

Tuesday, 12 July 2011

1

2 (10.30 am)

3 THE CHAIRMAN: Welcome, everybody, to this fourth
4 preliminary hearing in this particular Public Inquiry.
5 The principal purpose for today's hearing is for
6 consideration of an application by Public Interest
7 Lawyers that the hearing of the Iraqi evidence from key
8 Iraqi witnesses should be by that being taken in person
9 at this hearing room rather than by videolink evidence
10 from Istanbul.

11 Is there something you wish to say, Mr Acton Davis?

12 MR ACTON DAVIS: I was just going to introduce counsel to
13 you and then perhaps ask Mr O'Connor to make his
14 application. I'm here assisted by Mr Beer and
15 Ms Gargitter as Counsel to the Inquiry. The Ministry of
16 Defence are represented by Mr Johnson and Ms Cumberland,
17 the Treasury Solicitors by Mr Garnham and Ms Lambert,
18 and the PIL clients by Mr O'Connor and Steven Powles.
19 As you have said, this is a contested application so it
20 might be appropriate for Mr O'Connor to go first and
21 make his application.

22 THE CHAIRMAN: Thank you very much. Yes, Mr O'Connor.

23 Application by MR O'CONNOR

24 MR O'CONNOR: Sir, thank you. You have before you the
25 application made by Public Interest Lawyers by their

1 letter of 24 May, expanded by their written submissions.
2 You have the skeleton argument of the
3 Treasury Solicitors who support our position. You have
4 the skeleton --

5 THE CHAIRMAN: Pause for a moment, Mr O'Connor. I'm sorry,
6 I can hear you but I'm sure most people cannot. That is
7 not your fault; I think there is a microphone problem.

8 MR O'CONNOR: I will most certainly just start again because
9 it was only a sentence or two. You have in preparation
10 for this hearing the original application by letter from
11 Public Interest Lawyers dated 24 May and expanded by our
12 written submissions. You have the skeleton argument
13 from the Treasury Solicitors who support our position.
14 You have the skeleton argument of the Ministry of
15 Defence who oppose it, largely on costs grounds which
16 are a legitimate consideration, we entirely recognise,
17 and indeed it is your statutory duty to bear them in
18 mind. You have a very helpful analysis from the
19 Inquiry Secretariat of the potential costs implications
20 of the various options. Most recently you have had the
21 skeleton argument from your own counsel team, together
22 with some draft directions for today.

23 Those particular documents are both persuasive and
24 even-handed and even though I will, if I may, briefly
25 summarise the merits of the application, may I indicate

1 right away that there is agreement to the terms of those
2 draft directions, subject to a very few detailed aspects
3 of the wording, which I've informally indicated to your
4 counsel already.

5 The broad reasons behind this application are as
6 follows, and they really start from the commitment that
7 those key witnesses are making to our system of justice,
8 the extraordinary trust and faith that they have placed
9 in it in a sense by participating at all, but it extends
10 to their choice, whatever be the implications for their
11 comfort and convenience, that they would wish to attend
12 to be questioned live about the momentous evidence that
13 they give on these extremely important allegations.
14 They wish to communicate directly with you, Sir.

15 Whilst, of course, the alternatives have increased
16 very considerably recently in their efficacy, their own
17 judgment, for what it is worth, is that there is no
18 substitute for their attending and giving live evidence.
19 It is for you to assess that question for yourself, of
20 course.

21 Now, of course, the financial implications of the
22 attendance of those witnesses subject to our application
23 are really relatively limited. Your Secretariat
24 forgivably investigated the maximum option, and really
25 we can entirely see that they cannot be contemplated.

1 The financial implications of every single Iraqi witness
2 attending here are immense and unacceptable.

3 However, we were only ever applying for the key
4 Iraqi witnesses to attend, and we have clarified that
5 our current assessment is, even though there is
6 a significant proportion of witnesses who have not yet
7 been interviewed, but our current assessment is that it
8 would be about 15 of those who have been interviewed so
9 far.

10 We do not want to create worrying wriggle room, as
11 it were, so that we put a foot in the door and then
12 suddenly we are talking about many dozens and up to 50,
13 not at all. We firmly anticipate that the numbers will
14 be between 15 and 20, but it would be wrong to confine
15 those numbers now strictly and thus that brings me, Sir,
16 if I may, to the first hesitation we have over the draft
17 directions, because the end of paragraph 1 seems to
18 limit, as from today, those numbers as never exceeding
19 15.

20 We submit it is premature to do that. We have tied
21 our colours to the mast. We stand by our approximation
22 of 15 as we estimate it to be now. We will be
23 identifying those witnesses and communicating to you
24 a brief rationale in relation to each. It may be that
25 now it is one or two more than 15, and we emphasise that

1 we cannot cater for those witnesses who have not yet
2 been subject to or given Rule 9 interviews and
3 statements.

4 It is right to say the vast majority of witnesses
5 whom we anticipate to be key witnesses have already been
6 interviewed, so we can assess, that we would ask you in
7 paragraph 1 of the directions, not as of today, to limit
8 this matter rigidly to 15.

9 If that is right, then the financial implications
10 are a really quite small fraction of the figures that
11 rightly and accurately appear on the hypothesis of the
12 Secretariat in the paper before you.

13 May I come to the core reasons why we submit in the
14 particular circumstances of this case, it is important
15 for those witnesses to attend.

16 You will always, of course, be assessing these
17 questions in the light of the particular issues and the
18 particular evidence.

19 THE CHAIRMAN: Yes.

20 MR O'CONNOR: First of all, Sir, for these key witnesses, if
21 they were giving their evidence at a distance by
22 technological means, our legal team would of course only
23 have the most indirect and limited access to those
24 witnesses. It is impossible now to be confident that
25 there will not be a need for direct communication by way

1 of advice and assistance to those witnesses around the
2 time of, and indeed with your permission, during their
3 evidence. The kinds of issues that could well arise
4 could be issues of privilege.

5 Sir, without of course going into any detail, there
6 is Rule 12 sensitive material which might need really
7 quite delicate handling by all concerned and require our
8 consultation with any relevant witnesses, and it has
9 been conceded significantly by the Ministry of Defence
10 that these witnesses are all to be categorised as
11 potentially vulnerable.

12 There is no provision in the cost assessments of
13 your Secretariat for there to be support services
14 available in Istanbul for them, whereas automatically as
15 part of your procedures they will of course be directly
16 and immediately available here, and they may very well
17 be necessary.

18 So may I say the concession by the Ministry of
19 Defence is not lightly given, but it is responsibly
20 given, and certainly when I can speak now personally in
21 a sense, having met many of our clients once in Beirut
22 collectively, there is a sense of trauma lingering over
23 them. They have not had the kinds of support which we
24 take for granted in a sense in this country; they just
25 don't exist in their communities and Iraq.

1 Although years go by since 2004, unless addressed,
2 that kind of deep trauma lingers and stays. These
3 witnesses are very likely to need the assistance of the
4 Inquiry support services.

5 So it is really direct access to those witnesses by
6 our team and support services which could only take
7 place in this country.

8 Secondly, technology. Now, every confidence, of
9 course, in what is now a fact of everyday life, direct
10 and effective and glitch-free communications, audio and
11 visual, between locations all across the world.
12 However, we do invite you to put into the mix here the
13 fact that this is going to be much more delicate than
14 that, because there is going to have to be glitch-free
15 parallel Lextranet communication at the same time in
16 order to be able to examine the witnesses on the Inquiry
17 material.

18 Now, that we take for granted here. We have the
19 parallel screens; instantly documentation comes up.
20 That is going to have to be working just as well between
21 here and Istanbul.

22 Thirdly, overlaying that will be the Ministry of
23 Defence encryption systems to make sure that the
24 communication systems are secure. That is going to have
25 to work glitch-free as well.

1 Now, there has to be a very good chance that they
2 will all work glitch-free, but this is more fragile than
3 your conventional taking oral evidence from a witness
4 who is on the Continent or even further afield. It
5 relies on several parallel systems working, and the
6 resource implications of even a temporary glitch,
7 granted the hours' difference that we are already having
8 to face with the courtroom sitting hours, the expense of
9 multi parties and legal representatives, one doesn't
10 want to contemplate that either.

11 Now at least with these key witnesses, those
12 difficulties would not arise with their attendance in
13 London.

14 Sir, one would also avoid the vagaries, potentially,
15 of the situation in Turkey. One simply hopes that
16 Turkish society carries on in its reasonably calm and
17 stable way as it has for quite some time now, but
18 occasionally things change in Turkey, and we wouldn't be
19 at the mercy of any short-term disruption in civil
20 society or in the provision of basic utilities and
21 services there.

22 We also respectfully submit that appearance matters.
23 This is not the prime point and appearance would not
24 alone justify this at all, but there is no question that
25 quite rightly, the Ministry of Defence would be ensuring

1 that their key witnesses, even if they have to be
2 transported a long way, will attend here to give live
3 evidence, and they are quite entitled to do that. But
4 that is in a sense under their control, and it really
5 would give an inappropriate flavour to these hearings if
6 basically the MoD were able to secure, rightly secure,
7 the live attendance of all their key witnesses, but
8 basically none of the Iraqi witnesses were attending
9 here; it gives a flavour of differential treatment which
10 would not be attractive.

11 So I'm not going to go through all our reasoning,
12 because you have had them in writing, but I thought it
13 only right just to expand a little bit on what we submit
14 are the strong and objective public interest reasons to
15 give very careful consideration to this application and
16 to grant it in the limited way in which we put it.

17 The objective nature of those interests, we submit,
18 is demonstrated by the hands across the ocean between us
19 and the Treasury Solicitors' submissions. I mean, it
20 does show --

21 THE CHAIRMAN: What a romantic way of putting it,
22 Mr O'Connor.

23 MR O'CONNOR: Mr Garnham and I know each other very well.
24 No, it demonstrates that coming to it from different
25 points of view, the same answer is reached.

1 May I just conclude our submissions on the suggested
2 directions, having indicated what we say about the last
3 clause of paragraph 1. It is perhaps not necessary to
4 change anything, but in the middle of draft paragraph 3
5 is the phrase that the evidence of these witnesses is
6 "important" to the carrying out of the work of the
7 Inquiry. This is relating to the terms in which you may
8 choose, Sir, to communicate with the Secretary of State
9 in relation to their being granted leave to enter the
10 country to give live evidence.

11 "important" may or may not end up as the term you
12 wish to use, and it may be in the end that you would
13 wish to use a stronger term, most particularly because
14 if you conclude under section 17(3) that it is
15 consistent with that duty to have regard to financial
16 implications, then that would mean that you are
17 concluding that it is necessary for ...

18 THE CHAIRMAN: Have you an alternative word to suggest?

19 MR O'CONNOR: The word "necessary" is most probably the word
20 that you might then choose to use, but all we are
21 saying, Sir, we are not suggesting the wording of
22 a communication you may be making in some weeks' time.
23 That is very much a matter for you. All we are saying
24 is that we invite you to regard the word "important"
25 there as an indicator and not necessarily binding you as

1 to how you would communicate.

2 THE CHAIRMAN: I understand.

3 MR O'CONNOR: But subject to that, the word "important" can
4 remain there, we respectfully submit.

5 Sir, the only final sentiment we express about this
6 is that we would ask that for obvious reasons that when
7 you make a decision on this question, and then if and
8 when any relevant minister makes a decision about leave
9 to enter, that such decisions be communicated as soon as
10 practicable to Public Interest Lawyers. We have not the
11 slightest doubt you will, Sir, that of course is right,
12 but it is important that the relevant minister
13 communicates, for example, any refusal to us so that we
14 may consider our --

15 THE CHAIRMAN: Are you suggesting that the decision should
16 be communicated directly from whichever minister or
17 ministers are involved, directly to PIL? Or would you
18 be content that, as would indeed be the case, as soon as
19 I'm notified of any decision, I would communicate it to
20 the core participants, and of course that includes
21 Public Interest Lawyers?

22 MR O'CONNOR: We are content with the latter, provided that
23 you are informed by the minister as soon as practicable
24 of any such decision. It is really making sure that the
25 minister communicates promptly.

1 THE CHAIRMAN: I think you can be confident that I will be
2 anxious to have a decision as soon as possible.

3 MR O'CONNOR: Exactly. There is no need, then, to mention
4 anything about our hearing from the Inquiry. We of
5 course would, very, very quickly.

6 Those are our only submissions upon our application,
7 and subject to those short and very limited caveats, we
8 are very grateful for these draft directions and we most
9 certainly will comply with them. Sir, we do have one or
10 two things to say then about paragraphs 4 and 5 on
11 a quite different topic of the draft directions.

12 THE CHAIRMAN: Shall we come back to that in due course.

13 MR O'CONNOR: Yes.

14 THE CHAIRMAN: Of course. Very well. Thank you,
15 Mr O'Connor. Mr Johnson, I think you should go next.

16 Submissions by MR JOHNSON

17 MR JOHNSON: Sir, thank you. As part of his discussion,
18 Sir, on witnesses, Mr O'Connor understandably
19 distinguished between Iraqi witnesses and MoD witnesses,
20 and we all understand what he means, but it is important
21 to emphasise that all witnesses are your witnesses.
22 There is no parties to this Inquiry. It is not for the
23 Treasury Solicitor or the Ministry of Defence to decide
24 who should give evidence or by what means they should
25 give evidence. Those are all matters for you as the

1 independent Chairman of the Inquiry.

2 Sir, it is common ground that the starting point
3 should be that witnesses attend the hearing room to give
4 evidence. It is also common ground that you have power
5 to direct that individual witnesses should instead give
6 evidence for whatever reason by way of videolink.

7 The issue raised by PIL's application is whether you
8 should exercise that power in respect of at least some
9 of the Iraqi witnesses. In that respect, we broadly
10 agree with the submissions that have been advanced by
11 Counsel to the Inquiry. We will make some submissions
12 and we do both in writing, and I will develop them
13 briefly now, about how you should approach the issue,
14 but contrary to what Mr O'Connor suggested, we do not
15 formally oppose PIL's application. Rather, as Counsel
16 to the Inquiry accurately categorised our position, we
17 don't formally support the application.

18 There are a number of reasons, Sir, why we have not
19 felt it appropriate to make a submission as to how you
20 should determine the ultimate issue that is raised by
21 PIL's application.

22 The first is that we recognise it is very much
23 a matter for you in the exercise of your broad Inquiry
24 case management powers.

25 Secondly, although we make no complaint about this,

1 it is a fact that we do not have the information
2 necessary to make a final judgment. We don't know which
3 particular witnesses are now under consideration by PIL
4 for attending rather than giving evidence by way of
5 videolink. We don't have their witness statements and
6 we don't have the Inquiry's costings for the attendance
7 of those witnesses. We only have the global costings
8 for securing the attendance of all witnesses, and of
9 course our written submissions were made on that basis.

10 THE CHAIRMAN: Yes.

11 MR JOHNSON: Sir, thirdly, the MoD is both a core
12 participant in these proceedings and the sponsoring
13 department for the Inquiry. We are very sensitive to
14 that dual role. Having regard to your independence, we
15 wish to be careful about making submissions about how
16 you should answer this particular issue, where cost is
17 or may be a significant factor. We therefore thought it
18 appropriate simply to advance argument about how you
19 should approach the issue rather than how you should
20 determine it.

21 THE CHAIRMAN: Yes.

22 MR JOHNSON: Sir, our key submission which we have made in
23 writing is that in deciding whether a particular witness
24 should give evidence in the hearing room, you should
25 have regard to your obligations under section 17(3) of

1 the Inquiries Act. That provision imposes two
2 obligations. The first is as to securing fairness and
3 the other is to avoid unnecessary costs.

4 Sir, you must first assess whether it is unfair for
5 evidence to be give by way of videolink. Our short
6 submission is that depending on any specific
7 representations that are made in respect of specific
8 witnesses, it is not generally unfair for evidence to be
9 give by way of videolink. Evidence is routinely given
10 by that means in a number of different contexts, and
11 it is difficult to sustain, in our submission, any
12 suggestion that there would be unfairness due to
13 evidence having a lesser impact or it being more
14 difficult to assess the witness's demeanour.

15 There are two particular reasons for that. The
16 first is that the evidence is not being assessed by
17 a lay jury. There is no question, in our respectful
18 submission, that you would give evidence more or less
19 weight because it has been provided by way of videolink
20 rather than by the witness attending in this room.

21 The second is that the evidence to be given by these
22 witnesses are to be given by witnesses who do not speak
23 English as their first language and will, as we
24 understand it, give evidence through an interpreter.
25 That makes an assessment of demeanour all but

1 irrelevant.

2 Your counsel have developed arguments in relation to
3 both of those points, and also in relation to the point
4 that these are inquisitorial rather than adversarial
5 proceedings, and we agree with those submissions.

6 On the other hand, we also agree with Mr O'Connor
7 that there are practical reasons of convenience rather
8 than reasons of fairness why it might be more convenient
9 for a number of reasons for individual witnesses to
10 attend. One of the examples he gave is practical issues
11 in relation to Rule 12 and sensitive material.

12 THE CHAIRMAN: Yes.

13 MR JOHNSON: Sir, as to costs, we prepared our written
14 submissions, as I say, on the basis of the costs
15 estimate that had been prepared by the Inquiry. Our
16 submission on the basis of that material was that it
17 would require very strong justification to incur the
18 very considerable costs differential that those
19 estimates disclose.

20 Of course, if the proposal now is limited to a much
21 smaller number, then revised costs estimates would have
22 to be prepared. If there is still a cost differential,
23 then you will have to assess whether it is necessary to
24 incur those costs, having regard to your consideration
25 of issues of fairness and convenience. But as I've

1 said, we do not advance any positive submission as to
2 the ultimate conclusion you should draw.

3 So finally on this issue, can I just pick up the
4 suggested direction of Counsel to the Inquiry, which
5 I anticipate you have.

6 THE CHAIRMAN: Yes.

7 MR JOHNSON: As I said at the outset, we broadly agree with
8 the approach which is set out in those directions, but
9 may I just make some observations about them.

10 The first is that although we entirely agree it is
11 appropriate for PIL to identify which witnesses should
12 attend, there is of course no question of you delegating
13 your case management powers to any of the core
14 participants. Similarly, there is no reason why other
15 core participants or the Treasury Solicitor should not
16 have a role in that process.

17 We, as I say, would not wish to advance any
18 submissions as to how you should exercise your powers in
19 respect of any particular witness, but we would in my
20 submission be entitled to be cited on the process and to
21 be informed of the submissions that PIL make.

22 THE CHAIRMAN: Sorry, Mr Johnson, are you saying there is
23 something objectionable about the wording of the first
24 draft direction?

25 MR JOHNSON: Not in itself, Sir, but it might give the

1 impression that this is simply a matter for PIL. My
2 submission is that it is a matter on which all core
3 participants and the Treasury Solicitor could if they
4 wish be involved, so the Treasury Solicitor may also
5 wish --

6 THE CHAIRMAN: I see.

7 MR JOHNSON: It may be that I'm --

8 THE CHAIRMAN: I dare say Mr Acton Davis will deal with that
9 point, yes.

10 MR JOHNSON: There is nothing fundamentally objectionable;
11 it is just that it should be understood in that context.

12 THE CHAIRMAN: I see.

13 MR JOHNSON: The second point is that we rather agree with
14 PIL's submission that it would be wrong arbitrarily and
15 artificially to limit the number to 15. If there are
16 good reasons for particular witnesses to come and give
17 evidence, and your assessment is that the costs justify
18 it, then it is difficult for us to identify any
19 principal reason why that number has been put there.

20 Sir, the third observation we make is that at
21 paragraph 2 where it is said that you should decide
22 which witnesses you would wish in principle to give
23 evidence in person, we entirely agree with that, but our
24 short submission is that you should decide that having
25 regard to the factors we have identified and in

1 particular section 17(3).

2 Fourthly, although it is likely that any decision
3 you make will in reality and for practical reasons be
4 a final decision, it can of course be kept under review,
5 and if witnesses give evidence by videolink and there is
6 any particular concern about the quality of the
7 evidence, then it would at least be possible, although
8 I accept there would be practical difficulties, for your
9 view to be revised and for them to be called to give
10 evidence in the hearing room.

11 Sir, finally, Mr O'Connor drew attention to the word
12 "important" in paragraph 3 of the suggested directions.
13 Our short submission on that is that the appropriate
14 word to use should reflect your conclusion as to the
15 level of desirability of the witnesses attending to give
16 evidence, and there is lots of different words between
17 "desirable", "convenient" and "necessary" that you might
18 choose, but it would depend on your ultimate conclusion.

19 That is all we wish to say, Sir, on PIL's
20 application.

21 There are other matters we would wish to address,
22 but would it be convenient for Mr Garnham to address you
23 first on PIL's application?

24 THE CHAIRMAN: Yes, thank you very much, Mr Johnson.

25 Mr Garnham.

1 the Iraqi witnesses will need interpreters increases the
2 ability of such witnesses to avoid answering questions
3 and we stand by that submission.

4 Third, he says, Sir, that the concerns we set out at
5 paragraph 12 lose their force because the Inquiry is
6 being heard by you, Sir.

7 I'm as keen as the next man to praise my Tribunal at
8 least until I see the judgment, Sir, but we submit that
9 it is impossible to deny that however senior and
10 experienced the Tribunal is, it is more difficult to
11 control an evasive witness, who is 1500 miles away, than
12 it is one who is sitting in the same room as the judge.

13 Difficult also, we would suggest, to resist the
14 proposition that unless video conferencing facilities
15 are perfect, and they never are, that not having the
16 person in front of you makes more difficult, not, we
17 accept, impossible, but makes more difficult the task of
18 judging his demeanour. Impossible, we would suggest, to
19 resist an argument that it is easier to avoid telling
20 the truth if you are sitting in a hotel room with
21 a technician and a camera, than if you are having to
22 stand there in front of a High Court judge and in front
23 of an audience. So we would invite you, Sir, in making
24 your ruling on this, to take into account all the points
25 we make in paragraph 12 of our skeleton.

1 Fourth, Counsel to the Inquiry suggest in
2 paragraph 17 of their notes that we ignore section 17
3 and the importance of avoiding unnecessary costs. On
4 the contrary, Sir, we were the first participants to
5 suggest that the solution to the issue that now falls
6 for decision is to avoid either extreme of calling all
7 100 Iraqi witnesses or of calling none.

8 We suggested in paragraph 17 that the way to
9 reconcile the conflicting imperatives of minimising
10 costs and maximising the advantages of calling witnesses
11 in person, was to call here physically only those Iraqi
12 witnesses who made the most serious allegations against
13 my clients, and by minimising the length of time that
14 they have to spend in the UK for that purpose.

15 In passing, Sir, we would observe that counsel for
16 the MoD puts the section 17 test the wrong way round.
17 The test is not: is it necessary to incur the costs?
18 The test is: is this cost unnecessary? That difference
19 may appear slight, but getting the emphasis right, we
20 would submit, is important. We submit that the cost of
21 calling the critical witnesses is not unnecessary. At
22 the end of all of that, Sir, Counsel to the Inquiry in
23 substance, if not entirely in form, adopts our
24 submissions that the most important witnesses should be
25 invited to give evidence in person.

1 We have one important issue as we see it on the form
2 of the order that Counsel to the Inquiry proposes you
3 should make.

4 THE CHAIRMAN: Yes.

5 MR GARNHAM: We submit it must be for you ultimately, but
6 for the Inquiry, who decides which witnesses should be
7 called in person.

8 Mr Acton Davis's formulation suggests that PII
9 identify the witnesses they would wish to see called in
10 person, and then you decide which of those you wish to
11 hear, subject to it being possible to arrange the
12 mechanics.

13 That, we submit, would be quite wrong. As my
14 learned friend has been at pains to emphasise, this
15 Inquiry is not adversarial. The witnesses are not
16 PII's; they are yours. It should not be the
17 prerogative, we would submit, of one participant to
18 identify witnesses they would like to see here in person
19 and for you to make your selection from that limited
20 list.

21 Sir, the Inquiry is now well advanced in its
22 preparation for the opening at the end of October. The
23 Inquiry, we submit, must be in a position itself to
24 identify which Iraqi witnesses make the most serious
25 allegations against British servicemen, and it should be

1 the Inquiry and ultimately you, Sir, who determines
2 which witnesses ought to be heard in person; you should
3 do so, we submit, without according any favoured status
4 to one participant in pre-selecting the possible
5 candidates.

6 What we submit that means in practice, and what we
7 would suggest as an amendment to Mr Acton Davis's draft,
8 is that paragraph 1 ought to be amended so that it
9 reads:

10 "PIL and the Treasury Solicitor and the MoD ..."

11 Shall identify by that time the witnesses we all
12 think are important. Then you should decide, not out of
13 that list but in the general exercise of your
14 discretion, with the assistance of your counsel, which
15 witnesses should be heard in person.

16 THE CHAIRMAN: I would be less than human, wouldn't I,
17 Mr Garnham, if I were not to have initial recourse to
18 those witnesses identified by the parties as being the
19 key witnesses.

20 MR GARNHAM: Of course.

21 THE CHAIRMAN: But I accept in principle your submission
22 that it is my responsibility to decide which witnesses,
23 and the final decision on that aspect of the matter must
24 rest with me. So are your concerns adequately dealt
25 with by taking out the words "so identified" in

1 paragraph 2?

2 MR GARNHAM: Yes, as regards paragraph 2, and as regards
3 paragraph 1, they would be met by the insertion of the
4 words "and Treasury Solicitors and the MoD" after "PIL"
5 in the first line.

6 I can say, Sir, from the work we have done so far,
7 we would anticipate that Mr O'Connor is about right in
8 the sort of numbers of witnesses who it is important for
9 you to hear from in witness. Whether or not the names
10 we suggest are exactly the same, I don't know.

11 I wouldn't be surprised if they are pretty close, but if
12 you have got suggestions from at least the two of us and
13 the MoD if they choose to, then you might be in
14 a position to exercise that judgment independently.

15 Sir, finally, we submit you should approach with
16 some caution the question whether these Iraqi witnesses
17 are vulnerable.

18 As my learned friend for the MoD rightly submits,
19 vulnerability would depend on whether they are truthful
20 witnesses. No assumptions one way or the other should
21 be made about that. In consequence we submit PIL should
22 not be permitted any greater access to their clients
23 than we are to ours on the grounds of alleged
24 vulnerability. We say that you should keep that point
25 entirely open in dealing with this application.

1 THE CHAIRMAN: Yes, thank you very much, Mr Garnham.

2 Mr Acton Davis.

3 Submissions by MR ACTON DAVIS

4 MR ACTON DAVIS: Sir, it is the instinctive reaction of any
5 one schooled in the English system, be they advocate,
6 judge or former judge, to prefer live evidence in
7 preference to evidence that is given by videolink.

8 However, evidence by videolink has been taking place
9 now for well over a decade and there is judicial
10 authority from the Supreme Court downwards which refers
11 to it as being an entirely satisfactory means of giving
12 evidence. That is the speech of Lord Nicholls which is
13 at tab 16 of our bundle.

14 Whilst, of course, it may detract from the immediacy
15 of being tested under cross-examination, there are two
16 other significant features present in this matter. The
17 first is that these are not adversarial proceedings, and
18 second, the evidence is going to be filtered, whether by
19 video tape or live, through the intervention of
20 interpreters.

21 A powerful driver in our submission against live
22 evidence is the cost of bringing the witnesses to
23 London, and you are obliged by section 17(3) of the 2005
24 Act to bear that in mind. You will find that at tab 15
25 of the bundle.

1 THE CHAIRMAN: Yes, thank you.

2 MR ACTON DAVIS: Of course, if there are only 15 or perhaps
3 20, and if it can be done, the economic argument largely
4 goes. It is not, of course, a matter for you whether
5 the Border Agency gives visas. That is a matter for
6 them, having regard to their own criteria.

7 But the making of a request that a limited and
8 reasonable number of witnesses attend in person and are
9 given visas is something which you may think it
10 appropriate to do. Hence the directions which we have
11 suggested. If they are attractive to you, may I suggest
12 some amendments to reflect what my learned friends have
13 said.

14 THE CHAIRMAN: Yes.

15 MR ACTON DAVIS: Taking first in the order of the paragraphs
16 my learned friend Mr Garnham's suggestions. Sir,
17 I would suggest in the first line the insertion of the
18 words, "and Treasury Solicitors and the Ministry of
19 Defence", so that it reads:

20 "Public Interest Lawyers and the Treasury Solicitors
21 and the Ministry of Defence shall identify by 4 o'clock
22 on 19 July ..."

23 THE CHAIRMAN: Right.

24 MR ACTON DAVIS: Sir, I recognise that it is perhaps
25 premature at this stage to limit the number to 15 but,

1 Sir, it must be clear that the facility is open to only
2 a limited number.

3 THE CHAIRMAN: I suppose the quotation from the application
4 which appears in paragraph 1 makes it clear that we are
5 talking about a small number.

6 MR ACTON DAVIS: Indeed, indeed. So, Sir, I would propose
7 deleting the last phrase, so the words "the number of
8 such witnesses so identified not to exceed 15"
9 disappear.

10 THE CHAIRMAN: Right.

11 MR ACTON DAVIS: That, I think, deals with Mr O'Connor's
12 objection to paragraph 1.

13 THE CHAIRMAN: It does, yes.

14 MR ACTON DAVIS: And also Mr Johnson and reflects the
15 suggestion helpfully made by Mr Garnham.

16 Sir, paragraph 2, I respectfully adopt your
17 suggestion that the words "so identified" simply come
18 out.

19 THE CHAIRMAN: Very well, thank you.

20 MR ACTON DAVIS: Sir, I was attracted by something which
21 I think was pointed out by Mr Johnson; the effect of it
22 was that this is a fluid situation, and it may be as the
23 Inquiry progresses that people want to look again at the
24 identity of Iraqi witnesses who should be offered the
25 facility to come and give live evidence.

1 THE CHAIRMAN: If it helps you, I've put a quick note down
2 of a possible fourth direction, assuming that I'm minded
3 to go down this particular path, to the following
4 effect:
5 "In any event, the question of personal attendance
6 of Iraqi witnesses would be kept under review at all
7 times."
8 MR ACTON DAVIS: Yes, sir. That may be more attractive to
9 you than my suggestion which was this. I'll just give
10 it to you --
11 THE CHAIRMAN: Please do.
12 MR ACTON DAVIS: "liberty to all core participants at any
13 time to apply for additional witnesses to attend in
14 person".
15 The import is the same.
16 THE CHAIRMAN: I think one could combine the two, really.
17 What was your wording? "liberty to all core
18 participants", and TSol, and Treasury Solicitors.
19 MR ACTON DAVIS: Yes. "to apply at any time for additional
20 witnesses to attend in person".
21 THE CHAIRMAN: Right.
22 MR ACTON DAVIS: Sir, as to paragraph 3, I propose that we
23 leave it to you to use the adjective which you think
24 appropriate.
25 THE CHAIRMAN: Yes. Thank you.

1 MR ACTON DAVIS: Can I just, while I'm on my feet, deal with
2 directions 4 and 5?

3 THE CHAIRMAN: Yes, please do.

4 MR ACTON DAVIS: Sir, it would be impertinent and perhaps
5 premature for me to make any submissions about the
6 meaning of the judgment in Al-Skeini. However, it does
7 have potentially significant ramifications for this,
8 amongst other inquiries. The directions in 4 and 5 are
9 intended to flush out from those concerned what they
10 think are the consequences of the judgment so that
11 consideration can be given by all, which will no doubt
12 include those who decide policy, as to what the
13 consequences may be.

14 It may be that the timeframe which we have proposed
15 is unreasonable, in which case I know that you will
16 listen to anything that may be said about dates.

17 But in essence my strong submission is that it would
18 be helpful for the Inquiry to know what all think about
19 the possible consequences of this decision.

20 THE CHAIRMAN: Yes, thank you very much, Mr Acton Davis.

21 Now, Mr O'Connor, it is your application; is there
22 anything that you want to say by way of reply?

23 Reply submissions by MR O'CONNOR

24 MR O'CONNOR: No, sir, save one perhaps relatively small
25 extra point, which is about orientation, and the

1 witnesses being in a position to give evidence -- to do
2 justice to themselves. It is simply this: these are
3 witnesses from poor rural communities, very little
4 familiarity with the kind of technology which is going
5 to be deployed here. If they are in Istanbul they are
6 dependent upon the kind of roaming switching visual
7 communication which we can adjust to. It is no
8 substitute for physical presence in the Inquiry room, an
9 orientation visit, which conventionally is given these
10 days, to introduce them to the layout, and their
11 physically being able to switch with the blink of the
12 eye to the source of an intervention and who is saying
13 what.

14 That is quite different from sitting in front of
15 a television screen which may be a split screen, and
16 switching to somebody who is suddenly saying something,
17 and then of course it has a label saying "the chair" or
18 whatever. It is disorientating and may be discomfiting
19 to a witness giving important evidence.

20 But may I move on from that. I say nothing further
21 by way of reply at all.

22 THE CHAIRMAN: Are you going to come to 4 and 5?

23 MR O'CONNOR: Yes.

24 THE CHAIRMAN: I think, if I may, I will deal with your
25 application first and then I will invite everybody to

1 Second, the Ministry of Defence does not actively
2 support the application although it does not actively
3 oppose it. Essentially the position taken by the
4 Ministry of Defence relates to the cost and logistical
5 implications of the application.

6 Third, Public Interest Lawyers submit that the key
7 Iraqi witnesses which are now said to number about 15 or
8 so, but who are not presently identified, should give
9 their evidence in person. The application is not
10 pressed in relation to the balance of the Iraqi
11 witnesses, however many are involved in that figure.
12 I will come to a central submission made by Counsel to
13 the Inquiry in due course.

14 At this stage it suffices to say that I accept the
15 following propositions put forward mainly by Counsel to
16 the Inquiry.

17 It is preferable, if time, resource and logistical
18 constraints are all put to one side, that witnesses
19 should give evidence in person. However, I do not
20 accept that the ability properly to test the evidence of
21 a witness would be significantly hampered if that
22 evidence is given by videolink in a public inquiry such
23 as this.

24 In my view, as suggested by Counsel to the Inquiry,
25 it is very important to bear in mind the following

1 factors.

2 First, these are inquisitorial and not adversarial
3 proceedings.

4 Second, the evidence of the witnesses with which the
5 Inquiry is presently concerned will be given through an
6 interpreter in any event. Thus the immediacy of
7 cross-examination is likely to be measurably reduced by
8 that process.

9 Third, the long experience of the courts in
10 receiving evidence via videolink is that it should be
11 treated as a readily acceptable alternative to giving
12 evidence in person.

13 Furthermore, I'm satisfied that the cost and
14 logistical difficulties are such that it is neither
15 practicable nor consistent with my duty under section 17
16 of the Inquiries Act 2005 to secure the attendance of
17 all Iraqi witnesses to give evidence in person. For
18 details supporting that conclusion, see the paper
19 dated June 2011 produced by the Secretary to this
20 Inquiry, whose conclusions are based on a hypothetical
21 figure of 100 Iraqi witnesses.

22 However, as I have already indicated, Public
23 Interest Lawyers have now clarified by their written
24 submissions the extent of the application that is made,
25 namely that the application for key Iraqi witnesses to

1 give evidence in person is an application relating to
2 those whose allegations are at the heart of the issues
3 that this Inquiry is considering. This is said to
4 amount to about 15 or so people, although Mr O'Connor
5 has been careful to point out that he is not in
6 a position yet to give a precise figure.

7 In those circumstances, I have come to the
8 conclusion that I should take steps with a view to
9 securing the attendance of that limited number of Iraqi
10 witnesses, namely witnesses that I consider to be at the
11 heart of the issues that the Inquiry is considering.

12 Essentially, this is because the very substantial
13 logistical and cost implications that would otherwise
14 have been associated with a request involving 100 or so
15 witnesses are plainly substantially diminished in
16 relation to a request relating to 15 or so witnesses.
17 I'm supported in that conclusion by the informal
18 indication given to me by the Secretary to the Inquiry
19 once he had seen and considered the written submissions
20 prepared on behalf of Public Interest Lawyers.

21 I therefore propose to adopt the course helpfully
22 pointed out in Counsel to the Inquiry's submissions and
23 give appropriate directions to achieve the end which
24 I have just indicated.

25 Counsel had carefully prepared written draft

1 directions for consideration by all the parties in
2 advance of the hearing. That was a helpful and
3 productive exercise, because it has meant that everybody
4 has had an opportunity to consider the draft directions
5 and make a number of suggested amendments, all of which
6 in effect I accept.

7 Accordingly, so far as concerns the application made
8 by Public Interest Lawyers in their letter dated
9 24 May 2011, I give the following directions.

10 First, Public Interest Lawyers and the
11 Treasury Solicitor and the Ministry of Defence shall
12 identify by 4.00 pm on 19 July 2011 those witnesses whom
13 they consider to be within the category of a "small
14 number of the most significant Iraqi witnesses", giving
15 brief reasons for such identification in each case.

16 Second, I will decide by 26 July 2011 which
17 witnesses I would wish in principle to give evidence in
18 person.

19 Third, I will thereafter communicate my view to
20 a Secretary of State or Secretaries of State, whether
21 the Secretary of State for Defence or the
22 Secretary of State for the Home Department, or both, to
23 be determined following inquiry, that the evidence of
24 these witnesses is important/necessary to the proper
25 carrying out of the work of the Inquiry and that it

1 would assist the Inquiry if they could give evidence in
2 London.

3 Fourth, to the extent that these directions refer to
4 witnesses, they are in each case to be regarded as
5 referring to Iraqi witnesses.

6 Fifth, in any event, the question of personal
7 attendance of Iraqi witnesses will be kept under review
8 by me at all times.

9 Sixth, there is liberty to all core participants and
10 to the Treasury Solicitor to apply at any time for
11 additional witnesses to attend in person.

12 Accordingly, to that extent, this application is
13 granted. I will now turn to deal with the matters
14 relating to paragraphs 4 and 5 of the draft directions.

15 But, Mr Garnham, was there something you wished to say?

16 MR GARNHAM: There is, if I may, Sir. We are in a position
17 to carry out the exercise you have indicated based on
18 the material that we have so far. We, of course, do not
19 have in draft or final form any of the statements which
20 your team have been gathering from the Iraqi witnesses.

21 THE CHAIRMAN: Can I help you. I think there may be some
22 information that will update the position on that
23 particular aspect of the matter, which would probably be
24 better communicated to you by counsel.

25 MR GARNHAM: I'll sit down then, Sir.

1 THE CHAIRMAN: Unless there is anything that anybody else
2 wants to say about the first application, I propose to
3 give the stenographers a short break before we come on
4 to deal with paragraphs 4 and 5 of the draft directions.
5 Ten minutes.

6 (11.30 am)

7 (A short break)

8 (11.40 am)

9 THE CHAIRMAN: Yes, Mr Acton Davis.

10 MR ACTON DAVIS: Sir, that break gave me the opportunity to
11 explain to Mr Garnham that we hope to release the Iraqi
12 witness statements which we have thus far by the end of
13 this week.

14 THE CHAIRMAN: Yes.

15 MR ACTON DAVIS: I say "we hope". I have explained to
16 Mr Garnham that it might be sensible to assume that the
17 hope is delayed until Monday, but that I hope that it
18 will be no later than that. I've told Mr Garnham that
19 it is about two lever-arch bundles. Mr Garnham has told
20 me that on that basis he thinks he needs a little more
21 time. I'm sympathetic to that and I hope you will be as
22 well, but let him make his application.

23 THE CHAIRMAN: Yes, Mr Garnham.

24 Application by MR GARNHAM

25 MR GARNHAM: I'm very grateful to Mr Acton Davis for that

1 indication. It is very helpful.

2 As I said, we have a preliminary view based on the
3 material we have seen thus far who we think are likely
4 to be the critical Iraqi witnesses. I would certainly
5 want to reflect on such a provisional list in the light
6 of these two lever-arch files, and I would invite you to
7 put back the timetable by one week, so as to make it the
8 26th, by which time all parties are to give their
9 suggestions, and presumably the consequential delay for
10 the time when you make the decision.

11 THE CHAIRMAN: Very well. Does anybody else want to say
12 anything about that?

13 No. Well, I will amend the original suggested
14 directions, so that the first direction will read
15 26 July 2011.

16 As for paragraph 2, can anybody tell me what the
17 31st is, what day of the week that is? It is so it is
18 not a Sunday; I want to make sure it is not a Sunday.

19 MR ACTON DAVIS: Sorry, I haven't got a diary.

20 THE CHAIRMAN: The 31st is a Sunday in fact, so paragraph 2,
21 29 July, because I will be able to do at least some of
22 the preliminary work in respect of that in advance of
23 receiving notifications from the parties.

24 MR ACTON DAVIS: Very well, thank you Sir.

25 THE CHAIRMAN: Yes, so in that case we now come to

1 paragraphs 4 and 5 of the suggested draft directions.
2 That of course relates to the implications of the
3 judgment in Al-Skeini recently handed down by the
4 European Court of Human Rights in Strasbourg.

5 Mr O'Connor, do you want to go first on that.

6 Submissions by MR O'CONNOR

7 MR O'CONNOR: Thank you very much. We welcome the
8 initiative taken by your counsel and would welcome
9 directions to enable us to assist you to consider the
10 implications of that decision. We hope to assist
11 further immediately by suggesting actually from our
12 point of view, an acceleration in the timetable proposed
13 which we would be comfortable with. But may I first of
14 all indicate, as I have informally to Mr Acton Davis,
15 that first of all there were two Grand Chamber decisions
16 on the same day, Al-Skeini and Al-Jedda, and it is
17 clearly possible that the Al-Jedda decision might have
18 a different but parallel impact upon your terms of
19 reference. Might, that is all I say now.

20 So we invite you to amend the first sentence to the
21 following effect:

22 "... of any matter arising from the judgments of the
23 European Court of Human Rights in Al-Skeini v UK and
24 Al-Jedda v UK ..."

25 Which may affect the conduct of this Inquiry.

1 Al-Jedda, Sir, made a parallel decision about
2 jurisdiction, but it predominantly addressed article 5
3 and its applicability to those detained in Iraq and of
4 course that applies to all the survivor core
5 participants. So I needn't go any further. I think
6 just for the moment, it may have an impact and we would
7 like the opportunity to address you on that.

8 But as to timing, we are happy to indicate today
9 that we will be making submissions that there should be
10 some amendment to the terms of reference of your Inquiry
11 by reason of one or both of those decisions. We say
12 that in principle; therefore, there is no need to direct
13 us to do that later.

14 What we would like to do, please, is to amalgamate
15 our communication to you of the draft amendments and of
16 our explanation as to why those amendments are required
17 at the same time and may we please do so in two weeks'
18 time, by Tuesday 26 July.

19 THE CHAIRMAN: The 25th or 26th, sorry?

20 MR O'CONNOR: Yes, it is Tuesday the 26th, yes. So that
21 after today we have our eyes on one thing, and we feel
22 no need to, as it were, split up the drafting of the
23 proposed amendments and then the justification, you
24 would like to receive both as soon as possible, the
25 other core participants would like to receive them both

1 as well and we are happy to do so. There are very
2 substantial commitments that my instructing solicitor
3 has in the meanwhile, but as a team, we will progress
4 this as soon as we can. Might I suggest that?

5 THE CHAIRMAN: Right. Very well. Thank you very much. Is
6 there anything further you want to say about it at this
7 stage?

8 MR O'CONNOR: No. The impact, just to spell it out, would
9 be that you would have no need for paragraph (1), no
10 need for paragraph (3) and the new paragraph 1 should be
11 to set out what amendment is to be sought and the
12 reasons therefore by Tuesday, 26 July.

13 THE CHAIRMAN: Right. Thank you very much, Mr O'Connor.
14 Mr Johnson.

15 Submissions by MR JOHNSON

16 MR JOHNSON: Sir, thank you. Sir, before I come to
17 paragraphs 4 and 5 of the draft order, may I very
18 briefly raise a linked matter which we raised in our
19 written submissions, and that is the question of the
20 Inquiry's start date.

21 THE CHAIRMAN: Yes.

22 MR JOHNSON: Sir, we are continuing to work towards a start
23 date of 31 October, and we will continue to do what we
24 can to facilitate that. We have, for example, agreed to
25 timescales for the turning around of evidence which is

1 designed to achieve that start date. But there are
2 a number of reasons why we have questioned in our
3 written submissions whether the start date remains
4 realistic.

5 They include what appears to us to have been a delay
6 in the provision of witness statements. We, until
7 yesterday I think, had not seen a single witness
8 statement for the purposes of assessing public interest
9 issues. We are therefore concerned as to whether the
10 start date remains realistic.

11 We are assuming, consistently with what Counsel to
12 the Inquiry has said on previous directions hearings,
13 that it is intended that the bulk of the witness
14 statements will be made available before the Inquiry
15 starts.

16 In our submission that is necessary. We say that
17 not because we suggest that core participants have an
18 absolute right to question every witness. Plainly they
19 don't. But they do have a right to ask you for
20 permission to question witnesses, and that right can
21 only be exercised if core participants have the material
22 available in order to know whether they should be asking
23 particular questions of particular witnesses.

24 So all we say is that if the Inquiry shares our
25 concern that the start date is now potentially in

1 jeopardy, that should be confronted sooner rather than
2 later.

3 Sir, I raise that particularly now because it is
4 linked to the question of the impact of the Al-Skeini
5 and Al-Jedda judgments. Those important judgments of
6 the European Court are less than a week old. They
7 plainly both raise important issues which will require
8 very careful and detailed consideration. The suggested
9 directions of your counsel contemplate that those
10 decisions might impact on your terms of reference. You
11 will be in a far better position than any of us to
12 assess whether that possibility in turn has implications
13 for the start date, and it is a further reason why we
14 respectfully submit that the question of the start date
15 should be confronted sooner rather than later.

16 Sir, as to the particular directions that are being
17 suggested, we entirely support your counsel's suggestion
18 that PIL should be invited to notify the Inquiry of any
19 matters arising from the judgments which might affect
20 the Inquiry's conduct.

21 We also entirely agree with Mr O'Connor's proposed
22 amendments to the direction, particularly so as to
23 encapsulate any observations PIL may wish to make
24 on Al-Jedda as well as Al-Skeini.

25 Sir, again, as we submitted in relation to

1 paragraph 1 of the directions, there is no necessary
2 reason why that should be limited to PIL. The
3 Treasury Solicitor may for its part also have a view as
4 to the impact of these judgments on the terms of
5 reference, and if they do, they likewise should be
6 permitted to advance any representations they wish to.

7 Similarly, the Inquiry itself may have a view, and
8 if the Inquiry wishes to advance representations to the
9 Secretary of State, then of course it can do so. I'm
10 not suggesting that you direct yourself to do anything,
11 but I simply make the observation that it shouldn't be
12 limited to PIL, that anyone who wishes to make
13 observations can of course do so.

14 Sir, we are of course very willing to discuss these
15 matters with the Inquiry, and of course any change in
16 the terms of reference would only take place and could
17 only take place after consultation with you as
18 Chairman of the Inquiry.

19 For those reasons, and also because as
20 Mr Acton Davis suggested a moment ago, the timetable is
21 frankly unrealistic so far as the MoD is concerned, we
22 do not support the suggestion that we should notify you
23 by 19 July whether, irrespective of any requests given
24 by PIL, the Secretary of State for Defence intends to
25 amend the terms of reference.

1 We would not unilaterally prejudge any submissions
2 that are made by PIL or anybody else, and it is only
3 after we have had an opportunity, or the
4 Secretary of State has had an opportunity to consider
5 those matters, that the Secretary of State would be in
6 a position to form a judgment, again in consultation
7 with you.

8 So we support paragraph -- what is old paragraph 4
9 in the numbering.

10 THE CHAIRMAN: As amended by Mr O'Connor.

11 MR JOHNSON: As amended by Mr O'Connor.

12 THE CHAIRMAN: Yes.

13 MR JOHNSON: We submit that paragraph 5 is not appropriate
14 or necessary, but we will, of course, engage in
15 a dialogue with the Inquiry and with PIL and the
16 Treasury Solicitor if they wish, over these matters.

17 THE CHAIRMAN: Very well. Thank you very much, Mr Johnson.
18 Mr Garnham?

19 Reply submissions by MR GARNHAM

20 MR GARNHAM: Sir, I have very little to say, save to adopt
21 and endorse what Mr Johnson says about
22 Treasury Solicitor being at liberty to put in
23 submissions if so advised.

24 THE CHAIRMAN: Yes, very well. Mr Acton Davis.

25

1 Inquiry, hence our wish to flush that out as soon as
2 possible.

3 I would have hoped that the MoD, during the 12
4 months or so in which we have all been waiting for
5 the Al-Skeini judgment, would have given some thought to
6 how they might react to your terms of reference in the
7 event that Al-Skeini went the way in which it did go.

8 Similarly, because of the reasons mentioned by
9 Mr Johnson for wanting me to disclose my hand as soon as
10 possible, in particular the importance of not wasting
11 money, I would have hoped that the MoD would be in
12 a position to give us its views on the Al-Skeini
13 judgment as soon as is possible.

14 If the scope of the Inquiry is to be broadened or if
15 some other step is to be taken, it is important in my
16 respectful submission that that particular nettle is
17 grasped before the end of July, otherwise we are
18 in September.

19 So whilst perhaps the date of 19 July was intended
20 to flush out some sort of response, perhaps asking for
21 another seven days, it certainly was not intended to
22 flush out some kind of response along the lines of the
23 never-never.

24 Sir, I would invite you to direct the MoD by, say,
25 26 July, which is the date that PIL has signed up to, to

1 give us the information which we seek.

2 THE CHAIRMAN: Yes thank you. Mr Johnson, is there any
3 reason why that cannot be done?

4 Further submissions by MR JOHNSON

5 MR JOHNSON: Sir, yes, there are two reasons. The first, as
6 I say, is that if we were to do that, we would be
7 pre-judging everything that PIL and the
8 Treasury Solicitor wished to say. It is not appropriate
9 for us to announce our views -- I keep saying our views,
10 I mean the Secretary of State's views -- on the impact
11 of Al-Skeini when the Secretary of State may himself
12 have to reach a decision on representations that are
13 made by PIL and the Treasury Solicitor.

14 So that is the first reason. In our submission it
15 is wrong in principle for the Secretary of State
16 unilaterally to prejudge the appropriate response to
17 these judgments. It should be an announcement that is
18 made, taking account of all relevant representations.

19 Sir, the second point is that the consequences of
20 these two very important judgments cannot be
21 sufficiently addressed within the very short time period
22 that my learned friend suggests. We were given notice
23 of this suggested direction, I think only in the last
24 day or so. It is a suggested direction that we respond
25 to one important decision, now very two important

1 decisions of the European Court of Human Rights within
2 a period of days.

3 The reality, Sir, is that the Government's response
4 will require a very careful consideration, not just
5 within the Ministry of Defence, but throughout
6 Government, and it would be rash to give a response in
7 the form of this Inquiry within a short period of time,
8 whereas, as will be very apparent from the face of the
9 judgments, the consequences of those decisions have
10 potential ramifications well beyond the ambit of this
11 Inquiry.

12 Much as we would wish to provide the assistance my
13 learned friend seeks, the Secretary of State is not
14 simply concerned with the conduct of this Inquiry, very
15 important though that is. The Secretary of State must
16 also consider and Government must also consider the much
17 wider ramifications of these judgments. I regret that
18 we would not be in a position to provide the information
19 that is sought within the time period suggested.

20 We could, of course, formally comply with it by
21 saying on 19 or 26 July that as at that date there is no
22 present intention to amend the terms of reference,
23 because the consequences haven't fully been thought
24 through, but that sort of approach wouldn't assist
25 anybody. Rather than force the MoD and the

1 Secretary of State into that sort of position, in our
2 submission, the appropriate response is for the Inquiry
3 and the Ministry of Defence to engage in a form of
4 dialogue together with PIL, together, if the
5 Treasury Solicitor wishes to participate, with the
6 Treasury Solicitor, to seek to resolve the implications
7 of these important judgments on your terms of reference.

8 THE CHAIRMAN: You can see, of course, that driving
9 Mr Acton Davis's concerns in this field is that if there
10 is to be an amendment to the terms of reference and/or
11 there is some other step, some other course of conduct,
12 course of action to be taken in the light of the two
13 judgments, and in particular Al-Skeini, then the sooner
14 we know about that the better, because it goes without
15 saying, it will have huge implications for the
16 commencement date of this Inquiry.

17 It is bound to have, if there is to be, let's say,
18 an amendment to the terms of reference so as to embrace,
19 let's say, a consideration of allegations of unlawful
20 killing on the battlefield as opposed to in CAN, as well
21 as in CAN, well, that is bound to have a significant
22 impact on the prospects of being able to be ready to
23 start by 31 October.

24 I have a great deal of sympathy with Counsel to the
25 Inquiry doing everything he can to find out what lies in

1 the immediate future, so that this Inquiry is best
2 informed as to the prospect of being able to start on
3 31 October.

4 So having said that, I can understand your concerns
5 for the Secretary of State not being in effect put into
6 a position where he gives a fairly unhelpful answer by
7 a due date, because there are too many things to be
8 considered. But what do you suggest we do if anything,
9 constructively?

10 MR JOHNSON: Sir, constructively I suggest that we embark on
11 the process which I outlined, which is for PIL, as they
12 have helpfully agreed to do, to provide their detailed
13 observations within a relatively short period of time;
14 Counsel to the Inquiry if he wishes to provide, or the
15 Inquiry generally to provide their observations; and the
16 Treasury Solicitor and the Secretary of State will then
17 engage with the Inquiry and with others as to the
18 appropriate response.

19 There is no question of our position having to be
20 flushed out; we are very happy to sit down with the
21 Inquiry and to discuss these matters, but we are not in
22 a position to be able to agree to an artificial date,
23 which may cause more problems than it solves.

24 THE CHAIRMAN: All right. Mr Acton Davis, it doesn't seem
25 to me that it is going to be terribly helpful to have

1 a fairly negative response from the Secretary of State
2 by 26 July.

3 MR ACTON DAVIS: Sir, I can do no more. I have tried and
4 I can do no more.

5 THE CHAIRMAN: What I propose to do at the moment then is to
6 give the direction as drafted in paragraph 4 but as
7 amended by Mr O'Connor. The precise terms of the
8 amendment are not actually at my fingertips but I will
9 leave you and he to agree that in due course.

10 MR ACTON DAVIS: Indeed, of course.

11 THE CHAIRMAN: Then what I will do is simply do no more than
12 indicate to the Secretary of State that it is my earnest
13 wish that as soon as the Secretary of State is in
14 a position to do so, in the light of the indications
15 given by Public Interest Lawyers, that there should be
16 meaningful and constructive discussions between all the
17 parties as to the implications of the Al-Skeini
18 and Al-Jedda judgments and what action if any the
19 Secretary of State proposes to take in the light of
20 those judgments, and in the light of the applications to
21 amend the terms of reference, and that that should be
22 done as soon as possible, and including during August if
23 at all possible.

24 I don't know that I can do more than that,
25 Mr Acton Davis.

1 MR ACTON DAVIS: Sir, no, no more can be done.

2 THE CHAIRMAN: I shall be, shall I say, dismayed if I'm not
3 in a position to know what the implications of those
4 judgments are so far as concerns this Inquiry by the
5 early part of August.

6 MR ACTON DAVIS: Thank you very much.

7 THE CHAIRMAN: I can do no more than that.

8 MR ACTON DAVIS: Thank you, Sir.

9 That as far as I'm aware completes our agenda.

10 THE CHAIRMAN: Thank you very much indeed. Thank you
11 everybody.

12 (12.05 pm)

13 (The hearing concluded)

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