

**In the matter of an investigation into the death of
Mr Saeed Radhi Shabram Wawi Al-Bazooni**

Inspector: Baroness Heather Hallett

PUBLIC RULING

1. These Rulings are published in advance of the Public Hearings scheduled for 17 and 18 March 2020.
2. I was appointed as Inspector to investigate the death of Saeed Radhi Shabram Wawi Al-Bazooni on 23 May 2003. This was to discharge the positive obligations of the State under Article 2 ECHR, in accordance with the judgments of the High Court set out by Leggatt J (as he then was) in R(Al-Saadoon) v Defence Secretary (No 2) [2016] 1 WLR. Article 2 requires an independent and effective investigation, which provides sufficient explanation for the circumstances of the death: Hugh Jordan v UK (Application No 24746/94). Fundamental to the Article 2 duty is protection of the legitimate interests of the next-of-kin in an effective investigation.

Anonymity

3. I have received applications for the grant of anonymity from five witnesses to the Investigation. I have considered each application on its own merits, and record that I have granted each of them with reference to my predecessor Sir George Newman's [General Ruling on Anonymity](#).
4. Each witness who has been granted anonymity has been allocated a cipher, which will be used for the purposes of public proceedings and will be applied to documents that will form part of the public record. Their names and identities are not to be reported in the public domain.

Applications to excuse SO70 and SO71 from giving oral evidence

5. The representatives for SO70 and SO71 raised with Sir George concerns about the mental health of their clients and their ability to participate in the Investigation. As a result of their representations, Sir George gave permission for the instruction of medical experts to give evidence to the IFI in this regard.

SO70

6. In my Directions Hearing of 11 December 2019, I gave directions for the instruction of a Consultant Forensic Psychiatrist to give expert evidence on behalf of SO70 on the following matters:

'a. Whether SO70 is fit to engage with the Investigation: This should include, but not be limited to, consideration in relation to the provision of instructions, the preparation of a witness statement, attending at hearings and the giving of evidence.

b. If he is fit to engage with the Investigation, any special measures or reasonable adjustments required to facilitate this; and

c. Whether any issues concerning his health are relevant to the issue of anonymity i.e. would a grant of anonymity assist his ability to engage or would a refusal of anonymity result in any negative impact in respect of health considerations.'

7. I received a medical report dated 10 February 2020 and posed questions to the expert to clarify his opinion on how SO70 could best engage with my Investigation, if at all. I received responses on 21 February 2020.

8. In summary SO70's medical expert was of the view that:

- SO70 suffers from treatment resistant PTSD and severe depression;
- As a result of these conditions, SO70 would not be able to participate as a witness in the Investigation, either by giving a witness statement or being questioned at a public hearing;

- The severity of SO70's symptoms of PTSD and depression are such that there are no Special Measures which would mitigate against the risk of SO70 suffering an acute crisis which may have a permanent adverse effect on his mental health were he to participate in the Investigation. SO70's medical expert did not consider that SO70 had mental capacity to participate in the Investigation;
- On assessment, SO70 was not presenting with signs of psychosis, but mentioned that he had frequent suicidal thoughts;
- If proceedings continue without SO70's participation, an acute relapse of PTSD would be unlikely to occur as he would not be participating in the process. However, SO70's negative thinking, impaired judgment and associated suicidal ideation were likely to be further exacerbated. SO70's medical expert would accordingly be extremely concerned regarding the risk of SO70's current suicidal ideation shifting to actual suicidal intent;
- A refusal of the granting of anonymity with ensuing adverse press coverage would be likely to have a further detrimental impact on SO70's mental state.

SO71

9. In my Directions Hearing of 11 December 2019, I gave directions for the instruction of a Consultant Psychiatrist to give expert evidence on behalf of SO71 on the following matters:
 - i. Whether SO71 is fit to engage with the Investigation. Consideration should be given to the possible requirement for him to attend conferences, consider material served, provide instructions, prepare a signed witness statement, attend hearings and potentially give live evidence.*
 - ii. If SO71 is fit to participate in the Investigation what special measures should be considered to ensure effective engagement.*
 - iii. Whether the removal of anonymity will adversely impact upon SO71's health.'*
10. I received a medical report dated 23 January 2020 and posed questions to the expert to clarify his opinion on how SO71 could best engage with my Investigation, if at all. I received responses on 24 February 2020.

11. In summary SO71's medical expert was of the view that:

- SO71 suffers from PTSD with significant Depressive Disorder and anxiety symptoms;
- The stress of repeated questioning into the events of 23 May 2003 has given rise to SO71's PTSD condition, rather than the events of 23 May 2003 themselves;
- SO71 finds any attempts at questioning into the events of 23 May 2003 to be extremely traumatic and triggering of his PTSD symptoms. There are no Special Measures which would be adequate to assist SO71 to give evidence at a Public Hearing;
- On the balance of probability, it is almost inevitable that SO71 would suffer a sudden and severe deterioration in his mental state if he were to appear as a witness for the Investigation;
- SO71 has expressed feelings of worthlessness and hopelessness but presently no clear suicidal ideations due to the presence of protective factors which prevent him from putting any suicidal thoughts into action;
- The continuation of the Investigation is providing a repeated reminder and re-exposure to past trauma which is the causative, precipitating and perpetuating factor for SO71's PTSD. Only the resolution of investigations into the events of 23 May 2003 will provide the necessary sense of relief and security which are essential for SO71's long-lasting recovery to commence;
- The helplessness SO71 feels will be intensified if proceedings continue without his participation. On the balance of probability, this would lead to a worsening of his mental disorder. SO71's medical expert was concerned that this would significantly increase the risk to himself by possibly overcoming the protective factor currently preventing SO71 from acting upon any suicidal thoughts;
- The removal of anonymity is significantly likely to have a severe and lasting impact on SO71's mental health and further worsen his condition.

12. The evidence of both SO70 and SO71 is highly relevant to the matters I am investigating. I therefore consider and balance the usefulness of the witnesses' written and oral evidence against the adverse impact upon them of requiring their participation in the Investigation.

13. I am very alive to the unique position of both SO70 and SO71 as first-hand witnesses to the incident. However, I accept the evidence of their medical experts that the clarity of the recollection of each witness is affected by their mental health conditions, such that taking their evidence for this Investigation would be limited in its value. I also recognise in my assessment of the utility of their evidence that nearly 17 years have passed since the incident and that this will affect the recollection of both witnesses. Further, I take note that I have evidence available to me which was given by the witnesses in the course of previous investigations, that was taken under oath or verified by statement of truth, from which I am able to draw conclusions and inferences.

14. I accept the evidence of SO70's medical expert that he would not be able to participate as a witness to the Investigation, and that if he did so there is a risk of a serious worsening of his PTSD and depression. I have considered and made enquiries as to whether Special Measures might be available to enable SO70 to give his best evidence and minimise this harm, but am satisfied on the evidence that such measures would not sufficiently mitigate the risk of harm or enable him to give meaningful evidence.

I also accept the evidence of SO71's medical expert that requiring him to engage with proceedings through giving evidence in writing or orally would be extremely traumatic and trigger his PTSD symptoms. He lacks the capacity to give written evidence on the events in question. The expert has similarly confirmed that there are no Special Measures that would be adequate to assist him to give oral evidence.

15. In reaching my decision, I bear very much in mind the observations of Leggatt J in *R(Al-Saadoon) v Defence Secretary (No 2)* at [201] – [202]:

'When assessing the anticipated benefits and costs of possible lines of inquiry, there are two points which I think it important not to overlook. The first is that seeking to interview soldiers and other witnesses about traumatic events that occurred in 2003 or 2004 is an exercise which has human as well as financial costs...Of course, if there is sufficient reason to believe that a serious criminal offence may have been committed and that interviewing the witness may lead to the perpetrator(s) being prosecuted and convicted, the distress which this may

cause to the witness is a cost which has to be incurred. But it is not a step which should be taken lightly or without strong cause.'

16. I have also considered the impact of this ruling on my ability to conduct an effective investigation for the purposes of Article 2. I have regard to the fact that the duty to investigate historic allegations under Article 2 must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, and only requires the taking of such steps as are reasonable in all the circumstances (see *R(Al-Saadoon) v Defence Secretary (No 2)* at [198]).
17. I have concluded that Article 2-compliant investigation remains possible under the circumstances, in light of all the material generated by previous investigations, including photographs, plan and a video recording of the site, the previous statements given by SO70 and SO71 in respect of the incident, the statements of other witnesses (both Iraqi and British) made closer to the time of the incident, subsequently, and the participation of the deceased's family members in the Investigation.
18. I therefore rule that, in consideration of all the circumstances, both SO70 and SO71 are excused from giving written evidence to my Investigation and will not be called upon to give oral evidence.
19. Given the medical circumstances that form the basis of my decision, I will not draw adverse inferences against either SO70 or SO71 by reason of their failure to give evidence to my Investigation.

Applications permanently to suspend the Investigation

20. I now consider the applications to suspend permanently the Investigation into the Death of Mr Saeed Shabram made on behalf of SO71 on 10 March 2020 and on behalf of SO70 on 11 March 2020.
21. The Applications are both presented on the grounds that:

- a. The incident occurred nearly 17 years ago;
 - b. There have been previous investigations with no adverse findings made against either witness;
 - c. The continuation of this Investigation risks worsening the mental health conditions of the witnesses and heightening the risk of suicide. SO71 submits that this would be disproportionate in relation to the Inspector's duty to investigate alleged breaches of Article 2 ECHR;
 - d. Continuation of this Investigation would be capable of infringing both applicants' rights under Article 3 ECHR.
22. I was given Terms of Reference for my investigation in order to discharge the positive obligations of the State under Article 2 ECHR. The procedure and conduct of the Investigation are to be such as I may direct so as to achieve the aims and purposes of the Investigation and in compliance with the terms of the High Court's judgments, Orders and directions (Terms of Reference at [16]).

Previous investigations and passage of time

23. The fact that the death under investigation occurred nearly 17 years ago does not itself provide a basis for the suspension of the Investigation. I have been given the task of conducting this Investigation in order to discharge the State's procedural duties under Article 2 ECHR. The fact that the death occurred many years ago is a factor for me to take into consideration where relevant, for example in assessing the evidence before me, but I am satisfied that an effective investigation can be conducted into the death of Mr Shabram, notwithstanding the passage of time. Separately, I have already confirmed by decision which was communicated on 3rd March 2020 that SO70 and SO71 will not be called upon to give written or oral evidence to the Investigation. Accordingly, the impact of the passage of time on their present recollection of events is not relevant at this juncture.

24. I am well-aware that there have been previous investigations with no adverse findings made against SO70 and SO71. This was the position at the time that the Investigation was referred to the IFI by the Secretary of State for Defence ('SSD'). The Investigation was referred following the SSD's determination that previous investigations had not discharged the State's positive obligations under Article 2 ECHR. While this was a decision for the SSD, I must emphasise that the procedural obligation upon the State cannot be satisfied through civil proceedings initiated by the next-of-kin and that do not involve the identification of any alleged perpetrator, nor can the mere awarding of damages discharge the obligation under Article 2: Hugh Jordan v UK at [141]; Al-more, Skeini & Ors v UK (2011) 53 EHRR 18 at [165]. Further I am not concerned with questions of criminal or civil liability (Terms of Reference at [16]).
25. Whether previous investigations have made adverse findings in respect of SO70 and SO71 or not does not alter my task to consider the immediate and surrounding circumstances of the death, as I am required to do under my Terms of Reference, and to conduct an effective investigation that safeguards the interests of the family of the Deceased.

Risk of Harm

26. The Applicants argue that the Investigation should be suspended permanently because of the risk to their mental health. I have taken expert evidence in respect of the medical condition of each witness, and consider this ground in relation to each witness individually and on its own particular facts.
27. It has been submitted by SO71's representatives that the potential harm he would face should the Investigation continue is disproportionate. I understand this to be a submission that the potential harm to his mental health outweighs the Article 2 duty upon the State to conduct an independent and effective investigation into the death. I have considered this submission in respect of both SO71 and SO70.
28. I take into careful consideration the medical experts' views that there is a risk of the mental health of both witnesses worsening should the Investigation continue, with or without their participation. I note that neither expert suggests that the risk of worsening

mental health is contingent upon my findings— adverse or otherwise – in respect of their involvement in the facts and circumstances of the death.

29. I note in respect of SO71 that the medical expert is of the view that *resolution of these matters will provide a sense of relief and security which are essential for meaningful and long-lasting recovery*. I understand this to support that SO71’s recovery will be assisted by the conclusion of my Investigation. I have taken every effort to uphold a tight timetable so as to resolve the Investigation without delay and hope to conclude this investigation by the summer of 2020. The fact that these matters may be resolved in a matter of months is a relevant consideration when considering the issue of proportionality
30. I take the medical expert’s views on the increased risk of suicide carefully into account, but note that he places the risk of SO71 acting on any suicidal thoughts no higher than a possibility.
31. Regarding SO70’s symptoms of PTSD and depression, I note the concerns expressed by the medical expert regarding his negative thinking, impaired judgment and suicidal ideation. I consider these concerns alongside the expert’s view that an acute relapse of PTSD would be unlikely to occur if proceedings were to continue without his participation in the process.
32. When considering the potential harm to the witnesses, I also bear in mind the directions I have given to minimise their exposure to risk. I have excused both witnesses from giving written or oral evidence to the Investigation following consideration of the evidence and submissions in respect of their health. I have also granted both anonymity in respect of this Investigation, for reasons including the possible risks to mental health should their identity be made public. Both have legal representatives to represent his interests, and will not be required personally to engage with continuing proceedings.
33. Taking into consideration the evidence regarding SO70 and SO71’s mental health and the procedural and substantive measures adopted in the conduct of the Investigation, I consider that the risks to either do not outweigh the public interest and legitimate interests of the family in an Article 2 compliant investigation being concluded. I am

particularly mindful that the Deceased's next-of-kin are engaged in the Investigation and are entitled to a proper consideration of the death of their family member including findings of fact regarding the circumstances of his death.

34. I acknowledge the unsubstantiated submission that continuation of the Investigation may amount to an infringement of the Applicants' rights under Article 3 ECHR but do not accept it. I have considered whether SO70 and SO71's Article 3 rights are engaged and have a bearing on the continuation of the Investigation. I have seen nothing from the evidence and submissions to support that that the risk of the Applicants' mental health deteriorating reaches the minimum level of severity to fall within the scope of torture or inhuman or degrading treatment or punishment under Article 3.

Conclusion

35. The Applications to suspend the Investigation are accordingly dismissed.

Baroness Heather Hallett

13 March 2020