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Date: 21/03/2016

**DH-DD(2016)316**

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Meeting: 1259 meeting (7-9 June 2016) (DH)

Item reference: Updated action plan (04/03/2016)

Communication from the United Kingdom concerning the case of Al Skeini against the United Kingdom  
(Application No. 55721/07)

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Réunion : 1259 réunion (7-9 juin 2016) (DH)

Référence du point : Plan d'action mis à jour

Communication du Royaume-Uni concernant l'affaire Al Skeini contre Royaume-Uni (Requête n° 55721/07)  
**(anglais uniquement)**

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**Execution of Judgments of the European Court of Human Rights**  
**ACTION PLAN**

**AL SKEINI AND OTHERS V THE UNITED KINGDOM**

**Application number 55721/07**

**Judgment final on 07/07/2011**

**Information submitted by the United Kingdom Government on 04/03/2016**

**CASE SUMMARY**

The case involved six applicants whose relatives were killed in the course of operations conducted by UK Armed Forces in Basra, South East Iraq in the latter part of 2003, when the UK and US were occupying powers after major warfighting had been declared to be complete.

The European Court of Human Rights (ECtHR) found that all six deaths fell within the jurisdiction of the UK under Article 1 of the Convention because of the exceptional circumstances deriving from the UK's assumption of authority and responsibility for security in South East Iraq, as an occupying power from 1 May 2003 to 28 June 2004. Accordingly, the obligation in Article 2 of the Convention to investigate the deaths therefore applied. The obligation was to take all reasonable steps to ensure an effective and independent investigation.

The ECtHR held that there had been a breach of the procedural obligation under Article 2 of the Convention to carry out an adequate and effective investigation into the deaths of the relatives of the first, second, third, fourth and fifth applicants. The ECtHR decided that the investigations that had been held into the five deaths in question had not met the standard of the obligation under Article 2. However the ECtHR found no violation in respect of the sixth applicant as a full, public inquiry was nearing completion at the time of its judgment.

**INDIVIDUAL MEASURES**

**Just satisfaction:**

The first five applicants were awarded €17,000 each by way of non-pecuniary damage and a joint amount of €50,000 was awarded for legal costs and expenses. This was paid by the UK Government and received on 05/10/2011, evidence of which has been supplied

**Other measures:**

The six Al Skeini cases are at varying stages of the investigation process by the Iraq Historic Allegations Team (IHAT),<sup>1</sup> which was established in 2010 to conduct independent and effective investigations into alleged violations of Articles 2 and 3 of the Convention – described more fully in the section on General Measures below.

The **first applicant** is the brother of Hazim Al-Skeini. This case has progressed from the preliminary phases to full investigation by the IHAT. The IHAT will complete this investigation as

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<sup>1</sup> Further information about the IHAT is available on their website: <https://www.gov.uk/government/groups/iraq-historic-allegations-team-ihat#allegations-under-investigation>

quickly as possible, having due regard for the investigation to be effective. They are unable to forecast when this will happen owing to the need to trace and interview a number of witnesses from the UK and abroad. On completion of the IHAT's investigation and the prosecutorial process (assuming there is sufficient evidence to refer the case for a decision by the Director of Service Prosecutions), the United Kingdom Ministry of Defence will decide promptly whether an inquest-style inquiry is required.

The **second applicant** is the widow of Muhammad Salim. The IHAT has completed its investigation into this case, which the Secretary of State referred in May 2015 to Sir George Newman, who had previously been appointed to act as the Inspector for inquest-style inquiries (termed "Fatality Investigations") established following the High Court's 2013 judgments in the *Ali Zaki Mousa (No. 2)* judicial review. Sir George publishes information on the progress of his investigations on his website.<sup>2</sup> He has finished gathering evidence, including via oral hearings, and we anticipate that his report will be published at some time in March 2016.

The **third applicant** is the widower of Hannan Mahaibas Sadde Shmailawi. Following advice from the Service Prosecuting Authority (SPA) the IHAT is currently undertaking some focussed lines of enquiry. The IHAT wrote to Mrs Shmailawi's widower in June 2015 to notify him that it was starting the investigative process, but that owing to its very heavy caseload it might be some time before further contact was made. As in a civilian police investigation, the applicant will be notified of the outcome on completion of the criminal investigation. On completion of the IHAT's investigation and the prosecutorial process (assuming there is sufficient evidence to refer the case for a decision by the Director of Service Prosecutions), the United Kingdom Ministry of Defence will decide promptly whether an inquest-style inquiry is required.

The **fourth applicant** is the brother of Waleed Fayay Muzban. The IHAT have referred this case to the SPA with a recommended charge of murder. The SPA subsequently decided not to prosecute, a decision that the family have appealed, under the SPA's right of review process. The SPA's review upheld that decision. The United Kingdom Ministry of Defence has received from the IHAT the relevant papers, and has reviewed them. However, it has not reached a decision on whether to establish an inquest-style inquiry, as the applicant's lawyers have applied for a judicial review of the SPA decision. If the SPA decision not to prosecute is upheld, United Kingdom Ministry of Defence will decide promptly whether an inquest-style inquiry is required.

The **fifth applicant** is the father of Ahmed Jabbar Kareem Ali. Four soldiers had been previously charged with manslaughter in this case and were acquitted after a Court Martial. For this reason, there is a statutory requirement that before a re-trial could be ordered in respect of those individuals, "new" and "compelling" evidence must have been obtained. This death has been investigated by the IHAT, but no evidence meeting the requisite threshold has been found. The IHAT have now discontinued the investigation. The Secretary of State referred this case to Sir George Newman, whose terms of reference were finalised on 23 December.<sup>3</sup> We understand that Sir George has started to contact witnesses.

The **sixth applicant** is the father of Baha Mousa. The procedural duty to conduct an independent and effective investigation, which is accessible to the victim's family and publicly accountable,

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<sup>2</sup> <http://www.iraq-judicial-investigations.org/>

<sup>3</sup> [http://www.iraq-judicial-investigations.org/linkedfiles/ahmed\\_ali/key\\_documents/letterofappointmentandtermsofreference\(ahmedjabbarkareemali\).pdf](http://www.iraq-judicial-investigations.org/linkedfiles/ahmed_ali/key_documents/letterofappointmentandtermsofreference(ahmedjabbarkareemali).pdf)

and which considers not only the immediate circumstances of the death but also any wider or systemic issues, was discharged in this case by the £20M public inquiry. On conclusion of the public inquiry, the then Minister of State for the Armed Forces referred the case to the IHAT to consider whether the evidence disclosed potential criminal offences. This case is currently under full investigation by the IHAT; they advise that this is a complex investigation and is likely to take some time.

## GENERAL MEASURES

The UK takes due account of the *Al Skeini* judgment where relevant in its operations in other countries, such as Afghanistan. The UK Government's policies and decisions can be challenged by judicial review, in which the domestic courts will where appropriate take account of the *Al Skeini* judgment. The UK Government takes account of the ECtHR and domestic court judgments in setting future policies and making subsequent decisions.

### IHAT

Successive UK Defence Ministers have been determined to get to the bottom of allegations of abuse and unlawful killings, irrespective of the ECHR jurisdictional position. In March 2010, before the judgment was handed down, the Ministry of Defence (MOD) announced the establishment of IHAT.

There have been two legal challenges<sup>4</sup> in the UK domestic courts to the sufficiency of the IHAT. The first of these resulted in the IHAT being re-subordinated from the Provost Marshal (Army) to the Provost Marshal (Navy) after the High Court judged that the structure created a perception that the IHAT lacked independence (although it did not find that it actually was not sufficiently independent). In the second challenge, the High Court ruled that the IHAT possesses the requisite independence, but that a further process of inquest-style inquiries – which the MOD has termed fatality investigations – was necessary in order fully to satisfy all of the investigative requirements of the Convention.

In its judgment of 24 May 2013, the UK court expressed concern that members of the Royal Navy Police (including the Royal Marines Police Troop) who were assigned to the IHAT were covered by the wider Naval Command for the purpose of disciplinary matters. The concern was that this might give rise to a perception that the Royal Navy Police and Royal Marine Police personnel in the IHAT lacked independence; it was felt that it could be perceived that they might fear disciplinary action if they were critical of actions of Royal Navy/Royal Marine personnel.

Following the judgment, the MOD examined this issue and it was decided that Provost Marshal Navy should be formally designated as the CO of HQ PM(N), the Royal Navy Police Special Investigation Branch and the IHAT, and assume responsibility for those staff. This has taken place, thus eliminating the potential for any perception of influence by the wider military command chain. No follow-up is required by the High Court in relation to the measures taken to address the concerns raised in the judgment. The High Court said that this was a matter for the Secretary of State<sup>5</sup> and did not require the MOD to report back on the issue.

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<sup>4</sup> *R (Mousa) v Secretary of State for Defence (No. 1)* [2011] EWCA Civ 1334; [2012] H.R.L.R. 6 and *R (Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin) [*Mousa* (No 2)] and *R (Mousa) v Secretary of State for Defence* {2013} EWHC 2941 (Admin) [*Mousa* No2]

<sup>5</sup> See final sentence of paragraph 123 of the judgment of 24 May 2013

The IHAT Article 2/3 caseload has increased and its mandate has been extended to the end of 2019 with an increase in funding to a total of £57 million. Its caseload currently stands at 1,158 investigations; this encompasses 288 alleged victims of unlawful deaths, and 1,270 alleged victims of ill-treatment. This caseload is likely to increase further, as IHAT is still assessing a further 742 potential cases to determine whether an investigation will be required. The significant increase in the IHAT's caseload is a result of approximately 1,200 fresh allegations being reported since June 2014.

There are eight stages to the IHAT investigation from initial information gathering; assessment of the information gathered; joint consideration with the SPA, investigation (including victims and witnesses) through to completion and referral for a prosecution decision or disciplinary action.

### IRAQ FATALITY INVESTIGATIONS

Following the UK Court's decision that a further process may be required in order fully to discharge the implied investigative duty in Article 2 ECHR, the MOD has agreed to set up a number of Fatality Investigations once the IHAT has concluded its investigation of appropriate cases. These Fatality Investigations were considered necessary by the court in order for the UK's investigations to satisfy the requirements for the family of the victims to be involved and for public scrutiny, which have been held to be essential components of an ECHR-compliant investigation. The investigations are similar to inquests and involve providing the families of the deceased and the wider public with the fullest possible information as to how the deaths occurred. The first two were completed in March 2015.<sup>6</sup> Both cases involved deaths which occurred in the course of patrols by British soldiers during the Occupying Power period in Iraq. In addition to the publicly available information on the website, hearings were held in public and relayed via video link to Iraq to enable the families to participate. Witness statements, other evidence and transcripts of proceedings have been published on the website.

The Secretary of State for Defence takes advice from his officials about the decision he is empowered to make as to whether or not a case should be referred to a Fatality Investigation, as set out by the High Court in its judgment of 2 October 2013, and as clarified at paragraph 1 (vi) of the Court Order of 21 October 2013). This is a legal test: if a death occurred within the jurisdiction of Article 1 ECHR, and there is an arguable or credible allegation that it amounts to a breach of Article 2 ECHR (i.e. the circumstances of the incident are incompatible with international humanitarian law), then it must be referred to a Fatality Investigation if the IHAT investigation does not lead to a prosecution. In those cases where a prosecution does result, officials will consider whether there remain questions to be answered as to the circumstances surrounding the death of the individual, whether these fall to be investigated further in a publicly-accessible way, and conclusions drawn about those circumstances using the method adopted by a "*Middleton-type*" Inquest.<sup>7</sup>

Sir George Newman, a retired High Court judge, continues to act as Inspector. The Secretary of State directed him in May 2015 to conduct a fatality investigation in relation to the second

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<sup>6</sup> <http://www.iraq-judicial-investigations.org/linkedfiles/reports/consolidatedreportintothedeathsofnadheemabdullahandhassansaid.pdf>

<sup>7</sup> See paragraph 1(x) of the Court Order of 21 October 2013

applicant's case,<sup>8</sup> and in December 2015 to conduct a fatality investigation in relation to the fifth applicant's case.<sup>9</sup> Having reviewed the conclusions of the IHAT's investigations in a further 26 completed cases, the Secretary of State has decided not to refer them to Sir George; judicial reviews challenging six of these decisions were heard by the Designated Judge in November 2015. We expect his judgment will be handed down within the next few weeks.

It is not possible to determine at this stage how many such investigations will be established, or whether the cases of the remaining four applicants will require this type of investigation on conclusion of the IHAT investigations.

### THE DESIGNATED JUDGE

The UK High Court expressed concern about delays in IHAT investigations and, in particular, prosecution decisions being taken<sup>10</sup> and designated a judge – Leggatt J – to oversee the progress of the investigative process and Fatality Investigations.<sup>11</sup> It is open to either side to refer to the Designated Judge any matter of concern.

The Designated Judge provides oversight of the timeliness and effectiveness of all parts of the processes that the Secretary of State has established to discharge the UK's investigative duties under the ECHR, and can require the Secretary of State and the Director of Service Prosecutions to provide evidence of the progress being made. The last such hearing was held on 27 April 2015. Although the Designated Judge expressed concern about the unprecedented scale of the challenge faced by the IHAT, and the timeliness of the investigations, he did not order any changes to the investigative processes established by the Secretary of State.<sup>12</sup> He has scheduled a further hearing for 3-6 November 2015, at which he will: consider the progress made since the April hearing; hear applications in relation to issues of contention; hear the challenges to the Secretary of State's decision not to establish fatality investigations in six cases; and will issue directions to resolve these quickly and effectively.

In addition to the publicly accessible information on the IHAT website which is regularly updated, the IHAT writes to individuals including the applicants' families via their UK lawyers to keep them up to date with progress. The MOD also writes to the applicants' families via their UK lawyers to notify them of the Secretary of State's decision with regard to whether or not their case will be referred to a fatality investigation.

There remain some unresolved legal questions over the extent of UK jurisdiction in respect of deaths and operations in Iraq more widely. Trials of preliminary issues took place before Mr Justice Leggatt during the week commencing 27 October 2014. The judgment, which was handed down on 17 March 2015,<sup>13</sup> is currently being appealed. The Court of Appeal will hear the case during the week beginning 16 May 2016.

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<sup>8</sup> [http://www.iraq-judicial-investigations.org/linkedfiles/muhammad\\_salim/key\\_documents/confirmationofappointmentandtermsofreference.pdf](http://www.iraq-judicial-investigations.org/linkedfiles/muhammad_salim/key_documents/confirmationofappointmentandtermsofreference.pdf)

<sup>9</sup> [http://www.iraq-judicial-investigations.org/linkedfiles/ahmed\\_ali/key\\_documents/letterofappointmentandtermsofreference\(ahmedjabbarkareemali\).pdf](http://www.iraq-judicial-investigations.org/linkedfiles/ahmed_ali/key_documents/letterofappointmentandtermsofreference(ahmedjabbarkareemali).pdf)

<sup>10</sup> See paragraphs 165, 185-187 of the High Court judgment of May 2013

<sup>11</sup> See paragraph 223 of the judgment of 24 May 2013, and the Court Order of 31 October 2013

<sup>12</sup> [2015] EWHC 1769 (Admin).

<sup>13</sup> [2015] EWHC 715 (Admin).

## **Publication and dissemination:**

The judgment was widely reported in the UK media and has been published in a number of legal journals including the following:

- Al-Skeini and others v United Kingdom - (2011) 30 BHRC 561
- Al-Skeini and Others v United Kingdom (Application No 55721/07) (2011) The Times, 13 July
- Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg', *European Journal of International Law*, (pending vol 23 2012).
- BAILLII online case database:  
<http://www.bailii.org/cgibin/markup.cgi?doc=/eu/cases/ECHR/2011/1093.html&query=Al-Skeini&method=boolean>

The judgment has been widely disseminated across Government. Detailed advice has been taken from independent counsel on the implications of the judgment, and the Ministry of Justice has led co-ordination activity to ensure its implications are understood by the wide range of interested government departments. In addition there have been a range of expert and academic seminars on the judgment as well as academic commentary.

## **State of execution of judgment:**

The IHAT, which is independent of the UK Ministry of Defence for the purposes of investigations, is expected to complete all the investigations by the end of 2019. It is not known at this stage when individual IHAT investigations will complete. Ten have been completed so far<sup>14</sup> and the IHAT is resourced to meet all its investigative obligations. The UK courts have been actively seized of these issues and ensured that the investigations are compliant with Convention obligations and standards. We will provide the Committee of Ministers with another update as to the status of the individual investigations by the beginning of August 2016.

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<sup>14</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/421301/20150409-IHAT\\_work\\_completed\\_table\\_clean.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/421301/20150409-IHAT_work_completed_table_clean.pdf)