

PART 1: INTRODUCTION

CHAPTER 1: INQUIRY SET UP

1. The genesis of the Inquiry

- 1.1** The genesis of this Inquiry was a claim form issued in the High Court, Queen's Bench Division, Administrative Court. In proceedings for judicial review, Khuder Karim Ashour Al-Sweady (witness 1), an Iraqi national, alleged that his nephew Hamid Mez'el Kareem A'shour Al-Sweady (deceased 3) was one of a number of Iraqi nationals said to have been unlawfully killed whilst in the custody of British troops at Camp Abu Naji between 14 and 15 May 2004. In the same proceedings five further Iraqi nationals, Hussein Fadhil Abbas Al-Behadili (detainee 778), Atiyah Sayyid Abdulridha Al-Baidhani (detainee 779), Hussein Gubari Ali Al-Lami (detainee 780), Mahdi Jasim Abdullah Al-Behadili (detainee 773) and Ahmed Jabbar Hammood Al-Furaiji (detainee 777)¹ (the five detainees), alleged that they were mistreated by British forces in breach of their human rights whilst in custody at Camp Abu Naji and when subsequently detained at the Divisional Temporary Detention Facility ("DTDF") at Shaibah Logistics Base for just over four months. The six Iraqi nationals applied to the Administrative Court in respect of the alleged failure by the Secretary of State for Defence to conduct an independent Inquiry into their allegations, for the Secretary of State to accept liability for the deaths of the deceased Iraqis and for the ill-treatment and unlawful detention of the five detainees and for the Secretary of State to pay compensation.
- 1.2** The claim itself related to events which began on 14 May 2004 when armed Iraqi insurgents ambushed vehicles belonging to the Argyll and Sutherland Highlanders ("A&SH") near a permanent vehicle checkpoint ("VCP") known to the military by its code name of "Danny Boy". This was situated some five kilometres north-east of the small town of Al Majar al'Kabir, on the main road between Basra and Al Amarah in Iraq (designated "Route 6" by the British military) and at the junction with the road leading to Al Majar al'Kabir. A fierce battle had followed which involved not only the A&SH but also soldiers from the 1st Battalion of the Princess of Wales' Royal Regiment ("1PWRR"). It resulted in many Iraqis being killed and a small number of British soldiers being wounded. Although the battle was diffuse in nature, it was broadly divisible into two main areas, one of which was north of the Danny Boy VCP ("the Northern Battle") and the other being south of the Danny Boy VCP ("the Southern Battle"). The engagement, viewed as a whole, became popularly known as "the Battle of Danny Boy" and will be referred to as such from time to time in this Report.
- 1.3** Ordinarily, enemy dead would have been left on the battlefield. However, according to the Secretary of State, as the fighting drew to an end, an order was given to the British soldiers on the battlefield that was intended to result in identification of the Iraqi dead to see if there was amongst them an individual who was suspected of having been involved in the murder of six Royal Military Police ("RMP") in Al Majar al'Kabir in 2003. The Secretary of State's case was that this order was implemented by the British soldiers collecting from the battlefield the bodies of 20 dead Iraqis, who had been killed in the fighting, and transporting them back to the nearby British military base at Camp Abu Naji for the purpose of identification. The bodies of a number of other Iraqis killed in the fighting were not recovered, but were left where they had fallen. In addition to the 20 deceased, nine live Iraqis were also taken prisoner and taken back to Camp Abu Naji.

¹ Hussein Fadhil Abbas Al-Behadili (detainee 778), Atiyah Sayyid Abdulridha Al-Baidhani (detainee 779), Hussein Gubari Ali Al-Lami (detainee 780), Mahdi Jasim Abdullah Al-Behadili (detainee 773) and Ahmed Jabbar Hammood Al-Furaiji (detainee 777) represent five of the 'eventual' nine detainees relevant to this Inquiry; (see paragraph [1.13]-[1.14])

1.4 It was the Claimants' case that not all of the 20 deceased Iraqis had died on the battlefield and that a number of them had been murdered by British soldiers after having been taken alive to Camp Abu Naji. It was also alleged that, after their arrival at Camp Abu Naji, a number of the live Iraqis had been tortured or ill-treated contrary to Article 3 of the European Convention on Human Rights ("ECHR") and/or had been unlawfully detained contrary to their rights under Article 5 of the ECHR. It was said by the Claimants that Hamid Al-Sweady (deceased 3), the nephew of the First Claimant, Khuder Al-Sweady (witness 1), was one of those killed at Camp Abu Naji, either on 14 May 2004 after they had been detained by British soldiers, or on 15 May 2004 before his body and that of the 19 other Iraqis were handed back to the local Iraqi civilian authorities. As indicated above, the claim was contested by the Secretary of State for Defence. In particular the allegations of murder and torture and/or ill-treatment were all emphatically denied.

1.5 The judicial review hearings took place in 2009. It is plain from the judgment of the Administrative Court ([2009] EWHC 2387 (Admin)) that *"the disclosure obligations of the Secretary of State proved a constant and repeated source of friction and difficulty both before and during the hearing"*.² After a number of hearings in April, May, July and August 2009, the Secretary of State for Defence conceded that inadequacies in the disclosure process were indeed such that it would prevent the Court from making a satisfactory ruling on this case. As outlined in paragraph 43 of the judgment, the solicitors for the Secretary of State wrote to the Court explaining that:

"...It is clear that the searches conducted to date cannot be said to have been effective and can no longer be regarded as reasonable and proportionate. The Secretary of State further recognises that he cannot provide the reassurance that the Court will seek that all material documents have been disclosed within the timescale of the present hearing. In those circumstances, the Secretary of State recognises that, realistically, the Court cannot be sure that it is in possession of all the material that it needs. He recognises that the Court may consider that it cannot appropriately make the rulings on the issues of the alleged deaths at Camp Abu Naji and the allegations of ill-treatment at Camp Abu Naji and the Divisional Temporary Detention Facility at Shaibah."

1.6 In the light of that concession, on 10 July 2009 the Court postponed the proceedings until such time as a proper investigation into the allegations had concluded, ordering that:

"A stay be granted until further order of the Court in relation to the Claimants' claims for breach of Articles 2, 3 and 5 of the European Convention on Human Rights (ECHR) subject to there being an investigation into the Claimants' allegations of murder at Camp Abu Naji on 14 and 15 May 2004 and into the Claimants' claims of ill-treatment at Camp Abu Naji on 14 and 15 May 2004 and at the Divisional Temporary Detention Facility at Shaibah between 15 May 2004 and 23rd September 2004 made in these proceedings. The Defendant intends that the investigation shall satisfy the requirements of Articles 2 and 3 of the ECHR."

1.7 At one stage the Secretary of State considered that the necessary investigation might be conducted by the Metropolitan Police Service ("MPS"). However by letter dated 25 September 2009 the MPS informed the Court that it had *"come to the conclusion that it cannot usefully, and therefore should not, undertake an investigation into the matters alleged."*

1.8 Therefore, in a written statement to the House of Commons given on Wednesday 25 November 2009, the then Secretary of State, the Rt. Hon. Bob Ainsworth MP announced that there

² Scott Baker LJ giving the judgment of the Court; paragraph eight

would be a Public Inquiry into the allegations that Iraqi nationals were detained after a fire fight with British soldiers in Iraq in 2004 and unlawfully killed at a British camp (i.e. Camp Abu Naji), and that others had been mistreated at that camp and later at the DTDF facility in Shaibah.

- 1.9** This Inquiry was established formally under the Inquiries Act 2005 on 29 November 2009. The Inquiry's terms of reference are expressed as follows:

"To investigate and report on the allegations made by the Claimants in the Al-Sweady Judicial Review Proceedings against British soldiers of (1) unlawful killing at Camp Abu Naji on 14 and 15 May 2004, and (2) the ill-treatment of five Iraqi nationals detained at Camp Abu Naji and subsequently at the Divisional Temporary Detention Facility at Shaibah Logistics Base between 14 May and 23 September 2004, taking account of the investigations which have already taken place and make recommendations."

2. The approach to the terms of reference

Matters to be investigated by the Inquiry

- 1.10** In broad terms, it can be seen that the Inquiry's terms of reference required it to investigate the following three matters, arising out of the claims made in the judicial review proceedings, namely:
- a. Allegations of unlawful killing at Camp Abu Naji;
 - b. Allegations of the ill-treatment of five Iraqi nationals at Camp Abu Naji; and
 - c. Allegations of the ill-treatment of five Iraqi nationals at the Divisional Temporary Detention Facility ("DTDF") at Shaibah Logistics Base.
- 1.11** However, rather than only focusing on the precise allegations made in the judicial review proceedings and adopting a narrow and prescriptive approach, the Inquiry gathered evidence on, and considered, all allegations of unlawful killing at Camp Abu Naji on 14 and 15 May 2004, and all allegations of mistreatment of the five Iraqis referred to whilst they were at Camp Abu Naji and the DTDF.
- 1.12** From a very early stage, I became firmly of the view that it was necessary for the Inquiry to consider these wider allegations for a number of reasons. Firstly, allegations made by the Claimants changed during the course of the judicial review proceedings. Secondly the Claimants had not set out their allegations in respect of unlawful killing definitively, to include for example the precise number and identities of all of those who were said to have been unlawfully killed at Camp Abu Naji. It would appear that this was at least partly because their case was that this was an issue to be investigated. Finally, investigatory work undertaken by the Inquiry revealed additional allegations of ill-treatment that had not been raised during the judicial review proceedings. It seemed to me, the Claimants, the military, and the public were entitled to an independent and effective investigation into all allegations made by the Claimants, even if some of them had not been specifically raised in the judicial review proceedings.
- 1.13** Similarly, it will be noted that the terms of reference only require the Inquiry to investigate the allegations of ill-treatment of five Iraqi nationals at Camp Abu Naji and the DTDF. The Inquiry understood this to be a reference to the Second to Sixth Claimants in the judicial review proceedings, namely the five detainees Hussein Fadhil Abbas Al-Behadili (detainee 778),

Atiyah Sayyid Abdulridha Al-Baidhani (detainee 779), Hussein Gubari Ali Al-Lami (detainee 780), Mahdi Jasim Abdullah Al-Behadili (detainee 773) and Ahmed Jabbar Hammood Al-Furaiji (detainee 777).³ There were four other Iraqi nationals detained at the same time as these five, namely Hamzah Joudah Faraj Almalje (detainee 772), Ibrahim Gattan Hasan Al-Ismaeeli (detainee 774), Kadhim Abbas Lafta Al-Behadili (detainee 775) and Abbas Abd Ali Abdulridha Al-Hameedawi (detainee 776).

- 1.14** The Inquiry sought and obtained witness statements from each of these additional four detainees (making nine detainees in total), investigated the allegations that they made, looked for documentary evidence concerning those allegations and gathered relevant evidence from military witnesses relating to those allegations. In due course, the Inquiry heard evidence from each of the additional four detainees, as well as from the original five. In short, the Inquiry conducted a full investigation into the allegations of all nine detainees, i.e. the original five detainees plus the additional four.
- 1.15** I adopted this particular approach because, as it seemed to me, it would have been very unsatisfactory if the Inquiry had not taken evidence from the four additional detainees. They were, after all, members of the original group of nine Iraqis who had been detained on 14 May 2004, the remaining five being the Second to Sixth Claimants in the judicial review proceedings. They were thus not only witnesses to the ill-treatment alleged by the five Claimants, but – on their own accounts – they were subject in some cases to the same or similar ill-treatment at the same time and place as the five Claimants mentioned in the terms of reference.⁴
- 1.16** It is clear that the Inquiry's terms of reference neither permit nor require an investigation into the legality of the use of force on the battlefield (nor of the command and control of soldiers who used such force).
- 1.17** However, I took the view that, in order properly to discharge its existing terms of reference, the Inquiry should investigate and report on whether, as a fact, all or any of the 20 dead Iraqi citizens, who were handed over to the Iraqi civilian authorities on 15 May 2004, had been killed in the course of the Battle of Danny Boy. The reason for this is a simple and obvious one. The Inquiry's terms of reference require it to investigate and report on allegations that these Iraqi citizens were unlawfully killed at Camp Abu Naji. The Ministry of Defence ("MoD"), and its soldiers, claimed that the Iraqis in question were not killed at Camp Abu Naji but had been killed in the course of the Battle of Danny Boy. That claim was in dispute and therefore required investigation by the Inquiry.
- 1.18** Accordingly, what was important to the Inquiry's proper discharge of its terms of reference was whether, as a fact, any of the 20 deceased Iraqis had been killed in the course of the battle, before they got to Camp Abu Naji – not whether their killing in the course of the battle was justified (or whether there was proper command and control of the soldiers that used force on the battlefield).

³ A number of the Iraqi witnesses, including the nine detainees, have given different names (and have had different names attributed to them) in the course of the Royal Military Police ("RMP") investigations, the judicial review proceedings and in the course of this Inquiry. In the case of each of the nine detainees, the Inquiry has largely used the name given on that detainee's issued passport and/or failing that his *last* Inquiry statement. However, for ease of reference, clarity and convenience the detainee number that was attributed to each detainee at the DTDF on 15 May 2004 has also been used (i.e. the "*detainee number*" given in brackets after each name in paragraph 1.13). No discourtesy is intended to any detainee by this approach; we have adopted a similar format for all "other" (non-detainee) Iraqi witnesses, all of whom will have their respective Inquiry "*witness number*" in brackets following their name throughout this Report

⁴ On 12 March 2013 I gave a ruling setting out my detailed reasons for the approach adopted and summarised in this paragraph. The full written ruling is available on the Inquiry's website and is included in Appendix 6 to this Report

- 1.19** I therefore decided that if the evidence indicated that all or any of the 20 deceased Iraqis had actually been killed in the Battle of Danny Boy, it would be neither appropriate nor satisfactory for me simply to state such a finding of fact in short form and then proceed to express a conclusion that the allegations that they had been unlawfully killed at Camp Abu Naji had therefore not been made out. It was plainly going to be necessary for me to examine the broad circumstances of the battle, the soldiers and the Iraqis involved in it, and the manner and cause of death of the Iraqis killed in the course of the battle.

The Core Participants

- 1.20** In accordance with Rule 5 of the Inquiry Rules 2006, the Claimants in the judicial review proceedings, represented by Public Interest Lawyers (“PIL”), were designated Core Participants in the Inquiry from its outset, as was the Ministry of Defence (“MoD”). At a later stage of the Inquiry, a number of designated family members of relevant deceased Iraqis were added to the list of Iraqi Core Participants (“ICPs”).⁵ Additionally the Treasury Solicitor’s Department (“TSol”) was afforded the opportunity of participating in issues relating to the Inquiry’s process, given that it represented the majority of the military witnesses and civilian witnesses, currently or formerly employed by the MoD. TSol was therefore given the same rights as, although not the formal status of, a Core Participant. As the Inquiry progressed, it emerged that the evidence of a number of the military witnesses was in conflict with the evidence given by some of the other military witnesses and that these individuals could not therefore be represented by TSol. They were instead represented by Kennedys Solicitors, but did not have Core Participant status. Similarly, a very small number of Iraqi witnesses were represented by the law firm, Field Fisher Waterhouse.

The list of issues

- 1.21** The Inquiry sought to carry into effect its overall approach to the terms of reference by the promulgation of a List of Issues. This list was compiled in order to explain more fully those matters which the Inquiry considered relevant to its terms of reference and to assist in providing structure for the Inquiry and Core Participants when considering the evidence. The list was first issued, following helpful input from Core Participants, on 26 May 2010 and was amended on 17 September 2010.⁶
- 1.22** A challenge was brought by way of judicial review, by Public Interest Lawyers (“PIL”), in respect of (i) the Secretary of State’s decision of 5 September 2011 not to extend the terms of reference to require an investigation into *“whether or not any force used (resulting in either death or serious injury) was, in all the circumstances, justified, such investigation to consider: (a) the planning and control of the operation in question; and (b) the instruction, training and supervision given to soldiers”* and (ii) the Inquiry’s approach to its List of Issues, in that it was said that the list required the Inquiry to determine whether Iraqis were “lawfully” killed on the battlefield and that the Inquiry was not in fact investigating that issue. Permission to proceed with the claim for judicial review was refused by Elias LJ and King J on 11 November 2011.

⁵ A further 19 family members were designated Core Participants on 27 February 2013

⁶ The List of Issues appears on the Al-Sweady website and is attached as Appendix 5 to this Report

Ill-treatment

- 1.23** The terms of reference require me to consider, amongst other things, the “*ill-treatment of five Iraqi nationals detained at Camp Abu Naji and subsequently at the divisional temporary detention facility at Shaibah Logistics Base.*” As explained above, and as stated in a ruling that I made on 12 March 2013, I am of the view that I am nevertheless required to consider the alleged ill-treatment of all nine detainees in order to discharge properly my obligations under the terms of reference.
- 1.24** The terms of reference do not define “*ill-treatment*”. However, it is clear that the expression is derived from its use in the judicial review proceedings which led to the Inquiry being established. In the claim form for the judicial review proceedings, the decision to be judicially reviewed was cited as the failure to “*accept liability for the death, ill-treatment and unlawful detention (under ECHR 2, 3 & 5).*” The rest of the claim form outlined the claim in the same terms, namely that ill-treatment was synonymous with a claim made in respect of an alleged infringement of Article 3 of the European Convention on Human Rights (“ECHR”).
- 1.25** As already explained in this Report, the judicial review proceedings are currently stayed pending the conclusion of this Inquiry. In granting a stay of the proceedings, the Administrative Court envisaged that the pending investigation would satisfy the procedural requirements of Articles 2 and 3 of the ECHR. The judgment of the Administrative Court in October 2009 also clearly anticipated that the investigation into the allegations of ill-treatment would reflect the substance of the claims made in the judicial review proceedings, which had referred to ill treatment in the context of Article 3 ECHR.⁷ In my view, therefore, the expression “*ill-treatment*” in the Inquiry’s terms of reference is plainly intended to refer to conduct that engages Article 3 of the ECHR and that would support a claim made under that Article of the Convention.
- 1.26** Article 3 of the ECHR prohibits torture and inhuman or degrading treatment or punishment. The Courts’ consideration of claims under Article 3 has determined that “*ill-treatment*” must attain a minimum level of severity if it is to fall within the scope of Article 3.⁸ However, it is clear that the type of ill-treatment that is capable of amounting to an infringement of Article 3 can take many different forms. Cases in which Article 3 has been held to be infringed are very fact-sensitive and much depends on the particular circumstances of the case.⁹
- 1.27** Throughout the course of the Inquiry, I have heard a large number of allegations of “*ill-treatment*”. Some of these are trivial in nature, such that, even if proved, Article 3 is unlikely to be engaged. Others are of a more serious nature and may well meet the threshold of severity required to engage Article 3. The allegations in question have related to a wide variety of forms of “*ill-treatment*”, ranging from physical and verbal abuse to matters such as the deliberate deprivation of food and sleep.
- 1.28** I am satisfied that the terms of reference do not require me to make a finding as to whether Article 3 is engaged by reference to any of the many allegations of ill-treatment with which this Inquiry is concerned. Indeed, as I have already indicated, section 2(1) of the Inquiries Act 2005 prohibits me from making any findings of criminal or civil liability. I am therefore of the view that I am not required to nor do I have the power to determine whether any of the many and various allegations of “*ill-treatment*” actually amounts to a breach of Article 3.

⁷ [2009] EWHC 2387

⁸ *Ireland v United Kingdom* 5310/71 [1978] ECHR 1; at [162]

⁹ See, for example, *Ireland v UK Judgment* 18 January 1978, Application no. 5310/71

- 1.29** However, this does not mean that I have been inhibited from making appropriately expressed findings of fact in relation to those various allegations. On the contrary, I have endeavoured to make appropriate findings of fact in relation to all matters where ill-treatment or misconduct have been raised as an issue. This includes matters of a relatively minor nature. Where I have been able to reach an appropriate conclusion on the evidence, I have stated clearly what it is and have also indicated the degree of confidence or certainty with which I have reached the conclusion in question.
- 1.30** In a very small number of instances, where I have made a finding of some form of ill-treatment or misconduct of a relatively trivial nature, I have also expressed some doubt as to whether the incident in question could possibly amount to an infringement of Article 3. I have done this in order to distinguish trivial incidents of this nature from those matters which I believe to be more likely to be encompassed within the terms of reference and to form the substance of the judicial review proceedings. However, I wish to stress that, in all instances, my findings are purely confined to reaching an appropriate conclusion about the facts of what happened. It follows that none of the findings that I have made in this Report are intended to indicate that Article 3 has actually been engaged or infringed as a result.