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Wednesday, 11 May 2011

(10.30 am)

THE CHAIRMAN: Good morning everybody and welcome to this further directions hearing in the Al-Sweady Inquiry.

The main purpose of today's hearing, although not the exclusive purpose, is to fix a date for the opening of the oral hearings.

Mr Acton Davis?

Submissions by MR ACTON DAVIS

MR ACTON DAVIS: Sir, may I deal first with representation.

Instructed and on behalf of the Treasury Solicitor are Mr Garnham and Ms Lambert; on behalf of the MoD are Mr Johnson and Ms Cumberland; on behalf of the Iraqi core participants, instructed by PIL, are Mr O'Connor and Mr Powles; and your team here today are me, Mr Beer and Ms Gargitter.

Sir, may I just mention that since we were last here, there have been two appointments to the front row and may I formally congratulate both Mr Johnson and Mr Beer on their elevation.

THE CHAIRMAN: Yes, thank you very much. Many congratulations to both of you.

MR ACTON DAVIS: Sir, you will have seen, I hope, written representations from all --

THE CHAIRMAN: Yes.

1 MR ACTON DAVIS: -- including the latest salvo from

2 Mr O'Connor, which came in at 10.47 last night.

3 THE CHAIRMAN: Yes.

4 MR ACTON DAVIS: Have you seen that, sir?

5 THE CHAIRMAN: I have seen it, yes, and I have read it.

6 MR ACTON DAVIS: Thank you. The purpose of this hearing is
7 twofold, as you have said: first, to address
8 a suggestion made by the Inquiry team concerning
9 applications for protective measures on a generic basis;
10 and, second, to consider the timetable and hopefully, if
11 you are agreeable to do so, to fix a date for the
12 opening of this Inquiry.

13 Just to try to briefly summarise, if I may, the
14 submissions on behalf of the interested parties
15 concerning protective measures and to explain the view
16 taken by the Inquiry counsel. Mr O'Connor, on behalf of
17 his clients, is firmly against any suggestion of
18 protective measures being considered on a generic basis.
19 The Treasury Solicitor professes not to be firmly
20 against them, but puts in their path a number of
21 practical obstacles. The only purpose in suggesting
22 a generic approach to protective measures was to save
23 the Inquiry time and resources.

24 If experienced lawyers are of the view that they are
25 impracticable, we accept that view. But when criticisms

1 are made of the speed of the Inquiry work, this was
2 an attempt to save the expenditure of what hopefully
3 will be unnecessary time and expense.

4 So, Sir, we do not pursue that application.

5 THE CHAIRMAN: Very well. Thank you. In that case, I don't
6 require any further submissions from any of the core
7 participants or from the Treasury Solicitor in respect
8 of that particular matter.

9 MR ACTON DAVIS: May I then turn to the timetable?

10 THE CHAIRMAN: Yes, please do.

11 MR ACTON DAVIS: Sir, it would be wrong to say anything
12 other than that the progress of this Inquiry has been
13 slower than was hoped. That is not to say that there
14 are not and have not been good reasons for the rate of
15 progress, some of which are mentioned in our written
16 submissions. All of the reasons have to do with good
17 practical reasons which include the following:

18 First, the condition of the JR material received
19 from the MoD required considerable weeding out and
20 de-duplication. That de-duplication has been
21 time-consuming and difficult. Even now the work is not
22 entirely complete because issues of relevance remain.

23 If I can just touch on one paragraph in
24 Mr O'Connor's submissions of last night, when at
25 paragraph 5 he considers -- do you have it, Sir --

1 issues on a simple percentage basis. I comment simply
2 this: that it is wrong to see things in matter of simple
3 percentages because there is also the question of
4 relevance.

5 Sir, the matters being considered by the
6 Administrative Court were not the matters which will be
7 before you in due course, hence questions of relevance
8 arise.

9 Second, the interviewing of the Iraqi witnesses has
10 proved challenging, mainly in terms of logistics.

11 Sir -- and this is just a small example -- many of the
12 Iraqi witnesses do not have passports and it should be
13 unnecessary to say that passports are not as easy to
14 obtain in Iraq as they are in Victoria.

15 One small example: two detainees were identified in
16 the summer of 2010 as being potentially relevant or
17 having potentially relevant evidence. Permission to
18 travel was required from their employers; that was
19 sought and given. However, one passport simply became
20 unavailable. It became necessary to re-arrange the
21 interview of that witness for April, but then there was
22 a further problem in that Mr Shiner then became unable
23 to attend the interview on the date planned, so it has
24 had to go off until July. This is a potentially
25 important witness and Mr Shiner says he wants to be

1 there for reasons which we all understand. But that is
2 an explanation of one particular problem which that
3 particular witness has caused to the progress of the
4 Inquiry.

5 The third matter is the obtaining of further
6 material from the MoD. That is now working better than
7 was the case. It is an unfortunate matter of history
8 that the time limits set out in the disclosure protocol
9 were, in the main, not complied with. Hopefully that is
10 all now behind us.

11 Turning then to the issue of obtaining statements
12 from military witnesses. Of course, Sir, as all will
13 appreciate, before a military witness can be asked to
14 provide a statement, the Inquiry needs contact details
15 and those are available only from the MoD, who have been
16 providing current or last-known contact details for
17 serving or former military witnesses.

18 There are approximately 470 witnesses currently on
19 the Inquiry's list of military witnesses and the MoD
20 provided contact details or confirmation that the
21 witness had taken up the offer of TSol assistance for
22 around 215 of those people in August 2010.

23 Between August and December 2010, the Inquiry asked the
24 MoD to provide contact details for a further 165
25 witnesses. Unfortunately, they were not received until

1 January 2011.

2 There are particular difficulties. Some individuals
3 have very common surnames and the MoD searches of its
4 databases would return sometimes several hundred
5 possible matches, all of which would have to be filtered
6 for a best match. Occasionally the best match address
7 has been provided and then, although the Inquiry wrote
8 twice to the address with no response, it then became
9 necessary to instruct tracing agents to establish the
10 current whereabouts of the witnesses.

11 Then, in March 2011, the Inquiry notified the MoD of
12 a further 109 witnesses whom it wished to contact.
13 Those contact details are now coming through on
14 a regular basis, I am happy to report, which has allowed
15 the Inquiry to make better progress in recent months in
16 contacting witnesses and issuing the Rule 9 requests.

17 However, the Inquiry still awaits the provision of
18 contact details for 109 military witnesses, the majority
19 of which were sought from the MoD between October
20 and December 2010. It is obvious that we cannot issue
21 Rule 9 requests to such witnesses until contact details
22 are provided.

23 I set all this out, some of it in response to what
24 is said on behalf of those represented by Mr O'Connor
25 and Mr Powles, not to allege or apportion blame, but

1 simply to explain the difficulties which the Inquiry has
2 faced. I understand that it may appear that progress is
3 not all that everyone would like it to be, but this is
4 a difficult and logistically complicated Inquiry to
5 manage.

6 You, Sir, have a loyal and hardworking staff, and to
7 refer to the progress of the Inquiry in the language
8 chosen by Mr O'Connor at paragraph 3(i) of his first
9 written submissions is perhaps a forensic exercise that
10 they might yet regret. More importantly, perhaps, the
11 criticism is made without knowledge of the practical
12 difficulties faced by the Inquiry team.

13 Sir, the current position, in the light of the
14 difficulties identified by Mr O'Connor and Mr Powles, is
15 that we propose an alternative timetable to that which
16 we proposed in our written submissions. We will seek to
17 open this Inquiry on 31 October of this year. That is
18 a delay of five weeks, compared to the eight sought by
19 Mr O'Connor, and I understand from his document of
20 yesterday evening that he is content with that
21 adjournment.

22 THE CHAIRMAN: Yes.

23 MR ACTON DAVIS: Our current intention is that the opening
24 will be concluded within the first eight days of the
25 hearing, of which five days will be taken up by the

1 three of us, which will leave three days over for
2 anybody else who wishes to open their client's case.

3 We would then move immediately to evidence and the
4 first witnesses will be the Iraqi witnesses. It is
5 likely, because Beirut is no longer available to us,
6 that their evidence will have to be heard by videolink
7 from Istanbul. That, of course, causes problems over
8 timing because Turkey is two hours ahead of England and,
9 additionally, flights to and from Istanbul from Basra
10 are only on Wednesdays. So that will have to be
11 reflected in the sitting days and times which we had
12 anticipated asking you to sit.

13 What that means is that it is likely that we will be
14 asking you to sit on Monday and Tuesday and Thursday and
15 Friday, at least whilst the Iraqi witnesses are giving
16 evidence, and that, to reflect the time zones, the
17 sitting times in London will be from 9 in the morning
18 until midday and from 1 until 3.30 in the afternoon.

19 The advantage of that, perhaps, is that if there are
20 any administrative matters which need to be decided by
21 you, we could use the time between 3.30 and however long
22 it takes at the end of every day to deal with those
23 administrative matters and we should avoid having to
24 disrupt the flow of evidence.

25 No-one should under-estimate the practical

1 difficulties which there will be in taking evidence from
2 the Iraqi witnesses. Taking evidence by video and with
3 the assistance of interpreters is likely to be
4 time-consuming.

5 Now, to help get to a position where this Inquiry
6 can be opened on 31 October, we suggest the following
7 timetable: there be Inquiry disclosure of non-witness
8 statement material by 31 May this year, with additional
9 MoD documents by 31 July. To some extent, of course, we
10 are dependent, in adhering to that timetable, that good
11 progress is made with the restriction orders, but we
12 hope that 31 July will be achievable.

13 There will then be Inquiry disclosure of the Iraqi
14 witness statements by 1 September to the extent that
15 they are available by then. The others will follow,
16 with a view to them all being served by the end of that
17 month, which is 30 September.

18 THE CHAIRMAN: Sorry, when was the first tranche of the
19 Iraqi witness statement disclosure going to be by?

20 MR ACTON DAVIS: 1 September.

21 THE CHAIRMAN: 1 September, thank you very much. And then
22 the balance by the 30th?

23 MR ACTON DAVIS: By the 30th.

24 THE CHAIRMAN: Thank you.

25 MR ACTON DAVIS: That is because the Iraqi witnesses, on the

1 current timetable, their interviews will not be
2 completed before the end of August.

3 THE CHAIRMAN: Yes.

4 MR ACTON DAVIS: The military statements will be disclosed
5 by 1 September to the extent that they are available by
6 that date and thereafter on a rolling basis.

7 THE CHAIRMAN: Sorry, is that again 1 September?

8 MR ACTON DAVIS: 1 September.

9 THE CHAIRMAN: Thank you very much.

10 MR ACTON DAVIS: Now, Sir, all that depends upon the smooth
11 flowing of the interviews in Istanbul and the MoD and
12 TSol arrangements working to plan.

13 The issue of protective measures is, we hope,
14 capable of being resolved, but they are, of course,
15 an added strain on the timetable.

16 THE CHAIRMAN: Yes.

17 MR ACTON DAVIS: May I just, Sir, refer to the last
18 paragraph of Mr O'Connor's note of last night? May
19 I reassure Mr O'Connor? The Inquiry counsel and staff
20 are well aware of the need to adhere to this timetable
21 if my intention of opening this Inquiry at the end
22 of October is to be achieved.

23 THE CHAIRMAN: Yes. Thank you very much.

24 Now, Mr O'Connor, do you want to go first of the
25 core participants?

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Submissions by MR O'CONNOR

MR O'CONNOR: Sir, I really do not mind at all. We acknowledge the very heavy and unusual logistical burden that has lain with the Inquiry team and your staff, most particularly with the --

THE CHAIRMAN: Can I just halt you there? I am finding it just a little bit difficult to hear. It is not your fault. It is the room. I suspect that others cannot hear you at all.

MR O'CONNOR: There we are.

THE CHAIRMAN: I see that is acknowledged around the room. Again, it is no criticism of you. Can you rearrange your microphone so that it's amplified? Take your time.

MR O'CONNOR: It is a criticism of my microphone technique and I hope that that is rather better now. Is there a nodding from anywhere in the far distance of the room?

Sir, we acknowledge the heavy and very unusual logistical burden that has lain with your team, most particularly with regard to gathering the Iraqi evidence. The practical difficulties of arranging transport, accommodation, documentation actually may well be unique.

We have not drawn attention to our concerns about progress in order to detract from that or to allocate fault. The concerns we have expressed arise whether it

1 is anyone's fault or not and they are simply designed to
2 assist you to ensure achievement of what we are sure you
3 have always wanted to achieve, and that is the
4 preparations for an effective and fair hearing of the
5 serious allegations are on track.

6 Now, they are our genuine concerns. My forensic
7 judgment at this moment is that there is no need for us
8 to articulate them now, but we do say that there have
9 been sufficient acknowledgments by your counsel, even
10 just now, of delays that have taken place, most
11 particularly in dealings between the Inquiry team and
12 the Ministry of Defence, the gathering of military
13 witness statements and the gathering of material from
14 the MoD archives and corporate memory, to justify quite
15 a large extent of our concerns. If this were a blaming
16 exercise, one would be asking for explanations and
17 examining those explanations, but it isn't such
18 an exercise.

19 THE CHAIRMAN: In that case, Mr O'Connor, I accept your
20 invitation to treat your concerns as concerns expressed
21 with a view to the Inquiry being aware that there is
22 a need to move on --

23 MR O'CONNOR: Very much so.

24 THE CHAIRMAN: -- as expeditiously as possible. It is not
25 an exercise in allocating blame.

1 MR O'CONNOR: That's right, and I am most grateful for that.

2 So just to take one example: your counsel and my
3 learned friend has just conceded that in relation to
4 gathering MoD material, the disclosure protocol has not
5 been complied with in the main. We don't go beyond
6 that, but that is the fact; that is what has happened.
7 Presumably there is some explanation somewhere, but we
8 are not going to go there --

9 THE CHAIRMAN: Right.

10 MR O'CONNOR: -- and it is just regrettable that that is the
11 state of play.

12 Sir, really, having indicated that we leave our
13 concerns on paper, we note your counsel's new and very
14 helpful and specific timetable. If that is adhered to,
15 there should be no difficulty whatsoever in an opening
16 from your Inquiry counsel which will be as comprehensive
17 and fair and helpful to all the interested parties and
18 to you and to the public, as one would expect from
19 counsel of their distinction.

20 THE CHAIRMAN: Yes.

21 MR O'CONNOR: Now, Sir, first of all, may I, out of respect
22 to you, ask if there is anything more specific on which
23 you would want our assistance? If there isn't, may I be
24 allowed to turn to my left and behind me and just see if
25 they feel there is anything I should specifically --

1 THE CHAIRMAN: Yes, of course, Mr O'Connor.

2 MR O'CONNOR: But unless there is anything from you ...

3 THE CHAIRMAN: No, thank you very much.

4 MR O'CONNOR: I am grateful. (Pause)

5 Sir, may I just say that certainly there's one area
6 of correspondence which it is far, far better that we do
7 not spend open Inquiry time ventilating. I have no
8 doubt that, as has already happened several times and
9 particularly a week or so ago, we can have a brief and
10 private conversations with my learned friends --

11 THE CHAIRMAN: Very well.

12 MR O'CONNOR: -- your counsel team, which I am sure will
13 make progress.

14 THE CHAIRMAN: Very well. Thank you very much indeed
15 Mr O'Connor.

16 Now, Mr Johnson. Is there anything you wish to say?

17 Submissions by MR JOHNSON

18 MR JOHNSON: Sir, very little. We share the Inquiry's wish
19 to open as soon as possible. We had supported the
20 proposed date of 26 September. We note that that was
21 strongly opposed by PIL and we see their reasons. In
22 the circumstances, we entirely understand why your
23 counsel has proposed an adjournment until 31 October.
24 In the circumstances, we support that proposal.

25 We welcome the recognition that the process of

1 disclosure and provision of contact details is now
2 working better and we welcome the acknowledgment of the
3 practical difficulties that have arisen. In particular
4 there have sometimes been many dozens or even hundreds
5 of matches and they have to be worked through.

6 Sir, we will, of course, do everything we can to
7 facilitate the proposed new start date. We are grateful
8 for the timetable outlined by Mr Acton Davis. We
9 consider that that's entirely appropriate.

10 I would just draw attention, though, to the
11 observation we made at paragraph 8(ii) of our written
12 submissions.

13 THE CHAIRMAN: Just a moment. Paragraph ...?

14 MR JOHNSON: Paragraph 8(ii) on the final page.

15 THE CHAIRMAN: Yes.

16 MR JOHNSON: It concerns redaction. The point is simply
17 this: although the timetable is realistic so far as the
18 material which has already been identified by the
19 Inquiry as relevant is concerned, the timetable does
20 depend on new material being identified to the Ministry
21 of Defence in sufficient time for further redactions to
22 take place as necessary. That is our only observation.

23 Sir, unless there is anything else, that is all we
24 wish to say.

25 THE CHAIRMAN: No, thank you, Mr Johnson. Thank you very

1 much.

2 Mr Garnham?

3 Submissions by MR GARNHAM

4 MR GARNHAM: Sir, thank you. We too respectfully agree with
5 Mr Acton Davis in what he says about the start date of
6 this Inquiry and we have nothing to say about that. On
7 the question of restrictive measures applications, we,
8 of course, accept what he has said and what you have
9 indicated in that regard.

10 It may well be that as these applications are made,
11 there has developed sufficient familiarity on both sides
12 as to enable the matters to be streamlined. But if we
13 may say respectfully, what Mr Acton Davis has said thus
14 far seems sensible.

15 Our attitude throughout has been to cooperate with
16 your team and to progress the service of statements of
17 military personnel as soon as possible. That has been
18 our cultural stance, to adopt Mr O'Connor's expression.
19 We don't propose changing that stance.

20 THE CHAIRMAN: Thank you. Thank you very much, Mr Garnham.

21 Mr Acton Davis, is there anything further you wish
22 to say?

23 MR ACTON DAVIS: Other than to invite you to fix a date for
24 the opening of this Inquiry for 31 October 2011, no.

25 THE CHAIRMAN: Would it be helpful if there were to be

1 a public hearing. Thereafter, the oral hearings will
2 follow the pattern that he has indicated to me.

3 I think I should say also that having regard to what
4 Mr Acton Davis has notified the Inquiry about, with
5 regard to the time differences between here and Istanbul
6 and the hearing of the Iraqi witness evidence, it
7 appears that it will be necessary for the Inquiry to sit
8 on Mondays, Tuesdays, Thursday and Fridays, leaving
9 Wednesday free of oral hearings, and that for the
10 purposes of taking the Iraqi oral evidence the Inquiry
11 will sit at the following times: from 9 am until 12 noon
12 and then 1 pm until 3.30 pm. I make that indication as
13 a provisional indication of the times. It is not set in
14 stone. If it becomes necessary to look at it again and
15 re-adjust it, then that will be done on adequate notice
16 to the various interested parties.

17 Is there anything further?

18 MR ACTON DAVIS: Thank you, Sir, no.

19 THE CHAIRMAN: Thank you all very much.

20 (11.05 am)

21 (The hearing adjourned)

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