



Capture and detention of Iraqi national by the British armed forces during the hostilities in Iraq in 2003 was not arbitrary

The case [Hassan v. the United Kingdom](#) (application no. 29750/09) concerned the capture of an Iraqi national, Tarek Hassan, by the British armed forces and his detention at Camp Bucca in south-eastern Iraq during the hostilities in 2003. His brother claims that Tarek was under the control of British forces, and that his dead body was subsequently found bearing marks of torture and execution.

In today's **Grand Chamber** judgment¹ in the case the European Court of Human Rights held:

unanimously, that **Tarek Hassan had been within the jurisdiction of the United Kingdom** between the time of his arrest by British troops, in April 2003, until his release from the bus that had taken him from Camp Bucca under military escort to a drop-off point, in May 2003; but

by 13 votes to 4, that there had been **no violation of Article 5 §§ 1, 2, 3 or 4 (right to liberty and security)** of the European Convention on Human Rights as concerned the actual capture and detention of Tarek Hassan.

The case concerned the acts of British armed forces in Iraq, extra-territorial jurisdiction and the application of the European Convention of Human Rights in the context of an international armed conflict. In particular, this was the first case in which a contracting State had requested the Court to disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law.

The Court decided that international humanitarian law and the European Convention both provided safeguards from arbitrary detention in time of armed conflict and that the grounds of permitted deprivation of liberty set out in Article 5 of the Convention should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. In the present case, it found that there had been legitimate grounds under international law for capturing and detaining Tarek Hassan, who had been found by British troops, armed and on the roof of his brother's house, where other weapons and documents of a military intelligence value had been retrieved. Moreover, following his admission to Camp Bucca, he had been subjected to a screening process, which established that he was a civilian who did not pose a threat to security and led to his being cleared for release. Tarek Hassan's capture and detention had not therefore been arbitrary.

The complaints under Article 2 (right to life) and 3 (prohibition of inhuman or degrading treatment) concerning the alleged ill-treatment and death of Tarek Hassan were declared inadmissible for lack of evidence.

Principal facts

The applicant, Khadim Resaan Hassan, is an Iraqi national who now lives in Syria. Prior to the invasion of Iraq in March 2003 by a coalition of armed forces led by the United States of America, Mr Hassan was a general manager in the national secretariat of the Ba'ath Party, at the time the governing party under the leadership of Saddam Hussein. Mr Hassan was also a General in El Quds

1. Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Army, the private army of the Ba'ath Party. He lived in Um Qasr, a port city in the region of Basrah, south-eastern Iraq.

The case concerned the capture of Mr Hassan's brother, Tarek, by British armed forces and his detention at Camp Bucca in Iraq (close to Um Qasr). Mr Hassan claims that Tarek was under the control of British forces, and that his dead body was subsequently found bearing marks of torture and execution.

In April 2003, after occupying Basrah, the British army started arresting high-ranking members of the Ba'ath Party. According to Mr Hassan, he went into hiding at this time, leaving his brother Tarek behind to protect the family home. He claims that in April 2003, the British army came to his home in the early hours of the morning and took away Tarek. The UK Government accept that British forces arrested Tarek, claiming that he had been found armed with an AK-47 machine gun and on the roof of his brother's house, where other weapons and documents of a military intelligence value were retrieved and that he was therefore detained as a suspected prisoner of war, combatant or civilian posing a threat to security, in accordance with the Third Geneva Convention, until his status could be determined. It is the UK Government's argument that, in the context of an international armed conflict, the provisions of the European Convention on Human Rights either should not apply at all or should be applied to take account of law of armed conflict, including the Geneva Conventions of 12 August 1949.

The Government and Mr Hassan both accept that Tarek was taken by British forces to Camp Bucca, a detention facility operated by United States forces. However, the British forces exercised some control over inmates that had been arrested by the UK military. The extent of this control and its legal consequences are disputed by the parties. The UK Government, providing records of interviews with Tarek at Camp Bucca and screen shots of entries relating to him on a military database, state that, following interrogation by both US and UK authorities, Tarek was established to be a non-combatant who did not pose a threat to security and that he was released on or around 12 May 2003.

Mr Hassan states that Tarek did not contact his family during the period that the Government claim he was set free. According to Mr Hassan, Tarek's body was discovered with bullet wounds some 700 kilometres away from Um Qasr near a town north of Baghdad in early September 2003. The UK Government submit that there is no independent evidence of the cause of Tarek's death, emphasising that he was found in an area that had never been controlled by British forces.

In 2007 Mr Hassan brought proceedings in the British administrative court seeking a declaration that there had been a breach of his human rights under the European Convention on Human Rights, compensation and an order requiring the government to carry out an inquiry into the death of his brother. However, the case was dismissed after the court found that Camp Bucca was a US rather than a UK military establishment, and that the UK therefore did not have the relevant jurisdiction.

Complaints, procedure and composition of the Court

Mr Hassan lodged an application with the European Court of Human Rights on 5 June 2009. In his application, he alleged that his brother had been arrested and detained by British forces in Iraq and had subsequently been found dead in unexplained circumstances. He complained under Article 5 §§ 1, 2, 3 and 4 (right to liberty and security) of the Convention that the arrest and detention had been arbitrary and unlawful and lacking in procedural safeguards. He also complained under Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment) and 5 that the British authorities had failed to carry out an investigation into the circumstances of his brother's detention, ill-treatment and death.

The case was adjourned pending the Court's examination of [Al-Skeini and Others v. the UK](#) (application no. 55721/07), and was then [communicated](#) to the Government for observations on

30 August 2011. On 4 June 2013 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber. A Grand Chamber [hearing](#) was held on 11 December 2013.

Professor Françoise Hampson and Professor Noam Lubell, of the Human Rights Centre, University of Essex, who were authorised to intervene as third parties (under Article 36 § 2 of the Convention), submitted written comments.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
Josep **Casadevall** (Andorra),
Guido **Raimondi** (Italy),
Ineta **Ziemele** (Latvia),
Mark **Villiger** (Liechtenstein),
Isabelle **Berro-Lefèvre** (Monaco),
Dragoljub **Popović** (Serbia),
George **Nicolaou** (Cyprus),
Luis **López Guerra** (Spain),
Mirjana **Lazarova Trajkovska** (“the Former Yugoslav Republic of Macedonia”),
Ledi **Bianku** (Albania),
Zdravka **Kalaydjieva** (Bulgaria),
Vincent A. **de Gaetano** (Malta),
Angelika **Nußberger** (Germany),
Paul **Mahoney** (the United Kingdom),
Faris **Vehabović** (Bosnia and Herzegovina),
Robert **Spano** (Iceland),

and also Michael **O’Boyle**, *Deputy Registrar*.

Decision of the Court

[Article 2 and Article 3 \(alleged failure to investigate Tarek Hassan’s detention, ill-treatment and death\)](#)

The Court found that there was no evidence to suggest that Tarek Hassan had been ill-treated while in detention or that the UK authorities had in any way been responsible for his death, which had occurred some four months after his release from Camp Bucca in a distant part of the country not controlled by the British forces. There was therefore no obligation on the UK authorities to investigate such allegations and the complaints under Article 2 (right to life) and 3 (prohibition of inhuman or degrading treatment) were declared inadmissible.

[Article 5 \(Tarek Hassan’s capture and detention\)](#)

Was Tarek Hassan within the jurisdiction of the United Kingdom?

The Court was not persuaded by the Government’s argument that jurisdiction should not apply in the active hostilities phase of an international armed conflict, where the agents of the Contracting State were operating in territory of which they were not the occupying power, and where the conduct of the State should instead be subject to the requirements of international humanitarian law. Such a conclusion would have been inconsistent with the Court’s previous case-law² and with the case-law of the International Court of Justice.

² See Grand Chamber judgment [Al-Skeini and Others v. the UK](#) (application no. 55721/07).

Nor did the Court accept the Government's other argument for excluding jurisdiction in so far as the period after Tarek Hassan had entered Camp Bucca was concerned as it involved a transfer of custody from the UK to the US. Having regard to the arrangements operating at Camp Bucca, the Court was of the view that the UK had retained authority and control over all aspects of the applicant's complaints under Article 5. That authority and control had covered both Tarek's actual admission to the Camp, which was as a UK prisoner, as well as the period after his admission when he had been taken to the Joint Forward Interrogation Team compound, which was entirely controlled by UK forces. Following Tarek Hassan's interrogation at the compound and in accordance with the Memorandum of Arrangement which set out the various responsibilities of the UK and the US in relation to individuals detained at the Camp, the UK authorities had classified Tarek under the Third and Fourth Geneva Conventions, deciding that he was a civilian who did not pose a threat to security and ordering his release as soon as practicable.

Lastly, it was clear that Tarek Hassan, when taken to the civilian holding area for release, had remained in the custody of armed military personnel and under the authority and control of the UK until the moment he had been let off the bus that took him from the Camp.

In conclusion, therefore, Tarek Hassan had been within the jurisdiction of the UK between the moment of his capture by the British troops, on 23 April 2003, until his release from the bus that had taken him from Camp Bucca under military escort to the drop-off point, most probably Um Qasr on 2 May 2003.

Was Tarek Hassan's capture and subsequent detention arbitrary?

The text of Article 5 includes a list of situations in which detention is permissible under the Convention. It does not include the lawful detention of a person pursuant to certain powers under international humanitarian law during an international armed conflict, for example, the internment of a prisoner of war.

This was the first case in which a contracting State had requested the Court to disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law, no formal derogation request under Article 15 (derogation in time of emergency) having been lodged by the UK Government.

The starting point for the Court's examination was its constant practice of interpreting the European Convention on Human Rights in the light of the rules set out in the 1969 Vienna Convention on the Law of Treaties. According to the Vienna Convention, when interpreting a treaty such as the European Convention, it was necessary to take into account any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation and also any relevant rules of international law applicable in the relations between the parties.

In this respect, the Court noted that it was not the practice of the Contracting States to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts. Moreover, the principle that the Convention had to be interpreted in harmony with the rules of international law, of which it formed part, applied equally to the rules of international humanitarian law, such as those set out in the four Geneva Conventions of 1949. The Geneva Conventions, intended to mitigate the horrors of war, had been drafted in parallel to the European Convention on Human Rights and enjoyed universal ratification. The Court observed that it had to endeavour to interpret and apply the Convention in a manner which was consistent with the framework under international law delineated by the International Court of Justice.

In the light of the above considerations, the Court accepted the Government's argument that the lack of a formal derogation under Article 15 did not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case.

Nonetheless, and consistently with the case-law of the International Court of Justice, the Court considered that, even in situations of international armed conflict, the safeguards under the Convention continued to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out under Article 5 should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court was mindful of the fact that internment in peacetime did not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15. It could only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security were accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.

As with the grounds of permitted detention set out under Article 5, deprivation of liberty pursuant to powers under international humanitarian law had to be “lawful” to preclude a violation of Article 5 § 1. That meant that detention had to comply with the rules of international humanitarian law, and most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which was to protect the individual from arbitrary detention.

The Court considered that the UK authorities had had reason to believe that Tarek Hassan, found by British troops armed and on the roof of his brother’s house, where other weapons and documents of a military intelligence value had been retrieved, could be either a person who should be detained as a prisoner of war or whose internment had been necessary for imperative reasons of security, both of which provided a legitimate ground for capture and detention under the Third and Fourth Geneva Conventions. Almost immediately following his admission to Camp Bucca, Tarek Hassan had been subject to a screening process in the form of two interviews by US and UK military intelligence officers, which had led to his being cleared for release since it was established that he was a civilian who did not pose a threat to security.

Lastly, the Court also found that it was probable that Tarek Hassan had been released in or near Umm Qasr on 2 May 2003, given in particular the computer entries concerning Tarek Hassan’s release, Um Qasr’s proximity to Camp Bucca, the town’s mention in the annex of the military order relating to the release of detainees from the Camp and the UK policy of releasing detainees following the end of hostilities. Moreover, it was not surprising that no eye witness able to remember Tarek Hassan’s release had been traced, taking into account the time that had elapsed before the applicant had lodged his claim and the large number of UK detainees that had been captured, processed and released from Camp Bucca around the end of April and beginning of May 2003

Tarek Hassan’s capture and detention had therefore been consistent with the powers available to the UK under the Third and Fourth Geneva Conventions, and had not been arbitrary.

In the light of these considerations, the Court held that there had been no violation of Article 5 §§ 1, 2, 3 or 4 in the circumstances of the present case.

Separate opinion

Judge Spano expressed a partly dissenting opinion, joined by Judges Nicolaou, Bianku and Kalaydjieva. The opinion is annexed to the judgment.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.