the court accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, but observed that a prompt response by the authorities in investigating lethal force (the factual circumstance with which that case was concerned) “may generally be regarded as essential in maintaining public confidence in their adherence to the rules of law ...”.
117. The Secretary of State’s position is that in the circumstances of this case he is entitled to decide against an immediate public inquiry and to wait and see whether a public inquiry is needed in due course and, if so, into precisely what issues it should inquire. In that way any inquiry will be properly targeted and scarce resources will be properly and efficiently directed. A public inquiry in parallel with the existing IHAT/IHAP process and the existing public inquiries would be an inefficient and disproportionate way of approaching the matter. The course adopted will not prevent an effective investigation of systemic issues if and to the extent that such an investigation, properly focused, eventually proves necessary. Article 3 does not require the Secretary of State to disregard these considerations and to establish an immediate public inquiry.
118. The intervener, the Equality and Human Rights Commission, looking at its wide field of responsibilities, expressed great concern about any delay in investigating systemic issues arising out of allegations of ill-treatment contrary to article 3. Mr Wolfe submitted that the court should apply the following principles: (1) where a complainant raises a reasonable suspicion or arguable case that there are systemic issues relating to the substantive article 3 treatment complained of (as distinct from wider policy issues), then those systemic issues must be independently investigated promptly and with reasonable expedition; (2) that will require a public inquiry *unless* the combination of civil and criminal (and perhaps other) proceedings has met, or will *in practice* meet, those minimum requirements (including taking into account issues such as the claimant’s particular ability to pursue civil claims, e.g. arising from mental ability and/or access to legal aid); (3) the fact that “generally” or “in the ordinary course of events” or “more likely than not” a public inquiry will thus not be needed where substantive article 3 breaches are complained of says nothing about what will be needed in any particular case: those are statistical statements, not the basis for a rule which decides what is needed in any particular situation; (4) resource issues and proportionality concerns are to be borne in mind in not requiring “full bells and whistles” when they are not required by the triggering events, and in not requiring public inquiries into systemic issues merely because bare allegations of systemic problems have been made, but they are not the basis to decide not to do what is otherwise required in the case; (5) provided the trigger requirement is met, the overarching requirements of promptness and reasonable expedition preclude a “wait and see” approach, unless there are specific obstacles (such as avoiding prejudice to the criminal process) which prevent particular steps being taken at a particular time; and (6) there is discretion as to the precise means of delivery, but not as to the result

to be achieved, nor promptness and reasonable expedition, all of which the court must secure.

119. We have approached this issue in the light of the principles established in *AM* and *P*, which we have considered at some length above and do not repeat.
120. It is clear that article 3 imposes requirements of promptness and reasonable expedition in the discharge of the state's investigative obligation. It seems to us, however, that those requirements can be applied with a sensible degree of flexibility without falling below the standard prescribed by the Convention. For example, in *Brecknell v United Kingdom* (2008) 46 EHRR 42 the court was considering a complaint of failure to investigate under article 2 when fresh evidence had emerged in respect of a shooting many years previously. In that context it stated (at para 72):
- “Promptness will be likely not to come into play in the same way, since, for example, there may be no urgency as regards the securing of a scene of the crime from contamination or in obtaining witness statements while recollections are sharp. Reasonable expedition will remain a requirement, but what is reasonable is likely to be coloured by the investigative prospects and difficulties which exist at such a late stage.”
121. Similarly, article 3 cannot require everything to be done at once. It must allow for reasonable phasing of an investigation. The matter must be looked at as a whole when deciding whether the requirements of promptness and expedition have been met. In this case the Secretary of State has already established IHAT to carry out the investigation of the particular allegations of ill-treatment, and no complaint is made of the timescale within which IHAT is due to complete those investigations and to report: as the court stated in the permission judgment, the period of two years allowed “is a long time, but not disproportionately so in the circumstances, given the number of cases to be investigated and the inherent complications” (para 19). The IHAT process will lead on to any criminal or disciplinary proceedings that are found to be appropriate. Thus, work directed at fulfilling the main purpose of an article 3 investigation, namely the identification and punishment of wrongdoers, is already in hand. In those circumstances, if there are good reasons for deferring a decision whether to take the additional step of establishing a public inquiry into systemic issues, we do not think that the requirements of promptness and reasonable expedition under article 3 are infringed.
122. If delay were liable to jeopardise the effectiveness of any investigation of systemic issues that might ultimately be called for, then that would be a powerful factor against deferral. This was a matter of concern to the court at the permission hearing. As stated in the permission judgment, “Mr Eadie did not rise to the challenge of seeking instructions to enable him to undertake on behalf of the Secretary of State not to take any delay point dependent on the passage of time between now and future reconsideration of the need for a public investigation, if permission is refused now” (para 26). Subsequently, however, it was confirmed in the Secretary of State's detailed grounds that “he will not take a time point following the results of the IHAT/IHAP investigations, i.e. he will not seek to argue at that time that it is not feasible to conduct a public inquiry into any wider/systemic issues simply because of the passage of time” (para 91c). There is still a question, of course, whether even in

the absence of any formal objection delay might in practice frustrate an inquiry and thereby give rise to a breach of the duty to carry out an effective investigation. We are not persuaded, however, that that is a real risk in this case.

123. We accept that there are, by contrast, a number of good reasons for waiting, to which we attach importance and which individually and cumulatively persuade us that there is no error of public law in the Secretary of State's decision not to order a public inquiry at the present time.
124. First, the core fact-finding exercise already under way through IHAT is liable to impact on the systemic issues in two ways: (i) individual allegations may be found to lack all credibility or substance, with the result that any systemic issues depending upon them will fall away; and (ii) some systemic issues may themselves be investigated in practice as part and parcel of the circumstances of the individual allegations. As to (ii), since the investigations will be directed to whether criminal or disciplinary charges should be brought, it seems likely that a broadening of the scope of the investigations will be called for; and this is likely to spill over into the examination of such issues in the course of any criminal proceedings that follow. Some systemic issues may also come to be examined and addressed as a result of the reviewing role of IHAP, whose tasks include drawing attention to trends or wider issues emerging from the investigations and decisions taken, and considering the cases with a view to identifying and recommending improvements to Ministry of Defence processes. Thus, the number and formulation of systemic issues potentially requiring further investigation through a public inquiry may be substantially affected by the IHAT/IHAP process.
125. Secondly, the Baha Mousa Inquiry is currently addressing, and the Al Sweady Inquiry will address in due course, a number of the systemic issues that arise in the present case. The overlap with both inquiries was acknowledged by Mr Fordham.
126. As to the Baha Mousa Inquiry, Module 3 examined the training and guidance given to soldiers in Iraq and what orders were issued to those involved in the detention of Iraqis, as well as the chain of command upwards in relation to those matters. Module 4 is looking not only at what has happened since 2003 in relation to the specified conditioning techniques but also more widely at present practice and policy. The findings and recommendations of that inquiry are likely to have a substantial bearing on the extent to which the systemic issues alleged in the present proceedings require further independent investigation.
127. The same considerations apply to the Al Sweady Inquiry, although it is at a much earlier stage. The importance of the potential overlap with that inquiry is underlined by the large number of claimants represented in the present proceedings (in addition to the 8 Al Sweady claimants themselves) who have complained of ill-treatment at Camp Abu Naji or at the Shaibah Logistics Base. In examining the grievances of the Al Sweady claimants, the inquiry is likely also to examine systemic issues arising out of them.
128. Thirdly, it is settled law that in considering whether a public inquiry is necessary account has to be taken of other remedies, including civil claims. Many, if not all, of the claimants on whose behalf the present proceedings are brought have instituted separate civil claims against the Secretary of State. It may be that the factual

investigations by IHAT will lead to the settlement of some or all of those claims; and to the extent that claims are taken through to trial, it may be that any findings are limited to the particular allegations of abuse and do not extend to systemic issues. But the possibility of wider findings cannot be ruled out.

129. Fourthly, if a public inquiry were established now, there is relatively little that it could achieve pending the conclusion of the IHAT investigations and any ensuing prosecutions. It must not be forgotten that serious allegations of criminal misconduct have been made against British soldiers. Both the Baha Mousa Inquiry and the Al Sweady Inquiry followed the conclusion of relevant criminal proceedings. There would be an obvious risk of prejudice to criminal investigations and proceedings if an active public inquiry ran in parallel with them. Moreover, witnesses implicated in alleged abuse would be unlikely to give evidence to a public inquiry unless they were first given immunity from prosecution and, in the case of military witnesses, immunity from disciplinary action, as has been done in both the Baha Mousa Inquiry and the Al Sweady Inquiry; and in practice this would have to wait at least until charging decisions had been made. Mr Fordham accepted the need to avoid prejudice to criminal proceedings but submitted that that could be achieved by sensible handling of the public inquiry, for example by avoiding any oral hearing on a matter that was the subject of ongoing criminal investigation or prosecution. It seems to us that, given the number of allegations here in issue and the overlaps between them, the problems would be very considerable and little progress could in practice be made.
130. Mr Fordham submitted that some positive steps could nevertheless be taken and would save time at a later date: announcement of the inquiry, appointment of chairman and staff, the setting up of document management systems (including the acceptance of materials from the IHAT process and the Baha Mousa Inquiry, from the complainants and their representatives, and from the Ministry of Defence), beginning to build the picture, drawing up an initial list of questions and issues, and taking up cases that had been through the investigative process and had led to a decision not to prosecute. We accept that a limited amount of work could be done. In our view, however, it would involve a great deal of cost and effort, including duplication of effort with the existing IHAT process, for very little benefit. By contrast, as we have already indicated, there are real advantages and there is relatively little prejudice in waiting to see whether a public inquiry is needed at all in relation to systemic issues and, if so, precisely what issues it should cover.
131. That brings us to the fifth and final reason why we consider that the Secretary of State's "wait and see" approach is lawful. *AM* and *P* stand as authority that cost and proportionality are relevant considerations when deciding whether a public inquiry is needed at all (see *AM* per Longmore LJ at para 83 and per Elias LJ at para 112, and *P* per Stanley Burnton LJ at para 58). They are reinforced by the observation of Lord Rodger of Earlsferry in *R (L) v Secretary of Justice*, cited above, at [77]:

"The Secretary of State is concerned about the financial implications of having to hold an independent investigation in cases of attempted suicide. His concern is entirely proper, as the European court has recognised in the judgments cited at para 56 above [where Lord Rodger said that the obligation under article 2 "is not indeed to be interpreted as imposing an impossible or disproportionate burden]."

132. A *fortiori*, cost and proportionality must be relevant considerations when deciding whether a decision on a public inquiry can be *deferred*. A large sum of money has already been allocated to IHAT. We do not know the actual or projected cost of the Baha Mousa Inquiry and the Al Sweady Inquiry, but they undoubtedly involve large sums of public money. We would expect a public inquiry of the kind sought in this case, encompassing so many allegations over so many facilities and such a long period of time, to be a far more costly exercise. The Secretary of State must be entitled not to commit public funds to it unless and until it is clear that such an inquiry is needed and what precisely it needs to investigate.
133. The Secretary of State has decided that the balance lies in favour of waiting. Of course, it is ultimately for the court to decide whether article 3 requires a public inquiry to be established now, and we doubt whether the Secretary of State can strictly be said to enjoy a margin of appreciation in the matter (though Longmore LJ's reference to a margin of appreciation, at para 83 of *AM*, came in a passage from his judgment which was quoted with approval by the court in *P*). Nevertheless, in a case where the Secretary of State's "wait and see" approach is influenced in part by the very heavy resource implications of establishing a public inquiry now, we think it appropriate to place real weight on that consideration.
134. Taking everything into account, we are satisfied, as we have said, that the investigative obligation under article 3 does not require the Secretary of State to establish an immediate public inquiry. It is possible that a public inquiry will be required in due course, but the need for an inquiry and the precise scope of the issues that any such inquiry should cover can lawfully be left for decision at a future date.

### ***Conclusion***

135. For the reasons we have given, the claim for judicial review is dismissed.