In the matter of an Investigation into the death of
Mr Saeed Radhi Shabram Wahi Al-Bazooni

Inspector: Sir George Newman.

Second Statement dated 12 April 2019

1. The course and current progress of this Investigation indicate that there is a need to explain the legal process which is engaged when carrying out an investigation under Article 2 of the ECHR. Witnesses and where instructed, lawyers, should be fully acquainted with the object of such an investigation and equally, fully aware of what is not involved. Regarding what constitutes a compliant Article 2 investigation, there exists an abundance of case law but a careful analysis of two judgments of the Divisional Court, which have directly given rise to this investigation, is essential. For convenience and clarity, I shall set out a summary.

***R (Ali Mousa and others) v Secretary of State for Defence* [2013] EWHC 1412 (Admin) (25 May 2013)**

2. The death of Saeed Shabram was listed in the judgment of Silber J dated 25 May 2013 as a category 2 case. Category 2 cases were defined as cases "*…where there have been previous prosecutions and IHAT is continuing to investigate and might well bring a further prosecution.*" Shabram was one of three cases referred as being in this category. The only procedural step towards bringing a prosecution taken in Shabram (apart from three soldiers being charged) comprised a hearing under the Courts Martial (Army) Rules 1997, namely a Formal Preliminary Enquiry (FPE) which was held in Iraq in 2006. In paragraph 159 of the *Ali Zaki Mousa* judgment, the court summarised as follows: "*In 2006, following a Formal Preliminary Examination conducted in Basra, which included the hearing of live evidence from Iraqi witnesses, it was decided the matter should not proceed to a Court Martial because the witnesses had colluded and lacked credibility*." As to the then current position the court observed: "*The matter is being reviewed by IHAT and it is expected that a final*

report will be provided shortly". Thus it is obvious that apart from the live evidence of the two Iraqi witnesses, no evidence was given by anyone else. In particular, the soldiers gave no evidence.

3. The report "*to be made shortly*" was made about two weeks later, on 6 June 2013. It recommended that the case should be re-investigated. The need for further investigation necessarily delayed a decision about whether there should be a prosecution. Until there had been either a prosecution or a decision not to prosecute, the Secretary of State for Defence could not make his decision, which he is required to make in a case such as this, as to whether an Article 2 investigation was necessary.

4. The judgment of 25 May 2013 was the culmination of contested proceedings to determine how the UK's obligations under Article 2 of the ECHR could be discharged in connection with the deaths of Iraqi citizens involving actions on the part of UK soldiers in Iraq. This was new legal territory. The Article 2 investigative duty of the State can only be discharged "*by a full, fair and fearless investigation*" accessible to the victim's family and to the public. The circumstances of the Iraq cases make it inevitable that such an investigation, which meets both the legitimate interests of the victim's family and the public interest in the proper consideration of accountability of the State, if it is to be effective, will inevitably give rise to an obligation on the part of soldiers, including those who were present and involved, to give evidence as witnesses.

5. If a criminal prosecution of the soldiers takes place, it may fulfil these objectives, but it will not necessarily do so. In particular, should the soldiers exercise their right not to give evidence it is likely not to amount to a full and effective investigation. One of the cases to which the court referred, namely Ahmed Jabbar Kareem Ali, is on point. In that instance, Court Martial proceedings alleging manslaughter had taken place. However the soldiers were acquitted by the Court Martial Board. They had elected to give no evidence, as they were entitled to do because it was a criminal prosecution against them, but by not giving evidence, evidence going to all the circumstances of the death had

not been given and a full fair and fearless investigation of the circumstances of the death had not taken place.

6. The law required that there should be an effective Article 2 investigation. The Secretary of State had to consider whether there was a realistic prospect of a prosecution. He concluded that there was not. That being the position, he referred the death to me so that I could carry out the required investigation. The soldiers met their obligation to give evidence to me and I reported in September 2016. As can be seen, I divided my investigation into the drowning itself and wider considerations arising from other instances, including the case of Shabram, where drowning had occurred. I have yet to complete my investigations into any wider considerations. Completing my report into the death of Shabram is an essential part of that process.

7. The FPE in connection with the death of Shabram was held in accordance with the Courts-Martial (Army) Rules 1997 in order to determine whether there should be a Court Martial trial of three soldiers. But after hearing only two Iraqi witnesses (there were others available to give evidence), the Conducting Officer brought the proceedings to a close. He had been persuaded by submissions from leading counsel for the soldiers that justice required him to do so. Leading counsel had cross examined the two witnesses extensively, but because of the success of the submissions from counsel, the soldiers, had they even been minded to do so, gave no evidence. Whilst it must have been concluded by the Conducting Officer that there was no purpose to be served in hearing other witnesses, it has to be remembered the conclusion was reached in connection with the purpose of the process then under consideration, namely, whether Court Martial proceedings should be instituted. The Conducting Officer was not considering any other purpose which might have been served had all the evidence being made available, including obtaining evidence from the soldiers. The decision reached at an early stage of the FPE was that Court Martial proceedings should not be instituted. Inevitably, the question of whether there was a need for an Article 2 investigation remained.

8. In April 2011, a letter of claim was sent on behalf of the deceased's father and Mr. Auda. It claimed damages and other relief against the Ministry of Defence. A review was ordered by the MOD into the original investigation which had ended with the FPE. It was this review to which the court referred in the May 2013 *Ali Zaki Mousa* judgment and to which I have referred in paragraph 2 above as being concluded on 6 June 2013. For present purposes, it is important to note that it was obvious that the course taken by the FPE meant there had not been a full, fair and fearless investigation of the facts accessible to the family and the public which was sufficient to discharge the State's Article 2 obligations under the ECHR. The review by IHAT in the report of the 6 June 2013 recommended further investigation. When further investigations had been completed, the case was referred to the Director of Service Prosecutions to consider whether there should be a prosecution. He decided against prosecution and the Secretary of State for Defence was left to consider whether there should be an Article 2 investigation. He reached his decision following the guidance laid down by the Divisional Court in *Ali Zaki Mousa*, in particular with regard to whether there was a real likelihood of a prosecution. He concluded there was not and referred the case to me.

9. The guidance from the court is extensive but the material sections of the judgment can be taken up as follows.

> "*In cases in which there will not be a prosecution, consideration has to be given as to how the article 2 duty should be complied with*" (Paragraph 167).

> "*In cases (such as those in category 1 and 2 cases) where there are no prospects of a prosecution, a major impediment against a further inquiry is removed. In the usual case if the death had occurred in the United Kingdom, there would be a coroner's inquest, but it is not possible for that to occur in these cases because the coronial jurisdiction does not extend to cases where deaths occur abroad and the bodies are not within the jurisdiction. The fact that there has been a ruling, as in the case of Naheem Abdullah, finding no case to answer makes no difference. Although there has been an*

investigation, the full article 2 duties have not been performed" (paragraph 168).

The "*major impediment*" to a full investigation being undertaken, to which the court referred, is the exercise of a right by the soldiers to refuse to give evidence and in the course of interview prior to a trial to give "no comment" answers to questions asked of them. This right reflects the privilege from self-incrimination which is enjoyed by suspects. These important safeguards are a manifest impediment to carrying out a full and fearless investigation into all the facts. Where there is no real prospect or risk of prosecution, a former suspect has the status of being a witness who is bound to assist the investigation by giving evidence. It is obvious that, where death has occurred, the suspect would have faced serious charges if prosecuted and for that reason he was entitled to protect himself from being found criminally culpable. But when giving evidence as a witness in proceedings in which his culpability is not in issue and where his evidence is likely to be the best evidence of what happened he is bound to assist in making the investigation effective and compliant with the Convention.

10. Further in Ali, Abdullah and in this case (as in every other case I have considered to-date) the Attorney General and the Public Prosecutor of the International Criminal Court (ICC) have "*ring fenced*" the risk of self-incrimination by soldiers giving evidence to me by providing suitable protective assurances. These assurances have been given because it is recognized that all possible steps should be taken to provide encouragement to soldiers to fulfill their duty and to assist the State in fulfilling its Article 2 obligations. In the case of Abdullah for example, which was referred to me, the soldiers gave evidence to me and I was able to report and fulfil the requirements of Article 2.

11. In *Ali Zaki Mousa*, the Divisional Court rejected arguments that IHAT could fulfill the Article 2 functions. The court observed that

> "*…where there will be no prosecution.…it is therefore necessary that there be an inquiry accessible to the public. IHAT is neither structured nor staffed to do this*" (paragraph 188).

IHAT does not provide an inquiry "*accessible to the victim's family*" (paragraph 190). It will be seen that there is an essential distinction between bringing offenders to justice and bringing justice to the family of a victim. The process which has been adopted in connection with the case of Shabram has faithfully followed the terms of the judgment in ***Ali Zaki Mousa*** and the family is entitled to justice. There has been no Article 2 investigation and one must now take place with the assistance of all those bound to assist.

R (Ali Mousa and others) v Secretary of State for Defence **[2013] EWHC 2941 (Admin) (2 October 2013)**

12. In this judgment, which was delivered a few months after the June judgment, the court gave detailed consideration to the process which must be adopted.

    a. Paragraph 9: "*As soon as it is clear that there will be no prosecution in cases to which the Article 2 obligation to hold an inquiry attaches, then it is our view an inquiry ought to be commenced as soon possible thereafter*".

    b. Paragraph 10: "*Each inquiry should be established by the appointment of a suitable person such as a retired judge …*".

    c. Paragraph 11: "*It must be for the Secretary of State to determine the terms of reference and the detail as to the form of each inquiry in conjunction with the person he appoints to conduct the inquiry. The terms of reference must be drafted so as to ensure that the inquiry is compliant with Article 2."*

    d. Further it was stated in paragraph 13 that the Secretary of State "*...will give an undertaking that all documentation within the power of the Ministry and the British armed forces will be made available where required by the Inspector; and that serving members of the armed forces*

required to attend will attend and give evidence. The Secretary of State anticipates that once it is clear that prosecutions will not be brought those members of the armed forces who are alleged to be involved but are not presently within the armed forces will cooperate with the inquiry and give evidence. He has taken the view that an inquiry without powers of compulsion will therefore suffice."

e. Paragraph 14: "*It is essential that the Inspector is able to determine how each death occurred if the inquiry is to be effective. The best evidence will be from those who were present and in particular the members of the armed forces. However, as MacKinnon J observed at the end of the criminal trial arising out of the death of Baha Mousa, there had been a "more or less obvious closing of the ranks"*."

f. Because the court was unable to share the optimism of the Secretary of State that soldiers would invariably cooperate and give evidence, it went on to state in Paragraph 15: "*It is always possible that that position will change and the military personnel involved will give evidence as to what happened in a meaningful way (as the Secretary of State hopes). However there is a real risk that they will not: in our view the overwhelming probability is that soldiers will be reluctant to give evidence at all and certainly to give evidence that involves any significant criticism of a colleague. Thus a form of inquiry where such persons can be compelled to attend will be the only effective and fair way of determining what happened. In such circumstances it is clear that if, for example, allegations are put orally to a witness and unsatisfactory answers are given then the Inspector will be entitled to draw adverse inferences when determining what happened.*" I should add that if soldiers decline to give any meaningful evidence it will be open to me to draw adverse inferences when determining what happened.

The legal effect and significance of the above

13. The legal effect of the above must be recognized by soldiers, those advising them and any other witnesses who are able to assist the Inspector. They have a duty to assist in making an inquiry effective and compliant with Article 2 of the Convention. They are not suspects facing allegations in a criminal prosecution. Whilst they are entitled to the same rights enjoyed by any other person, not being suspects facing a criminal prosecution, they do not have the rights attaching to that status. They have rights and interests and I shall spell those out later, but they do not have, for example, the procedural right enjoyed by a defendant to a criminal prosecution to call for the general disclosure of documents. They are witnesses. As the court observed, they are the persons who can give the best evidence of what happened. If they are in possession of documents which are relevant to what happened they should disclose them to the Inspector. The object and purpose of this investigation is to determine what happened so that the family of the deceased can learn how their son and family member died. Consideration has also to be given to the public interest that, where necessary, it can hold to account and bring to light discreditable actions which should be exposed.

14. Many safeguards exist to protect a suspect under threat of prosecution but, as the court observed, the impediment arising from a risk of prosecution is lifted where there is no prospect of a prosecution. Where that occurs, the focus is firmly set towards achieving the legal purpose of the inquiry. An attempt by a witness to assert the procedural rights which can be exercised in a criminal prosecution is out of place. The legal imperatives underlying Article 2 require witnesses who are no longer under threat of prosecution to state what happened. In a case, such as Shabram, those present have to state what they saw and did and answer questions reasonably directed to clearing up conflicts of evidence and lines of inquiry which might clarify the circumstances in which the death occurred. I refer to my first public statement in Shabram for the way in which I then envisaged the inquiry should be pursued. The core facts are not complex and the areas for assistance from the witnesses is not complex. The soldiers have

for years been in possession of the evidence of Iraqi witnesses as to what happened. There is no reason for them not to respond.

The form of the Inquiry as outlined by the Divisional Court in the October judgment

15. The Inquiry must be public and be given the necessary support to enable families in Iraq to participate in it in such a way as to safeguard their legitimate interests; "*the fact that the inquiry will be public does not, of course, mean that every aspect has to be in public"*. (See the citation from Lord Rodger in paragraph 21 of the October *Ali Zaki Mousa* Judgment).

16. The Inspector should consider the proceedings being made accessible to the family by video link and consider the extent to which documents and transcripts are made available on the website (paragraph 22). The Inspector should generally conduct the examination of the witnesses. The court's "*strong view*" was that there should be

> "*… no separate counsel to the inquiry as the inquiry can be effective without that disproportionate cost*" but "*the Inspector will plainly need assistance"* according to *"the amount of documentation disclosed and the number of witnesses required*" (paragraph 23).

The involvement of representative counsel, which commonly arises in adversarial proceedings, is not a feature of this inquisitorial process.

17. Disclosure to the Inspector. In paragraph 29 of the October judgment, the court stated:

> "*In each of the cases into which there will be an inquiry, there will be the papers produced in the investigation. These papers should in cases investigated by IHAT contain much of what will be needed: these must be provided to the Inspector… The Inspector will then consider what else needs to made available ([*that is generally from the public or the

> Ministry or elsewhere*] based on a consideration of those papers which should provide a clear indication of any areas where further documentation may be required. Simply asking the relevant service or Ministry…for "full disclosure" is highly likely to be inappropriate. A highly focused approach is needed. The strictest control must be exercised so that only documents relevant to the issues in the inquiry are sought.*"

This principle has relevance to the way in which my discretion should be exercised in assisting witnesses to give focused and relevant evidence. I may consider that witnesses need disclosure of what has been said by others and what they have said in the past in order to give accurate evidence. It is clear from this paragraph that the reach of the inquiry extends, for the purposes of disclosure and jurisdiction generally, only to matters relevant to the issues in the inquiry. The issues are to be reflected in the Terms of Reference where the general lines of the Inspector's jurisdiction are laid down. In this case I have already identified what I believe to be the core issues in my first statement.

18. Disclosure to the Parties. Paragraph 33 provides the following guidance:

> *"...it may well be that the statements of witnesses relating to the circumstances of the death should be disclosed well in advance of the hearing to the families of the deceased and to the soldiers, as such course will generally assist in the ascertainment of what happened by suggesting lines of inquiry or questions that need to be asked. However, even in that connection the Inspector will, for example, need to consider carefully whether any report containing recommendations on whether to prosecute should be disclosed: it generally is not … .*"

19. The inquiry is inquisitorial, not adversarial, but witnesses have a right to suggest lines of inquiry or questions (paragraph 37). For that reason, the family have the benefit of a lawyer familiar with English law and the Article 2 process. In general, soldiers are provided with the benefit of legal advice, if they request it, but the lawyer must properly advise them as to the purpose and scope of the

investigation. Unless the Inspector orders otherwise, all questions will be put by him or someone nominated by him. Those interested or their representatives may propose questions which they consider relevant and the Inspector will decide on what can be put. The Inspector may decide in a particular case that those interested or their representatives may ask questions, but there is no such right. There is no cross examination. These facets of the inquiry flow from the inquisitorial character of the process.

Legal Assistance

20. Legal assistance is to be calibrated according to need. The families of the victims may need assistance in understanding the part they can play but do not need an advocate. Equally soldiers may need assistance in understanding the obligations to which the inquiry gives rise and in providing the Inspector with the participation he requires of them, for example, preparing a witness statement and being present at a public hearing when he or she is questioned. The nature of the participation of interested witnesses as envisaged by the court means there is no need for advocates. The extent of legal assistance necessary for the families, soldiers and other witnesses is a matter for the discretion of the Inspector and *Ali Zaki Mousa* requires that this must remain under continuing review.

The Current Stage of the Inquiry

21. The MOD have duly supplied me with the documents generated by the course of the investigations, including IHAT's investigations. The RMP had carried out extensive interviews of Iraqi witnesses in preparation for any criminal prosecution of soldiers. On the 23 June 2004, three soldiers were interviewed under caution. They were represented by a lawyer. Each soldier provided a pre-prepared written statement. They were interviewed at great length but exercised their right to give no comment to all the questions asked of them. They were made fully aware of the detail of the allegations against them.

22. In advance of the FPE, the soldiers and their counsel received the statements then available from the Iraqi witnesses. Their counsel cross examined at length on the basis of their contents. The soldiers were interviewed again in 2015 but again gave “no comment” answers. In effect, the soldiers with full knowledge of the evidence from Iraqi witnesses concerning what happened and what actions they took have provided no information since 2004.

23. After the delivery of documents to me, I supplied them with hard copy documents comprising the evidence of those Iraqi witnesses I had determined (on a preliminary basis) should be included in the inquiry and the statements of military witnesses. The bundles were prepared in the autumn last year to enable the soldiers to decide whether they wish to add to their existing statements prepared in 2004 and they were invited to respond in greater detail. I approved of the appointment of solicitors for each of them to assist them in this task. I approved of representatives for each of them because I assumed it was in their best interests to be separately advised. I remain of this view but I have had meaningful contact with only one representative who has been good enough to obtain the views of the others and communicate a common view to me. As Inspector I have to scrutinize the fees which are being incurred by legal advisers. If I hear only from one lawyer I cannot know with precision what has been done by which firm. As I have already observed, the facts are not complex and I had envisaged that the benefit of legal assistance to the soldiers would be most beneficial in advising them to fulfil their legal obligations by helping them to prepare a written statement.

24. Progress has been made in obtaining the co-operation of a number of other witnesses and contact has been made with family of the deceased and Munem Auda. He is the principal witness who is still alive who has given first hand evidence of what happened. We are at a stage where we can plan for a hearing at which Mr. Auda and the soldiers can be questioned. It will facilitate that hearing if the opportunity is taken to provide full written statements without delay. The soldiers, and indeed all those giving evidence, will enjoy the protection provided by the Attorney General and the Public Prosecutor of the

ICC against any evidence they give being used against them should there be any future prosecution in connection with these events.

25. I believe a meeting between the IFI lawyers and the individual lawyers for the soldiers will be of benefit and I understand one is proposed to see what reasons, if any, there may be for my expectations not being met forthwith. Of course I am open to consider any suggested reasonable lines of inquiry which fall within the Terms of Reference for this investigation.

SIR GEORGE NEWMAN