

# Britain: High Court clears way for investigation into troop killing of Iraqi citizen

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Earlier this week, the High Court ruled that there must be a full independent inquiry into the September 2003 death of 26-year-old Iraqi citizen Baha Mousa at the hands of British troops in Basra, southern Iraq.

Mousa, a hotel worker and the father of two children, died covered in bruises just days after he was detained by soldiers in The Queen's Lancashire Regiment. Last year, Mousa's family and the relatives of five other Iraqis killed by British soldiers had sought a judicial review, arguing that the government was in breach of the European Convention on Human Rights and the UK Human Rights Act 1998 by not conducting an independent inquiry into the deaths.

Their application had been opposed by the government. Lawyers acting for Defence Secretary Geoff Hoon argued at the High Court that the convention only applied to Europe and was not applicable to British troops in Iraq, and that the Human Rights Act 1998 that had incorporated the convention into UK law only applied in UK territory.

Christopher Greenwood, acting for the government, told the court that the UK had no jurisdiction in Iraq, and that applying the convention to British troops in that country would mean "war as it has never been fought."

But in Mousa's case, two judges, Lord Justice Rix and Justice Forbes, ruled that the Human Rights Act also covered territorial "outposts," including prisons in foreign countries under the control of British personnel. Under Article 2 of the European convention, they said, there must be an independent inquiry into Mousa's death, as it had not occurred "in the highways or byways of Iraq but in a military prison under the control of British forces."

Human rights groups immediately welcomed the ruling, as changing the rules of engagement for war, whilst the *Times* opined that "Britain's justice system sometimes seem to turn rather slowly. Yet they do turn." In truth, the judges' ruling is far more nuanced.

The court heard testimony by Mousa's fellow worker, Kifa Taha al-Mutari, describing how Mousa and several others had been taken into custody at the hotel by British troops. Al-Mutari said that they were beaten by British

troops, hooded, deprived of sleep and had freezing water poured over them. Al-Mutari, who suffered acute renal failure as a consequence of his treatment, said that soldiers would compete "as to who could kickbox one of us the furthest."

On the third night of his detention, al-Mutari testified that he heard Mousa, saying he was bleeding from his nose. His last words were, "I'm a dying ... blood ... blood ..." Mousa's battered body had been identified by his father, a colonel in the Iraqi police.

Mousa's family had been told that his death was under investigation and that those responsible would be punished, but nothing had happened, and although the Army Prosecuting Authority had recommended charges be brought, nothing had become of it.

In February 2004, the International Red Cross had "expressed concern" to the British government over Mousa's treatment. In its confidential report leaked on the Internet, the IRC detailed three allegations against British troops.

In relation to Mousa the IRC said that he was one of nine men detained by British soldiers at the al-Hakimiya, a former office used by Iraq's secret police, and severely beaten. The detainees were "made to kneel, face and hands against the ground, as if in a prayer position," the report stated. "The soldiers stamped on the backs of the necks of those raising their head. They confiscated their money without issuing receipts."

Mousa died following this "ill-treatment," the IRC continued. Two others detained with Mousa were also hospitalised with severe injuries, the IRC report went on. "A week later, a doctor from the International Committee of the Red Cross examined them in hospital and observed large haematomas with dried scabs on the abdomen, buttocks and sides, thighs, wrists, nose and forehead consistent with their accounts of beatings."

In the High Court, Justices Rix and Forbes rejected the government's claim that the RMP investigation had been "adequate in terms of the procedural obligation arising out

of Article 2 of the convention.” They attacked the “dilatatoriness” of the RMP inquiry and its lack of public accountability. “They were not independent; they were one-sided; and the commanders concerned were not trying to their best,” the judges said.

They also rejected Greenwood’s submission that there were territories in the world, such as Iraq, “for which the convention was not designed and for which they might not be ready.” The judges said this was “an unhappy submission to have to make about a country which was one of the cradles of civilisation.” They added: “No one knows to whom the baton or batons of the human race will be handed. The convention was not created because of the humanity of Europe, but because of its failures.”

Mousa’s imprisonment by British personnel was not in question, the judges ruled. As such the detention centre was an “outpost of the State’s authority,” and British law, including that on human rights, must prevail there.

Consequently an independent inquiry will now investigate whether Mousa was unlawfully killed in breach of Articles 2 and 3 of the convention guaranteeing the right to life and freedom from torture. If proven, the Mousa family could claim damages from the Blair government.

Writing in the *Guardian* newspaper, Phil Shiner, acting for Mousa’s family, described the ruling as “critically important,” writing: “[T]hese incidents cannot be explained by nailing a few ‘rogue soldiers’ in the ranks. The evidence suggests officers were involved and that a torture policy exists. There are striking comparisons between these techniques and those used by US forces at Guantanamo Bay, Abu Ghraib and Mosul. An inquiry must establish how far up the chain of command responsibility lies.”

By establishing that the soldiers had personal jurisdiction over Mousa during detention, the High Court ruling created an exception “to the usual rule that the UK—and other contracting states to the convention—have jurisdiction only within their own territory,” Shiner continued.

“The other exception—which has broader implications—is when a state has effective control of an area. The court has left this point open, finding that this doctrine cannot apply outside Europe. It will now go to the court of appeal.”

Should the appeal court find in favour of the complainants, Shiner added, “it will change the face of future conflicts, peace keeping operations or occupations involving European members of NATO. Once one of those states alone, or with others, can be said to have effective control of another territory—anywhere in the world—the European convention will apply.”

“... Alternatively, if the government is correct, the UK could create its own Guantanamo Bay. As long as it was outside Europe the convention would not be in play.”

In addition to these crucial matters, however, the High Court ruled that the five other cases brought before it, where civilians had allegedly been shot dead by British soldiers, were not covered by the Human Rights Act.

Hazim al-Skeini, 23, Waleed Musban, Raid-al Musawi, 29, Muhammad Salim, 45, and Hanan Schmailawi were all killed in separate shooting incidents involving British soldiers between August and November 2003.

Dismissing claims by relatives of the five for a judicial review of the deaths, the High Court ruled that the shootings had occurred “in the field.” The victims were not in custody and their deaths had occurred on Iraq territory, which was outside UK jurisdiction and therefore “outside the scope of the convention and the Act.”

This is despite the fact that Britain had occupied southeast Iraq and, together, with its US ally, had taken effective control over the country and its administration.

Both parties have been given leave to appeal. In a statement, the Ministry of Defence welcomed the High Court’s decision to reject a judicial review into the five shooting deaths. It stated: “In court, we argued that the ECHR [European Court of Human Rights] was never intended to cover the circumstances we face in Iraq where the security situation does not permit all deaths to be investigated in the same way as would happen in peacetime Europe.

“We welcome the court’s acceptance of the general principle that any application of the ECHR outside the United Kingdom is exceptional and limited and occurs only in specific cases recognised in international law.

“This decision is important for current and future operations since in Iraq, where UK armed forces are regularly fired on and regularly return fire in self-defence, [and] it is not possible for us to adopt procedures such as the immediate establishment of a police cordon to enable the painstaking collection of forensic evidence.”



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