Neutral Citation Number: [2011] EWCA Civ 1334

Case No: C1/2011/0524

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
RICHARDS LJ AND SILBER J
Ref: CO/1648/2010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/11/2011

Before :

LORD JUSTICE MAURICE KAY, Vice President of the Court of Appeal, Civil Division
LORD JUSTICE SULLIVAN
and
LORD JUSTICE PITCHFORD

- -

Between :

THE QUEEN (oao) MOUSA	**Appellant**
- and -	
SECRETARY OF STATE FOR DEFENCE & ANR	**Respondent**

- -

Mr Michael Fordham QC, Mr Dan Squires and **Ms Rachel Logan** (instructed by **Public Interest Lawyers**) for the **Appellant**
Mr James Eadie QC, Mr Philip Havers QC and **Ms Kate Grange** (instructed by **Treasury Solicitors**) for the **Respondent**
Mr David Wolfe for the **Intervener, Equality and Human Rights Commission**
Written submissions on behalf of the **Intervener,** the **Redress Trust**

Hearing dates : 18, 19, 20 July 2011

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Approved Judgment

Lord Justice Maurice Kay :

This is the judgment of the Court to which all three members have contributed

1. It sometimes seems that part of the choreography of public accountability in this country is the clamour for a public inquiry into suspected wrongdoing by agents of the state. Usually the ministerial decision to order or to refuse such an inquiry is a matter of discretion. However, where the suspected wrongdoing involves breaches of Articles 2 and/or 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), the investigatory obligation of those provisions is engaged. It may be satisfied in various ways, depending on the circumstances of the case. The central issue on this appeal is whether it was permissible for the Secretary of State to adopt a specific procedure which fell short of a public inquiry.

2. The context and the rival contentions of the parties are set out with admirable succinctness in the judgment of the Divisional Court (Richards LJ and Silber J), [2010] EWHC 3304 (Admin), paragraphs 1-3:

> "… 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 … 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 ill-treatment.
>
> The claimant's case is that the obligation under article 3 … 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 … 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 … ill-treatment and which makes it possible to learn lessons for the future action of the British military.
>
> 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 … 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."

3. Since the hearing of the present appeal, the Baha Mousa Inquiry, chaired by Sir William Gage, has reported (8 September). Baha Mousa died whilst in detention in 2003. The Al-Sweady Inquiry is concerned with allegations of unlawful killing on 14 and 15 May 2004 and ill-treatment at Camp Abu Naji and Shaibah Logistics Base between 14 May and 23 September 2004. It is in its very early stages. The allegations in the present case relate to far more detainees held in various detention facilities between 2003 and 2008.

4. It is apparent from the judgment of the Divisional Court (paragraph 5) that it was common ground that, for an investigation to satisfy the requirements of Article 3, it must be independent, effective and reasonably prompt. This led the Court to define the primary issue as "whether IHAT is sufficiently independent for the purposes of an Article 3 investigation – if it is not, it is accepted that a public inquiry providing the requisite degree of independence may be needed now." It defined the second issue as "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". Interwoven with both these issues is the question of timing, that is to say whether the Secretary of State was entitled to adopt a "wait and see" policy pending the outcome of IHAT's investigation and the completion of the Baha Mousa and Al-Sweady Inquiries.

The factual allegations

5. The claimant has provided a detailed account of ill-treatment. It is set out in paragraph 9 of the judgment of the Divisional Court. He was arrested on 16 November 2006 by British soldiers and detained in several locations before his release in November 2007. His account is one of violence and wide-ranging ill-treatment. It includes several of the manifestations of alleged ill-treatment covering all the complainants and tabulated for the hearing. The Divisional Court summarised it as follows (at paragraph 11):

> "(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 excessive 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)."

6. The case for the claimant is that all this amounts to a credible allegation of systemic abuse in that, given the number of people and places, it is not merely fortuitous or the result of rogue members of the Armed Forces but must have a common or underlying cause which requires investigation.

7. The allegations have yet to be proven as facts but it is accepted on behalf of the Secretary of State that they are not incredible, that they raise an arguable case of breach of Article 3 and that in their present form they raise arguable systemic issues, although it is suggested that these may change or fall away in the light of the findings of IHAT and the reports of the Baha Mousa and Al-Sweady Inquiries.

The judgment of the Divisional Court

8. Having considered the arrangements in the context of the statutory structure, the Divisional Court rejected the contention that IHAT lacks the requisite independence for the purposes of an Article 3 compliant investigation into the allegations. It considered that any problem that arises can be dealt with appropriately (for example, by recusal) and that compliance need not be jeopardised: paragraph 87. Turning to the allegation of systemic abuse, the Court said (at paragraph 113-114):

> "In our view it raises issues so closely related to the circumstances of the individual allegations of abuse … 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 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.
>
> 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."

9. The Court then further considered the "wait and see" approach before concluding that it was legally permissible. Its reasons included the observations that "the core fact-finding exercise already under way through IHAT is liable to impact on the systemic issues" (paragraph 124); that the Baha Mousa and Al-Sweady Inquiries overlap with the issues in the present case; that civil claims may provide further answers; and that the "very heavy resource implications" merit "real weight" (paragraphs 124-134).

10. All this demonstrates the centrality of the primary issue of the independence of IHAT. Plainly if, contrary to the conclusion of the Divisional Court, it does not have Article 3-compliant independence, its potential as an investigator of systemic issues and as a justification of "wait and see" is compromised.

11. Permission to appeal to this Court was granted by the Divisional Court on 10 February 2011. It considered that the issue of the independence of IHAT was an issue of sufficient importance to merit the attention of this Court. It was also concerned that one passage in its judgment was now conceded by the Secretary of State to be erroneous. It was concerned with the role of the General Police Duties branch (GPD) of the Royal Military Police (RMP). In paragraph 81 of its judgment, the Divisional Court said that "the GPD has no part to play now in the conduct of investigations within IHAT". This was in the context of a finding that "the primary involvement of the RMP on the ground in Iraq was that of members of the GPD" (*ibid*). In response to the application for permission to appeal, it was conceded on behalf of the Secretary of State that "it is not correct to state that the GPD has no part to play in the conduct of the IHAT investigations".

The law on independent investigations

12. Before turning to the minutiae of the specific structure of IHAT, it is appropriate to set out some of the legal principles, although they are not significantly in dispute. Although this is essentially an Article 3 rather than an Article 2 case, the Divisional Court considered and it is common ground that the same basic principle applies. In *Jordan v United Kingdom* (2003) 37 EHRR 2, it was stated by the European Court of Human Rights (ECtHR) in these terms (at paragraph 106):

> " … it may generally be regarded as necessary for the persons responsible for and carrying out the investigations to be

> independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence."

13. The purposes of the investigation were described by Lord Bingham in *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653 (at paragraph 31):

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

In an Article 3 case, that satisfaction would accrue to a proven victim in person.

IHAT

14. The judgment of the Divisional Court (at paragraph 15) contains the following description of IHAT:

> "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, Investigations 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. 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)."

15. In the event of the work of IHAT leading to prosecution or disciplinary proceedings, the relationship between the investigation process and the charging functions of the

Director of Services Prosecutions (DSP) and of commanding officers under the Armed Forces Act 2006 is brought into play. This aspect of the arrangements received detailed consideration in the judgment of the Divisional Court (paragraphs 45-67).

16. The civilian IHAT Head is Mr Geoff White. In his third witness statement he describes the membership of IHAT. He has a Deputy Head in relation to investigations who is a commissioned officer in the rank of Major in the Special Investigation Branch (SIB) of the RMP. The IHAT command team also includes a Deputy Provost Marshal (a Colonel who acts as Chief of Staff and senior military representative for all non-investigative aspects of IHAT business), a Royal Navy Legal Adviser and a RMP Executive Officer (who acts as Mr White's personal staff officer). There is a Secretariat comprising seven Ministry of Defence civil servants. There are a further 38 civilian staff of whom the majority are retired civilian police officers. In addition there are six "RMP, SIB investigators" and "30 RMP GPD personnel". The total establishment is therefore 86.

17. The Deputy Head is in overall charge of investigations. Some of the investigating teams are led by SIB officers with GPD staff acting as support. There is an Intelligence Cell with 37 staff which deals with the initial identification, recovery, analysis and dissemination of all material that may be relevant to all IHAT investigations. Twenty of its 37 members are GPD. The Investigations Cell includes four teams. The head of the interviewing team is a SIB Warrant Officer Class One. Management and coordination of the interviews are the responsibility of a SIB Warrant Officer Class Two. The team includes two other SIB and one GPD member in addition to six contracted civilian investigators. Investigation Team 1 includes a SIB Captain. Investigation Team 2 includes four GDP NCOs. Investigation Team 3 is an *ad hoc* group of three which investigates video footage showing the apparent abuse of an Iraqi made by British Forces in 2003. The group includes an SIB Warrant Officer Class One and a Warrant Officer Class Two from the interviewing team. The Major Incident Room has seven personnel attached to it. They are involved in collation. They include four GPD members who discharge the functions of exhibits officer, disclosure officer and indexers.

18. We have taken this summary from the third witness statement of Mr White. It was not before the Divisional Court but was made for this appeal "in order to clarify the role of the RMP and GPD personnel within IHAT". In it Mr White further states:

> "One of my key tasks is to design, agree with PM(A) and put in place strategies and policies to ensure that IHAT performs its functions."

19. The PM(A) is the head of the Provost Branch of the Adjutant General's Corps which includes RMP (SIB and GPD). RMP comprises about 1800 personnel (about 200 SIB and 1600 GPD). The Provost Branch also includes the Military Provost Staff (MPS).

The involvement of the Provost Branch in events in Iraq

20. Having considered the evidence before it, the conclusions of the Divisional Court under the heading *The direct/indirect involvement of the RMP and PM (A)* included the following:

(1) It accepted the evidence of Colonel Ian Prosser, Deputy Provost Marshal (Custody and Guarding) that the MPS had been too few in number (between 6 and 12 in the years since 2003 in Iraq) to have had a permanent presence in every operational custody facility or place of detention. They were based at the Divisional detention facility (initially the Theatre Internment Facility at Camp Bucca, then the Divisional Temporary Detention Facility (DTDF) at Shaibah Logistics Base, and then the Divisional Internment Facility (DIF) at Basra Airport. They were under the command of the officer commanding (OC) the Divisional detention facility in question, not of the PM (A), and it was to the OC that they 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. (Paragraph 70).

(2) As regards the RMP, a distinction was to be drawn between the SIB and the GPD. The primary involvement 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 the SIB was more limited still. "The GPD has no part to play now in the conduct of investigations within IHAT" and the involvement of the SIB on the ground in Iraq was not on such a scale as to give cause for concern about the independence of RMP investigations within IHAT. (Paragraph 81)

The part of that last sentence which we have set out in direct speech is the one that was conceded, after judgment, to be erroneous.

21. The Divisional Court concluded (at paragraph 85):

> "… 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."

22. To the extent that there was a contrary risk, it could be met by the recusal provisions which were written into IHAT's arrangements and appropriate oversight of those involved. Thus, the Divisional Court accepted the Secretary of State's case which, in its simplest form, was that the members of Provost Branch on the ground in Iraq had minimal involvement and, in any event, were under the command of the OC, not the PM (A).

23. In order to see whether these conclusions are sustainable, it is necessary to refer to passages of evidence, some of which were before the Divisional Court but others of which were produced for the first time in the Court of Appeal, probably as a result of the identification of the error concerning the involvement of the GPD in IHAT.

24. CSM Winters, 522 Squadron, 23 Pnr Regiment, was deployed to Basra in September 2007 and was in command of the outer security of the DIF. He states:

> "We were … trained by the RMP on arrest and restraint techniques. All of this specialist training was only aimed at a basic level due to the MPS, who were the Subject Matter

> Experts in this field, actually running the DIF, my troops were only there to assist … [They] did not hold any keys to the cells, this was entirely down to the MPS … There would always be MPS present when the Ground Force were with the detainees."

He observed blindfolding and disorientation of detainees prior to questioning by the Joint Forward Interrogation Team (JFIT).

25. Major David Spencer took command of the DIF Basra in May 2007. He too refers to the MPS as the Subject Matter Experts on how to run a detention facility and to their being instrumental in guiding his staff.

26. These descriptions of the role of the MPS by outsiders are effectively confirmed by Staff Sergeant Simon Lewis who served with the MPS at the DIF between December 2005 and June 2006. He states:

> "Within the DTDF the key personalities are the Sergeant Major of the MPS who runs the facility together with the current OC of the Ground Force. The MPS S Sgt would act as the CQMS while the MPS Sgts would be the shift commanders with the Ground Force soldiers working on the ground and in the sangers around the perimeter … The MPS did all the escorts as we were the keyholders."

27. On the basis of the evidence of these witnesses, whilst the MPS were no doubt formally under the command of OC rather than the PM (A) when carrying out these duties, it is clear that they were Provost Branch members with an important role in the conduct of the detention facilitees. Indeed, the Divisional Court described them as "responsible for ensuring that those detained were held in a safe and secure environment" (paragraph 70). However, it emphasised the command of the OC rather than the PM (A).

28. We turn to the position of the PM (A). He is the head of Provost Branch which includes the RMP (both the GPD and the SIB) and MPS. The SIB recruits from the RMP. The current PM (A) is Brigadier Edward Forster-Knight. Although he was only appointed PM (A) in May 2009, in May 2003 he assumed command of 1st Reg RMP and was Provost Marshal, 1 UK Armed Division, in Iraq. In July 2003 he became Provost Marshal (Germany). In 2005 he was appointed Deputy Provost Marshal (Investigations) responsible for the SIB among others. He made three witness statements for the Baha Mousa Inquiry and a further one in these proceedings. His first witness statement to the Baha Mousa Inquiry dated 26 March 2010 was before the Divisional Court, but his statement in these proceedings was not (it being dated 6 July 2011). His evidence includes the following:

1) When he became Provost Marshal, 1 UK Armed Division on 1 May 2003, one company of RMP was deployed in Basra City. They were to support the Black Watch and the 2nd Battalion Royal Regiment of Fusiliers. A second company was deployed outside Basra City.

2) During the warfighting phase RMP personnel were embedded with units to provide advice and support with regard to the handling of prisoners, search and the collection and collation of evidence as the battlegroups carried out operations. However, in April and May 2003 they were "re-roled" as custody sergeants and placed in every detention facility.

3) From May 2003, after the fighting phase, he, along with others, provided custody and detention advice.

4) He exercised direct command over the two companies referred to in (1) above. He also had a functional and coordinating responsibility for the other RMP units in theatre although they remained under the direct command of their respective formations or units to which they were providing support. Amongst other things, he acted as adviser to GOC 1 (UK) Armed Div on policing, custodial and detention matters. As PM, he had direct access to the GOC.

5) The MPS, "who are the Army's custody and detention experts", were spread thinly across Theatre and initially they provided training and technical expertise to the brigades and battlegroups as well as providing support to the main prisoner of war camp during warfighting operations. After the fighting phase, they also manned Al Maqel Prison and provided support to the Theatre Internment Facility (TIF) where detainees and internees were housed.

6) MPS personnel were placed in the TIF to handle detainees and to provide specialist technical advice and training to the guard force. The PM (A), in his then capacity as Provost Marshal, 1 UK Armed Division, visited the TIF on a few occasions between May and early July 2003 to liaise with the MPS personnel and to ensure that any issues were being handled correctly.

7) He was aware that custody and detention issues, including the handling of prisoners, would be a key issue in the post-conflict phase and so he specifically retained Major Simon Wilson RMP in theatre to lead on the policy issues, allowing the limited MPS staff to engage in the various theatre detention facilities where their technical expertise and guidance was much in demand.

8) After July 2003 there was only one RMP company deployed in Iraq (a reduction from 250 to about 70). Small numbers of RMP NCOs worked in support of battlegroups in the second phase.

29. The next source of evidence to which we should refer is a miscellany of contemporaneous documents. These include a series of reports of inspection of detention and internment facilities which took place between April 2006 and November 2007. They were carried out on behalf of the PM (A) so as to ensure acceptable practice and enable the PM (A) to determine whether internees were being held under "the safest and most humane conditions that are reasonably attainable". The May 2006 report contains an entry suggesting that the Geneva Convention was not being complied with, apparently on the assumption that it did not apply. The June 2007 report includes this passage:

> "Deprivation of both senses of sight and hearing should not take place concurrently – this practice should cease. This was commented on strongly in the April 06 inspection report and again in the follow-up inspection of Oct 06. It is surprising and disappointing that remedial action has not been taken."

The report of November 2007 referred to dual sensory deprivation as "now heavily constrained" and stated that "default is now no sensory deprivation".

30. We should also refer to a more controversial document. On 8 May 2003, Brigadier Forster-Knight, then the Lieutenant Colonel and Provost Marshal 1 UK Armed Division, wrote a document headed "Detention Procedures" which was distributed to, amongst others, the RMP companies stationed in and outside Basra City "for action" and to various other RMP personnel (including "MPS Det") "for information". It stated that a review of custody and detention procedures had been conducted to ensure compliance with the United Nations Declaration of Human Rights and the ECHR. It continued:

> "It has been determined that current procedures are not consistent with UK legislation and accepted 'best practice' in relation to custody and detention. It may also be argued that current procedures are inconsistent with Article 5 of [the ECHR]. Remedial action is, therefore, required."

31. It concluded with the words: "The imperative is to ensure that RMP acquits itself lawfully". This document was only disclosed shortly before the hearing in this Court, but had been referred to by Brigadier Forster-Knight in his evidence. Counsel for the Secretary of State told us on instructions that the document was concerned exclusively with those arrested and detained on suspicion of "civilian" offences and was not intended to apply to those detained as posing a danger. On the face of it, the document does not seem to be so limited. In his first witness statement to the Baha Mousa Inquiry, Brigadier Forster-Knight did not ascribe such a limited purpose to it. He said that it was written "to highlight the need to change procedures in light of the move from warfighting operations to post warfighting operations where the restoration of law and order was paramount". However, he added:

> "The review of the policies referred to in … the document was carried out to ensure the correct processing of internees and detainees in the complex post-warfighting phase, as the existing procedures needed clarifying and supplementing for the changed context … Because I was not in direct command of all RMP units, these units were copied into the directive for information but I expected them to follow these guidelines as well."

We also observe that in the document, whilst some of its contents may be more referable to the policing of "civilian" offences, it also refers to detention by a battlegroup for "posing a threat to Coalition Forces". It would be wrong to attach too much significance to this document.

32. Another contemporaneous document disclosed shortly before the hearing casts light on the role of the Provost Marshal on the ground in Iraq. In June 2006, the PM (A) – then Brigadier Findley – issued a directive to one of his RMP COs appointing him Provost Marshal in Iraq. We infer that he was a successor to Brigadier Forster-Knight in that role. The directive stated:

> "I am appointing you Provost Marshal MND (SE) for Operation Telic 8, the deployment to Iraq. You will deploy under Operational Command … of General Officer Commanding … and you will be my functional representative in Theatre. As such you are to discharge the functions and responsibilities conferred on me by statute, by the Queen's Regulations for the Army and other relevant orders and instructions …
>
> … while acknowledging that custody and detention on operations is a chain of command issue, you are to ensure the safe and secure custody and detention of Internees and Detainees."

It then referred to the PM (A)'s role in relation to inspection of detention facilities in Theatre and required a monthly report on matters including "Provost reputation and discipline". Notwithstanding the chain of command, it is clear that the PM (A) had responsibilities in relation to inspection and advice in connection with detention facilities which included the giving of advice up the chain of command.

33. In his witness statement dated 6 July 2011, Brigadier Forster-Knight emphasised the relatively small numbers of Provost Branch personnel in Iraq from 2004 onwards – fewer than 100 GPD, between 9 and 14 SIB and between 6 and 12 MPS.

Is IHAT independent?

34. The key question is whether the involvement of the Provost Branch in Iraq has been such as to transgress the requirement that IHAT be hierarchically, institutionally and practically independent, having regard to the role of the PM (A) and members of RMP (GDP and SIB) in IHAT. Much of the judgment of the Divisional Court addressed the hierarchical and institutional criteria by way of a detailed analysis of the complex statutory and regulatory framework. On behalf of the Secretary of State, Mr Philip Havers QC repeated and expanded his submissions on this aspect of the case before us. However, it seems to us that the central concern in this case is not related to the formal chain of command or to the niceties of the hierarchical or institutional military arrangements. It is to do with the reality of the situation on the ground in Iraq and the extent to which that may impact on the practical independence of IHAT in view of the involvement of the Provost Branch.

35. Before going any further, we should emphasise two points. First, there is no evidence that any individual member of the Provost Branch was involved in reprehensible conduct towards detainees or internees in Iraq. The parameters of this case are that ostensibly credible allegations of mistreatment by British soldiers have been made; that they require investigation; and that the investigation must bear the hallmark of independence to which I have referred. Secondly, for the appellant to succeed in

establishing a lack of independence, it is not necessary for him to prove that some element or person in IHAT actually lacks impartiality. One of the essential functions of independence is to ensure public confidence and, in this context, perception is important. As Lord Steyn said when giving the single opinion of the Appellate Committee in *Lawal v Northern Spirit Ltd* [2003] ICR 856, albeit in a different context (at paragraph 14):

> "Public perception of the possibility of unconscious bias is the key."

This statement was adopted by Laws LJ in *R (JL) v Secretary of State for Justice* [2009] EWHC 2416 (Admin), at paragraph 37.

36. We refer again to the composition and structure of IHAT as described by Mr White, its civilian Head, whose evidence we summarised in paragraphs 16 and 17 above. In our judgment, when one places it (recalling that his third witness statement was not before the Divisional Court) alongside the evidence about the involvement of the Provost Branch on the ground in Iraq (see paragraphs 24 to 34 above), it is impossible to avoid the conclusion that IHAT lacks the requisite independence. The problem is that the Provost Branch members of IHAT are participants in investigating allegations which, if true, occurred at a time when Provost Branch members were plainly involved in matters surrounding the detention and internment of suspected persons in Iraq. They had important responsibilities as advisers, trainers, processors and "surety for detention operations". If the allegations or significant parts of them are true, obvious questions would arise about their discharge of those responsibilities. SIB, GPD and MPS members would all come under scrutiny. Moreover, the PM (A) himself and his predecessors would also be likely to be called to account, given his position as head of the Provost Branch and the nature of his responsibilities in Iraq as Brigadier Forster-Knight has described them. It is, of course, to him that IHAT is required to report.

37. None of this is contradicted by the Secretary of State's "chain of command" case to the effect that, for the most part, the RMP personnel in Iraq came under the direct command not of the PM (A) but of the OC, who is not of Provost Branch. The fact remains that, under the IHAT arrangements, Provost Branch members are investigating allegations which necessarily include the possibility of culpable acts or omissions on the part of Provost Branch members. Nor is it a satisfactory answer (as counsel for the Secretary of State submit) that practical independence is underwritten by IHAT's recusal arrangements. If anything, their operation has compounded the cause for concern. Notwithstanding the relatively small numbers, there have been seven full recusals and nine partial recusals in relation to RMP members of IHAT. This simply goes to confirm the extent of the role of Provost Branch members in Iraq.

38. We are conscious that, in reaching these conclusions, we are differing from the judgment of the Divisional Court. However, it is a fact that, as was rapidly appreciated, that judgment rested in part on a misapprehension about the involvement of GPD members in IHAT and, in any event, we have received significant evidence that was not before the Divisional Court. In the event, we do not consider this to be a marginal case. On the contrary, we are of the view that the practical independence of IHAT is, at least as a matter of reasonable perception, substantially compromised.

IHAP

39. It will be recalled that IHAP is separate from IHAT and that its functions include consideration of the results of IHAT's investigations and other matters including the question whether any wider issues should be brought to the attention of the Secretary of State. We have considered whether the existence of IHAP dilutes or mitigates our concerns about IHAT. It does not. Its chair is Mr Peter Ryan, a senior civil servant and Director Judicial Engagement Policy at the Ministry of Defence. Its core membership includes the Director of Personal Services (Army) who is the Army's policy lead on matters including standards of conduct and the maintenance of discipline. It is also attended by the PM (A) and an "IHAT or RMP case officer as appropriate". If, as we have found, IHAT suffers from a lack of practical independence and the raw material destined for consideration by IHAP is the product of IHAT, IHAP's independence is itself compromised. Moreover, it comprises representatives of the three bodies – the Ministry of Defence, the Army chain of command and the Provost Branch – which would be vulnerable to criticism if the case on systemic abuse is established.

"Wait and see"

40. We have described the basis for the conclusion of the Divisional Court that the Secretary of State's "wait and see" stance was permissible. Its ultimate conclusion was expressed in these terms (at paragraph 134):

> "Taking everything into account, we are satisfied … 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."

41. We mean no discourtesy to the submissions of Mr James Eadie QC, who dealt with this aspect of the case on behalf of the Secretary of State, when we say that "wait and see" cannot survive as a policy once the independence of IHAT has been rejected.

42. The policy rested on the hypothesis that it would be untimely to establish a public inquiry before IHAT had completed its task, at which point the need could be assessed on the basis of fuller information. Waiting for the outcome of an independent preliminary investigation is one thing. However, once that investigation is adjudged to lack the necessary independence, it cannot be permissible to rely on it as the main reason for postponing a decision. That by itself leads us to the conclusion that "wait and see" is not a tenable position.

43. We should also refer to the reliance that was placed by the Divisional Court on the Baha Mousa Inquiry and, to a lesser extent, the Al-Sweady Inquiry as factors in favour of "wait and see". Since the hearing of the present appeal, Sir William Gage has produced his report following the Baha Mousa Inquiry. We invited and received written submissions from the parties on anything relevant to this appeal which emerged from Sir William's report. The Secretary of State points to the anticipated overlap between that Inquiry and report and the issues raised in the present case. That

there is an overlap is unquestionable. Moreover, Sir William has addressed systemic issues in so far as they were susceptible to findings based on the evidence he received. However, the fact remains that his limited terms of reference focused on the death of Baha Mousa in detention at the Temporary Detention Facility in Basra on 15 September 2003 when his custodians were members of the 1st Battalion the Queen's Lancashire Regiment. Whilst he was able to explore the background and culture as it had developed to that date and to make findings and recommendations which addressed systemic issues on that basis, he was not in a position to consider the present allegations which cover the whole period from 2003 to 2008 in a number of different locations.

44. Sir William stated (Volume I, Part I, paragraph 1.5):

> "I have not been asked to examine any other incidents where the practice of conditioning detainees may have been used; nor any other incidents involving allegations of ill-treatment of detainees. I have adhered to these terms of reference and have only investigated other satellite incidents where they appear to throw light on the issues with which I am directly concerned."

45. In the context of the practice known as "hooding", he stated (Volume III, Chapter XIII, paragraph 13.97):

> "… there is more than a hint that hooding, if not other conditioning practices, was more widespread than in just 1 QLR. However, to have investigated thoroughly whether and to what extent any of the five techniques were used by other Battlegroups would have extended the scope of this Inquiry disproportionately."

These statements are unsurprising. It was entirely predictable that Sir William's terms of reference would limit his ability and authority to investigate further in the way he describes.

46. We can understand why the Divisional Court attached significance to the Baha Mousa Inquiry when coming to its conclusion on "wait and see" but that was in conjunction with the finding that IHAT is independent. However, it is not simply the benefit of hindsight or wisdom after the event that disposes us to the view that, at the time when the ongoing Baha Mousa Inquiry was being relied upon as part of the justification for "wait and see", it was entirely foreseeable that it would not and could not satisfy the Article 3 investigative obligation in relation to later allegations spreading over several years in various locations involving different units.

47. The other point to which the Divisional Court accorded "real weight" was "the very heavy resource implications". Again, however, that weight inevitably reduces in the face of a conclusion that IHAT lacks independence.

48. For all these reasons, and notwithstanding Mr Eadie's eloquent submissions, we do not consider that the "wait and see" policy can be justified.

Conclusion

49. It follows from what we have said that we allow this appeal. It will be for the Secretary of State to reconsider how the Article 3 obligation should now be satisfied.