

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

Application no. 29750/09
by Khadim Resaan HASSAN
against the United Kingdom
lodged on 5 June 2009

STATEMENT OF FACTS

PROCEDURE

1. The case originated in an application (no. 29750/09) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Iraqi national, Mr Khadim Resaan Hassan ("the applicant"), on 5 June 2009.

2. The applicant was represented by Mr P. Shiner, of Public Interest Lawyers, a lawyer practising in Birmingham. The United Kingdom Government ("the Government") were represented by their Agent, Ms R. Tomlinson, Foreign and Commonwealth Office.

3. The applicant alleged that his brother was arrested and detained by British forces in Iraq and was subsequently found dead in unexplained circumstances. He complained under Article 5 §§ 1, 2, 3 and 4 of the Convention that the arrest and detention were arbitrary and unlawful and lacking in procedural safeguards and under Articles 2, 3 and 5 that the United Kingdom authorities failed to carry out an investigation into the circumstances of the detention, ill-treatment and death.

4. The Court's examination of the application was adjourned pending adoption of the judgment in *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011. Subsequently, on 30 August 2011, the application was communicated to the Government. The Court also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The facts of the case, as submitted by the parties, may be summarised as follows. Where certain facts are in dispute, each party's version of events is set out.

1. The invasion of Iraq

6. On 20 March 2003 a coalition of armed forces under unified command, led by the United States of America with a large force from the United Kingdom and small contingents from Australia, Denmark and Poland, commenced the invasion of Iraq from their assembly point across the border with Kuwait. By 5 April 2003 the British had captured Basrah and by 9 April 2003 United States troops had gained control of Baghdad. Major combat operations in Iraq were declared complete on 1 May 2003.

2. The arrest and detention of the applicant's brother

7. Prior to the invasion, the applicant was a general manager in the national secretariat of the Ba'ath Party and a General in El Quds Army, the private army of the Ba'ath Party. He lived in Umm Qasr, a port city in the region of Basrah, near the border with Kuwait and about 50 kilometres from Basrah City. After the British Army entered into occupation of Basrah, they started arresting high ranking members of the Ba'ath Party. Other Ba'ath Party members were killed by Iraqi militia. The applicant and his family therefore went into hiding, leaving only his brother, Tarek Ressaan Hassan (henceforth, "Tarek Hassan"), and his cousin to protect the family home. According to information given to the applicant by his cousin and by a neighbour, Salim Hussain Nassir Al-Ubody, the British Army came to his house on 22 April 2003 at around 4.30 a.m, broke down the door and took away Tarek Hassan, with his hands tied behind his back. Mr Al-Ubody told the applicant that the British troops had three or four armoured vehicles and that the noise woke up the neighbours, who gathered to watch. He also told the applicant that an Iraqi who accompanied the British soldiers told him that the British were looking for him.

8. The Government emphasised that in April 2003, when major combat operations had not yet ceased, there were 25,000 British troops in and around the Greater Basrah area. Of those, approximately 5,000, across 15-25 different sub-units, would have been engaged in activities such as search and arrest operations. As the situation was very fluid, no particular unit was based in any one particular part of Basrah. Moreover, unit records would generally record no more detailed information concerning arrests than the number of people arrested and put into detention. On the basis of computerised records from Camp Bucca, they accepted that Tarek Hassan was arrested by British forces but they submitted that, according to the entry on the United Kingdom's database, the date and time of arrest was 23 April 2003 at 00:01 (that is, shortly after midnight). The Government further alleged that Tarek Hassan was found on the roof of the house armed with an AK-47 and that other weapons and documents relating to the Ba'ath Party were found in the house.

9. According the applicant, his family were not informed where Tarek Hassan was being detained. He alleged that two days after the arrest Mr Al-Ubody went to United Kingdom headquarters at the Shatt-Al-Arab Hotel where he asked an interpreter who was working for the British to find out what had happened. The interpreter asked him to come back in two days, when he was told by an interpreter that the United Kingdom authorities were detaining Tarek until the applicant surrendered himself to them. The applicant's sisters claimed also to

have approached the United Kingdom military authorities on an unspecified date and to have been told, by an unspecified person, that the applicant would have to surrender himself before Tarek Hassan would be released. The Government submitted that the applicant's allegation that his brother was taken hostage was supported only by vague hearsay evidence and that the information about Tarek Hassan's detention held on the Camp Bucca databases and the Tactical Questioning Report (see paragraphs 11-14 below) indicated that he was arrested as a suspected combatant or civilian posing a threat to security, and released once his status as an innocent civilian had been established.

10. Both parties agreed that Tarek Hassan was taken by United Kingdom forces to Camp Bucca. This Camp, situated about 2.5 kilometres from Umm Qasr, was first established on 23 March 2003 as a United Kingdom detention facility. However, it officially became a United States facility, known as "Camp Bucca", on 14 April 2003. In April 2003 the Camp was composed of eight compounds, divided by barbed wire fencing, each with a single entry point. Each compound contained open-sided tents capable of housing several hundred detainees, a water tap, latrines and an uncovered area. In accordance with a Memorandum of Arrangement dated 23 March 2003 (see paragraph 23 below), the United Kingdom continued to detain civilians at the Camp, in a compound designated for that purpose. In addition, the United Kingdom continued to operate a separate compound at the Camp for its Joint Forward Interrogation Team (JFIT), which interrogated prisoners for intelligence purposes. However, the United States Army was responsible for guarding and escorting all detainees within the Camp, including those in United Kingdom criminal and JFIT compounds. The United Kingdom was obliged to reimburse the United States for costs involved in maintaining United Kingdom captured detainees held at Camp Bucca. British Military Provost staff had an overseeing responsibility for United Kingdom detainees transferred to United States custody.

11. On arrival at Camp Bucca, in accordance with usual practice, Tarek Hassan was entered on the United Kingdom's AP3-Ryan computerised database. There was no entry under his name (Tarek Resaan Hassan) but there was an entry for "Tarek Resaan Hashmya Ali". In his witness statement the applicant explained that for official purposes Iraqis use their own first name, followed by the names of their father, mother, grandfather and great-grandfather. "Ali" was the applicant's great-grandfather's name and it appeared that Hassan (his grandfather's name) was omitted by mistake. His photograph was taken and entered in the database. He was issued with a wristband printed with his United Kingdom internment serial number UKDF018094IZSM; with "DF" denoting "detention facility", "IZ" meaning allegiance to Iraq and "SM" standing for "soldier male". He was then transferred to the custody of the United States, who issued him with a second wrist band, dated 23 April 2003, with his photograph and the number UK91Z-107276EPW.46. The "UK" reference indicated that the United Kingdom was the capturing nation and "EPW" indicated that he was regarded by the United States forces as an enemy prisoner of war. After registration, detainees were usually medically examined, then provided with bedding and an eating and washing kit and transferred by United States forces to the accommodation areas.

12. According to the Government, where the status of a prisoner was uncertain at the time of his arrival at Camp Bucca, he would be registered as a prisoner of war. They submitted that the military order in force at the relevant time called for a two-stage screening process for all prisoners claiming to be innocent civilians. An initial interview was to take place, to establish whether or not the prisoner was a civilian, followed by a second interview to establish whether there were grounds to suspect that he was a security risk or a criminal. The order further provided that if no such reasonable grounds existed, the individual was to be released immediately.

13. A print-out from the JFIT computer database indicated that in Camp Bucca Tarek Hassan was assigned JFIT no. 494 and registration no. UK107276. His arrival was recorded as 23 April 2003 at 16.40 and his departure was recorded as 25 April 2003 at 17.00, with his "final destination" recorded as "Registration (Civ Cage)." Under the entry "Release/Keep" the letter "R" was entered. Under the heading "TQ", which stood for "tactical questioning", there was the entry "231830ZAPR03-Steve" and under the heading "Intg 1" was the entry "250500ZAPR03". According to the Government, the first of these entries meant that Tarek Hassan was first subjected to tactical questioning on 23 April 2003 at 18.30 Zulu ("Zulu" in this context means Coordinated Universal Time, also known as Greenwich Mean Time). On 23 April, 18.30 Zulu would have been 21.30 Iraqi time. The second entry indicated that Tarek Hassan was again subject to questioning on 25 April 2003 at 5.00 Zulu, or 8.00 local time and then released into the civilian pen at Camp Bucca at 20.00 local time on 25 April 2003.

14. The Government provided the Court with a copy of a record of an interview between Tarek Hassan and United States agents, dated 23 April 2003, 18.30 Zulu, which stated as follows:

> "EPW [Enemy Prisoner of War] was born in BASRA on August 3, 1981. He currently resides in his home with his father, mother, older brother (Name: Qazm; born in the 1970s), and his little sister (age; unexploited). Home is across from the Khalissa school in the Jamiyat region in N. BASRA. EPW left middle school as a recruit to play soccer. He currently plays in the Basra Soccer Club and his position is attacker/forward. His team receives money from the government and the Olympic committee to pay for team expenses. EPW has no job since soccer is his life and they pay for all of his soccer expenses.
>
> EPW knows that he was brought in because of his brother, Qazm. Qazm is a Othoo Sherba in the Ba'ath party and he fled his home four days ago to an unknown destination. Qazm joined the Ba'ath party in 1990 and is involved in regular meetings and emergency action planning (nothing else exploited). Before the war, Qazm received a pickup rom the Ba'ath party. When the coalition forces entered BASRA, Qazm gave the pickup to a neighbour (name not exploited) to safeguard it and Qazm went to a hotel in downtown BASRA (name of hotel is unknown). Qazm made a few phone calls during that time, but never mentioned where he was staying. A problem arose when the original owners of the pickup, the local petroleum company, came to reclaim the vehicle they had lent the Ba'ath party. Qazm became frustrated with the whole mess and fled soon after that.
>
> EPW seems to be a good kid who was probably so involved with soccer that he didn't follow his brother's whereabouts all that much. But it seems they have a close knit family and EPW could know more about his bother's activities in the Ba'ath party, and some of his friends involved in the party, too. Using any type of harsh approach is not going to be effective. EPW loves his family and soccer. EPW will cooperate, but he needs someone he can trust if he's going to tell information about his brother that is going to harm him. EPW seems to be innocent of anything himself, but may help with information about others around him."

15. A record of the second questioning was provided by the Government in the form of a Tactical Questioning Report. This document indicated that it related to "PW 494" with the "date of information" recorded as "250445ZAPR03", that is 4.45 Zulu or 7.45 local time on 25 April 2003. The report stated:

> "1. EPW [Enemy Prisoner of War] is 22 years old, single, living with his 80 year old father (who is a Sheik) and his mother in the Jamiyet district of BASRAH. He works as a handyman and has not done his military service due to his status as a student. He stated that an AK 47 was present in their house at the time of his arrest but it was only kept for personal protection. The EPW and his father are not Ba'ath Party members.
>
> 2. EPW says he was arrested at his house by United States troops who were looking for his brother, Kathim. His brother is a Ba'ath Party member, an Uthoo Shooba. He joined the party in 1990 when he became a law student in the school of law in the Shaat Al Arab College. His brother is still a student, in his last year of study, married but with no children. He has alternated study with periods of work as a car trader. His brother was in fear of his life because of fear of reprisals against Ba'ath Party members and so

had run away possibly to SYRIA or IRAN. The EPW last spoke with his brother 5 days ago by phone. His brother did not disclose his location.

JFIT COMMENT: EPW appears to be telling the truth and has been arrested as a result of mistaken identity. He is of no intelligence value and it is recommended that he is released to the civilian pen. **JFIT COMMENT ENDS.**"

16. The applicant submitted a summary of an interview with Fouad Awdah Al-Saadoon, formerly the Chairman of the Iraqi Red Crescent in Basrah and a friend of the applicant's family. He had been arrested by British troops and detained at Camp Bucca, in a tent holding approximately 400 detainees. He stated that on 24 April 2003 at around 6 p.m. Tarek Hassan was brought to the tent. Mr Al-Saadoon stated that Tarek seemed scared and confused but he did not mention that he complained of having been ill-treated. Mr Al-Saadoon was released on 27 April 2003, in a batch of 200 prisoners, since the British had decided to release all detainees aged 55 or older. The detainees were released on a highway between Al-Basrah and Zubair and had to walk 25 miles to the nearest place they could hire cars. Following his release, he informed the applicant's family that he had seen Tarek Hassan at Camp Bucca. According to the applicant, this was the only information received by the family about his brother's whereabouts following his arrest.

17. The Government submitted a witness statement by Mr Timothy Lester, who was charged with running the United Kingdom Prisoner of War Information Bureau (UKPWIB) in respect of Iraq from the start of military operations there in March 2003. He stated that the UKPWIB operated in Iraq as the "National Information Bureau" required by Article 122 of the Third Geneva Convention (see paragraph 25 below) and monitored details of prisoners of war internees and criminal detainees in order to facilitate contact with their next-of-kin. The Third Geneva Convention also required the establishment of a "Central Prisoners of War Information Agency". This role was subsumed by the Central Tracing Agency of the International Committee of the Red Cross (ICRC). The ICRC collected information about the capture of individuals and, subject to the consent of the prisoner, transmitted it to the prisoner's country of origin or the power on which he depended. In practice, details of all prisoners taken into custody were entered by United Kingdom forces at the detention facility in Iraq and sent to Mr Lester in London, who then transferred the data to a spread-sheet and downloaded it to the ICRC's secure website. He stated that during the active combat phase he typically passed data to the ICRC on a weekly basis, and monthly thereafter. However, Tarek Hassan's details were not notified to the ICRC until 25 July 2003, because of a delay caused by the updating of UKPWIB computer system. In any event, it was noted on Tarek Hassan's record that he did not consent to the Iraqi authorities being notified of his capture. In the absence of consent, Mr Lester considered it unlikely that the ICRC would have informed the Iraqi authorities and that they in turn would have informed the Hassan family.

18. According to the witness statement provided by the Government of Major Neil Wilson, who commanded a group of soldiers from the Military Provost Staff who advised on detention issues within the United Kingdom area of operations in Iraq during the relevant period, the decision to release United Kingdom captured detainees held at Camp Bucca, other than those facing criminal charges, was taken by a tribunal convened by United Kingdom military legal officers. Details were then passed to the United States guards, before those released were processed out of the Camp, with their details checked and entered on the AP3-Ryan database. According to the orders made by the United Kingdom's Military Divisional Headquarters based in Basrah and applying at that time, the United States was responsible for the repatriation of all prisoners to the areas within its field of operation and the United Kingdom was responsible for returning prisoners to areas within its field of operation, namely South East Iraq, regardless of which force had captured them. The International Committee of the Red Cross was to have access to all those being released.

Again according to the applicable orders, prisoners repatriated by the United Kingdom were to be loaded on to buses with armed guards on-board and armed military escort vehicles to the front and rear. Release was to be to specific repatriation points in daylight hours, with sufficient food and water to last the individuals being released until they got home. There were four drop-off points within the United Kingdom field of operation. Umm Qasr was not listed as a drop-off point and the nearest was "Al-Basrah GR TBC [grid reference to be confirmed]".

19. An entry was made on AP3-Ryan on 4 May 2003 at 1.45 p.m. recording the release of "Tarek Resaan Hashmya Ali" on 2 May 2003. The releasing authority was stated to be "United Kingdom (ARMD) DIV SIG REGT"; the place of release was stated to be "Umm Qasr"; the method of release was "By Coach" and the ground of release was recorded as "End of Hostilities". A further entry was made in the United Kingdom AP3-Ryan system on 12 May 2003 at 10.13 p.m. recording that: "PW was found to be absent from the internment facility when 100% check was conducted. PW was released on AP3 on 12 May 03". According to the Government, some 400 individuals' records included the statement "PW was released on AP3 on 12 May 03", when they had in fact been released earlier. The United States computer system did not record any release until 17 May 2003.

3. The discovery of Tarek Hassan's body

20. According to the applicant, Tarek Hassan did not contact his family during the period following his purported release. On 1 September 2003 his family received a telephone call from a man unknown to them, from Samara, a town north of Baghdad. This man informed them that locals in the nearby countryside had found a dead man who had an identity tag on him and a piece of paper with their telephone number written on it. The applicant and other family members went to the morgue in Samara. There they found Tarek with eight bullet wounds from a Kalashnikov rifle in his chest. Tarek's hands were tied with plastic wire and had many bruises. A death certificate was issued on 2 September 2003, giving the date of death as 1 September 2003, but the sections reserved for the cause of death were not completed. A police report identified the body as Tariq Hassan but gave no information about the cause of death. The Government pointed out that there was no independent evidence of the cause of death and emphasised that Samara was some 700 kilometres from Camp Bucca, in an area that had never been occupied by British forces, and that the Kalashnikov was not a weapon used by British forces.

4. Correspondence with Treasury Solicitors and legal proceedings

21. The applicant remained in hiding in Iraq until October 2006, when he crossed the border to Syria. In November 2006, through a representative in Syria, he made contact with solicitors in the United Kingdom. The applicant's solicitors wrote to the Government's Treasury Solicitors on 21 December 2006 requesting explanations for the arrest and detention of Tarek Hassan and the circumstances that resulted in his death. It took some time to identify the applicant's brother, because he was entered in the Camp Bucca databases under the name "Tarek Resaan Hashmyh Ali". However, in a letter dated 29 March 2007 Treasury Solicitors stated that a check of the United Kingdom's prisoner of war computer records had produced a record of Tarek Resaan Hashmyh Ali being detained at Camp Bucca. In a further letter dated 5 April 2007 Treasury Solicitors stated that further computer records had been recovered which "confirm the handover" of Tarek from the United Kingdom authorities to the United States at Camp Bucca and which recorded his release on 12 May 2003.

22. The applicant commenced proceedings in the Administrative Court on 19 July 2007 seeking declarations in respect of breaches of his rights under Articles 3 and 5 of the

Convention, as set out in Schedule 1 to the Human Rights Act 1998, financial compensation and an order requiring the Government to initiate an independent and public investigation into the fate of the deceased after he was detained by British Forces on 22 April 2003. The claim was heard on 19 and 20 January 2009 and was rejected in a judgment delivered on 25 February 2009 ([2009] EWHC 309 (Admin)). The judge held that, in the light of the judgment of the House of Lords in *Al-Skeini* (see further the summary of the House of Lords' judgment in *Al-Skeini v. the United Kingdom,* cited above, §§ 83-88), it could not be said that Tarek Hassan was within the United Kingdom's jurisdiction under Article 1 of the Convention at any time. In *Al-Skeini* the House of Lords had recognised a number of exceptions to the principle against extra-territorial jurisdiction, but these did not include detention of a person outside a military prison or other comparable facility controlled by the Contracting State. Analysis of the Memorandum of Arrangement (see paragraph 24 below) indicated that Camp Bucca was a United States rather than a United Kingdom military establishment, for the following reasons:

> "… It is plain that the detaining power [the United Kingdom] relinquishes, until such time as it requires return of the individual in question, responsibility for maintaining and safeguarding those transferred. Accountability in that regard is the responsibility of the accepting power [the United States]. As regards adjudications concerning the individual's contact after transfer to the accepting power the detaining power relinquishes to the accepting power primary jurisdiction. Overall this amounts to a legal regime in which the detaining power has no substantial control over the day to day living conditions of the individual in question."

23. The applicant was advised that an appeal would have no prospect of success.

B. The Memorandum of Arrangement relating to the transfer of custody of detainees

24. In anticipation of the United Kingdom using shared facilities to hold United Kingdom detainees, on 23 March 2003 the United Kingdom, United States and Australian Governments entered a Memorandum of Arrangement relating to the transfer of custody of detainees, which provided as follows:

> "This arrangement establishes procedures in the event of the transfer from the custody of either the US, UK or Australian forces to the custody of any of the other parties, any Prisoners of War, Civilian Internees, and Civilian Detainees taken during operations against Iraq.
>
> The Parties undertake as follows:
>
> 1. This arrangement will be implemented in accordance with the Geneva Convention Relative to the Treatment of Prisoners of War and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, as well as customary international law.
>
> 2. US, UK, and Australian forces will, as mutually determined, accept (as Accepting Powers) prisoners of war, civilian internees, and civilian detainees who have fallen into the power of any of the other parties (the Detaining Power) and will be responsible for maintaining and safeguarding all such individuals whose custody has been transferred to them. Transfers of prisoners of war, civilian internees and civilian detainees between Accepting Powers may take place as mutually determined by both the Accepting Power and the Detaining Power.
>
> 3. Arrangements to transfer prisoners of war, civilian internees, and civilian detainees who are casualties will be expedited, in order that they may be treated according to their medical priority. All such transfers will be administered and recorded within the systems established under this arrangement for the transfer of prisoners of war, civilian internees, and civilian detainees.
>
> 4. Any prisoners of war, civilian internees, and civilian detainees transferred by a Detaining Power will be returned by the Accepting Power to the Detaining Power without delay upon request by the Detaining Power.

5. The release or repatriation or removal to territories outside Iraq of transferred prisoners of war, civilian internees, and civilian detainees will only be made upon the mutual arrangement of the Detaining Power and the Accepting Power.

6. The Detaining Power will retain full rights of access to any prisoner of war, civilian internees and civilian detainees transferred from Detaining Power custody while such persons are in the custody of the Accepting Power.

7. The Accepting Power will be responsible for the accurate accountability of all prisoners of war, civilian internees, and civilian detainees transferred to it. Such records will be available for inspection by the Detaining Power upon request. If prisoners of war, civilian internees, or civilian detainees are returned to the Detaining Power, the records (or a true copy of the same) relating to those prisoners of war, civilian internees, and civilian detainees will also be handed over.

8. The Detaining Powers will assign liaison officers to Accepting Powers in order to facilitate the implementation of this arrangement.

9. The Detaining Power will be solely responsible for the classification under Articles 4 and 5 of the Geneva Convention Relative to the Treatment of Prisoners of War of potential prisoners of war captured by its forces. Prior to such a determination being made, such detainees will be treated as prisoners of war and afforded all the rights and protections of the Convention even if transferred to the custody of an Accepting Power.

10. Where there is doubt as to which party is the Detaining Power, all Parties will be jointly responsible for and have full access to all persons detained (and any records concerning their treatment) until the Detaining Power has by mutual arrangement been determined.

11. To the extent that jurisdiction may be exercised for criminal offenses, to include pre-capture offenses, allegedly committed by prisoners of war, civilian internees, and civilian detainees prior to a transfer to an Accepting Power, primary jurisdiction will initially rest with the Detaining Power. Detaining Powers will give favourable consideration to any request by an Accepting Power to waive jurisdiction.

12. Primary jurisdiction over breaches of disciplinary regulations and judicial offenses allegedly committed by prisoners of war, civilian internees, and civilian detainees after transfer to an Accepting Power will rest with the Accepting Power.

13. The Detaining Power will reimburse the Accepting Power for the costs involved in maintaining prisoners of war, civilian internees, and civilian detainees transferred pursuant to this arrangement.

14. At the request of one of the Parties, the Parties will consult on the implementation of this arrangement."