In brief: Iraq abuse judgment of May 2013

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The number of cases of alleged abuse by the UK armed forces in and around Basra in southern Iraq has been growing. They have been the subject of a number of court cases looking into the Government's handling of them. The latest judgment, from the High Court, sets out the scale of the allegations:

> On the basis of the Strasbourg Court's decisions there were thought at the turn of the year to be about 40 cases where it is accepted the investigative duty into deaths under Article 2 and 135 cases where the duty under Article 3 arises. These figures are now much greater. We were told that there might be as many as 150-160 cases involving death and 700-800 cases involving mistreatment in breach of Article 3, though the precise numbers that require investigation will be determined by decisions as to the scope of the application of the Convention to the activities undertaken by the British armed forces in Iraq.

The High Court went on:

> The allegations made are allegations of the most serious kind involving murder, manslaughter, the wilful infliction of serious bodily injury, sexual indignities, cruel inhuman and degrading treatment and large scale violation of international humanitarian law. The incidents in relation to which the allegations arise are fact specific. What happened is often unclear and the subject of dispute. Many of the incidents occurred several years ago; the Iraqi witnesses are largely residents of Iraq. Some incidents have been the subject of prosecution and more may be. The only public inquiry that has been completed, Baha Mousa, has cost £25m and the second, Al Sweady, has cost more than £17m so far. The other investigations established by the Secretary of State are costing about £7.5m a year.

While the decision to hold an inquiry is normally a political one, signatories to the European Convention on Human Rights are obliged to investigate suspected breaches of Articles 2 and/or 3 of the convention. The Iraq Historic Allegations Team was set up within the Ministry of Defence in 2010 to investigate the claims of 146 Iraqi men that they had been tortured while in UK custody in Iraq. The team was originally composed of military and retired civilian police.

The IHAT arrangements fell short of a full public inquiry, and there have been many complaints that the inquiry team is insufficiently independent. The fact that the Royal Military Police were involved was a particular cause for concern and the matter was the subject of a judicial review. The Appeal Court ruled in November 2011 that the involvement of the military police "substantially compromised" the inquiry, at least in public perceptions, because the Royal Military Police had been involved in detentions in Iraq.

In March 2012, the Royal Military Police investigators were replaced by civilian contractors and five Royal Naval Police investigators.

The Iraqi claimants continued to argue in court that the process was flawed. They said that the process was slow, that there was no involvement of the families or the public, and that the focus of the IHAT's work was too narrow and did not go into the training and planning of the military operations.

On 24 May, the High Court ruled that the IHAT was now acting independently and that a full public inquiry should not be held, but that the IHAT approach was not sufficient and inquest-style hearings should be held into each allegation of unlawful killing.

Public Interest Lawyers, the solicitors representing the claimants, produced the following summary of the requirements set out by the High Court:

> 1. That all death cases should now be subject to a public "inquisitorial process" and that "the establishment of IHAT and the arrangements associated with it are not sufficient to discharge the duty imposed on the state" (para 179);
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> 2. That was is required in all death cases pursuant to Article 2 ECHR is a "full, fair and fearless investigation accessible to the victim's families and to the public into each death, which must look into and consider the immediate and surrounding circumstances in which each of the deaths occurred" (para 148);
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> 3. That in two death cases where there have already been decisions not to prosecute any UK personnel there is no impediment to starting the public inquisitorial process now (paras 154-157);
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> 4. That in all other cases "an order should now be made that the Secretary of State should state either through an official or the Head of IHAT within six weeks:
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> i. What further progress has been made in investigating the deaths of each of those who fall in this category;
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> ii. When a decision will be made as to whether a prosecution will be brought in respect of each of these cases" (paras 164 and 167);
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> 5. That in all cases the subject of this "inquisitorial process" new guidelines as to how these public enquiries might be conducted are the subject of the court's guidelines (paras 213 – 225) upon which both the SSD's lawyers and the claimants' lawyers are invited to make submissions (para 233);
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> 6. That in all torture and CIDT [cruel, inhuman or degrading treatment] cases the DSP [Director of Services Prosecutions] should be properly involved now and that it "must surely be possible to make a realistic appraisal in a number of cases whether prosecution is a realistic possibility and use that as a basis for future decision-making, given the volume of cases that arise" (para 228);
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> 7. That in all torture and inhuman and degrading treatment cases "once it is determined that there are cases in which there will be no prosecution, the procedure for Article 3 cases should be reviewed by the Secretary of State in the light of the experience in the Article 2 cases; it may well be possible to conduct the inquisitorial enquiry into these cases by taking a sample of the more serious cases" (para 230). Further if "the procedure cannot be agreed, then the court will have to consider these issues further under the provision we propose making in the formal order of the court" (para 231),

that is, the court will maintain a supervisory role going forward in all of the torture and CIDT cases.

Public Interest Lawyers summary of the court's decision on the continued functioining of IHAT is as follows

1. All death cases must now be the subject of this new inquisitorial process. The court found as follows:- "we have reached the conclusion in relation to cases where deaths have occurred that the establishment of IHAT and the arrangements associated with it are not sufficient to discharge the duty imposed on the state" (para 179).

2. IHAT is neither charged, nor structured nor staffed to consider and report publically on all the systemic issues arising from these one thousand or so cases and the court found that the SSD's system of dealing with systemic issues in private is not lawful. In particular it found that "The absence of this capability is particularly significant because in this case the case for public investigation becomes greater where there is 'an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but a pattern or system'" (paras 192 – 194).

3. The Court therefore found that "the steps taken in the Ministry of Defence to deal with wider and systemic issues" are "not public or subject to independent scrutiny" (para 195).