

Tuesday, 9 March 2010

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(10.30 am)

Opening statement by THE CHAIRMAN TO THE INQUIRY

THE CHAIRMAN: Good morning, everybody. Now this is a Public Inquiry established by the Secretary of State for Defence, the Right Honourable Bob Ainsworth MP, under the Inquiries Act 2005 on 29 November 2009.

As most of you probably already know, I am Sir Thayne Forbes. I was called to the Bar in 1968 and appointed Queen's Counsel in 1984. In 1990 I was appointed as a senior circuit judge and assigned to deal with the business of what is now the Technology and Construction Court.

In 1993 I was made a High Court judge and assigned to the Queen's Bench Division. I was appointed to hear cases in the Crown Office list, as it was then known, now the Administrative Court, in 1995.

As presiding judge of the Northern Circuit I conducted the trial of Harold Shipman on 15 counts of murder. From 2001 until 2004, I was the High Court judge in charge of the Technology and Construction Court. I retired from the High Court bench in January 2009, but have been approved by the Lord Chief Justice to continue to sit as a High Court judge on a part-time basis in the Queen's Bench Division, the Administrative

1 Court and the Court of Appeal Criminal Division.

2 On 29 November 2009, I was invited by the Secretary  
3 of State for Defence to be the chairman of this Inquiry.

4 I am supported by three counsel: Mr Jonathan  
5 Acton Davis, Queen's Counsel, who is Leading Counsel to  
6 the Inquiry, Mr Jason Beer and Ms Emma Gargitter who are  
7 the Junior Counsel to the Inquiry. The Inquiry  
8 solicitor is Ms Jillian Glass. The Secretary to the  
9 Inquiry is Mr Lee Hughes CBE.

10 They all work from the Inquiry's offices, the  
11 details of which are to be found on the Inquiry's  
12 website at [www.alsweadyinquiry.org](http://www.alsweadyinquiry.org).

13 The terms of reference.

14 The Inquiry's terms of reference are as follows --  
15 and I quote:

16 "To investigate and report on the allegations made  
17 by the claimants in the Al-Sweady judicial review  
18 proceedings against British soldiers of (1) unlawful  
19 killing at Camp Abu Naji on 14 and 15 May 2004, and (2)  
20 the ill-treatment of five Iraqi nationals detained at  
21 Camp Abu Naji and subsequently at the divisional  
22 temporary detention facility at Shaibah Logistics Base  
23 between 14 May and 23 September 2004, taking account of  
24 the investigations which have already taken place, and  
25 to make recommendations."

1           The terms of reference require the Inquiry to do  
2 three things:

3           First, to investigate. This stage comprises the  
4 investigative, evidence gathering and public hearing  
5 parts of the Inquiry.

6           Second, to report. This stage of the Inquiry  
7 crystallises in the writing of my report to the  
8 Secretary of State for Defence.

9           Third, to make recommendations. This obligation  
10 will also fall to be discharged at the report-writing  
11 stage.

12           I turn now briefly to the factual background.

13           In proceedings for judicial review brought in the  
14 Administrative Court, Mr Al-Sweady, an Iraqi national,  
15 alleged that his nephew was one of those said to have  
16 been unlawfully killed whilst in the custody of British  
17 troops at Camp Abu Naji between 14 and 15 May 2004. In  
18 the same proceedings, five further Iraqi nationals,  
19 Hussein Fadel Abass, Atiyah Sayid Abdelreza, Hussein  
20 Jabbari Ali, Mahdi Jassim Abdullah and Ahmad Jabbar  
21 Ahmood, alleged that they were mistreated by British  
22 forces in breach of their human rights whilst in custody  
23 at Camp Abu Naji and when subsequently detained at  
24 Al Shaibah for approximately five months.

25           The six Iraqi nationals applied to the

1 Administrative Court in respect of an alleged failure by  
2 the Secretary of State for Defence to conduct an  
3 independent inquiry into their allegations, to accept  
4 liability for the death, mistreatment and unlawful  
5 detention of the applicants and to pay just  
6 satisfaction.

7 After a number of hearings in April, May, July and  
8 August 2009, the Secretary of State for Defence informed  
9 the court that, in the light of failings in the  
10 disclosure process by the Ministry of Defence, an  
11 independent inquiry compliant with the procedural  
12 requirements of Articles 2 and 3 of the European  
13 Convention on Human Rights would be carried out. That  
14 is the purpose of this Inquiry.

15 The proceedings themselves in the  
16 Administrative Court are currently stayed. On 2 October  
17 2009, the Administrative Court handed down a judgment,  
18 which was reported at [2009] EWHC 2387 (Admin) in which  
19 the history of that litigation is set out.

20 The Inquiry's approach.

21 Unlike some previous inquiries there have been to  
22 date, no fact-finding exercises such as a trial in which  
23 the allegations outlined in the proceedings in the  
24 Administrative Court have been explored in detail so as  
25 to enable any findings of fact to be made as a result of

1           such a trial. At this juncture, it is important to  
2           emphasise that HM Armed Forces and its individual  
3           soldiers of all ranks deny the alleged unlawful killing  
4           and/or ill-treatment. Thus, the first step which the  
5           Inquiry and its team must carry out is to identify and  
6           gather all the available evidence that will enable an  
7           effective factual investigation to be made into these  
8           allegations and denials. Of necessity, that task will  
9           require considerable preparation and research.

10           I do stress that this Inquiry is wholly independent  
11           and will carry out its work with thoroughness and  
12           fairness. I shall control the conduct of this Inquiry  
13           and decide what evidence I shall receive. The decisions  
14           and recommendations which I make following the  
15           conclusion of the Inquiry and which will be set out in  
16           my report to the Secretary of State for Defence will be  
17           mine and mine alone.

18           I intend to adopt flexible, even-handed and open  
19           procedures which will enable the Inquiry expeditiously  
20           and economically to establish the facts and to make  
21           recommendations.

22           As everybody is fully aware, the Inquiry's process  
23           is an inquisitorial and not an adversarial one. The  
24           Inquiry will itself seek to find out the truth. The  
25           Inquiry will itself gather in the relevant documents,

1 obtain witness statements and decide from whom oral  
2 evidence should be heard. The Inquiry will not treat  
3 those from whom it obtains any such material or from  
4 whom it obtains witness statements or hears evidence as  
5 parties in an adversarial contest or trial. Although  
6 I will make factual findings based on the evidence and  
7 may make recommendations to the Secretary of State, I am  
8 not empowered under the legislation to make any finding  
9 of criminal or civil liability on the part of any  
10 individual or groups of individuals.

11 Thus, there are no parties as such to the Inquiry.  
12 Some individuals and organisations may be granted core  
13 participant status, but they are not claimants or  
14 defendants and this is not a trial. These proceedings  
15 are unlike a civil or criminal trial in which there are  
16 two sides with each side calling its own witnesses and  
17 advancing its own case.

18 Counsel to the Inquiry will call all the evidence  
19 and, for the most part, it will be them that test it in  
20 order to enable me to reach appropriate conclusions.  
21 I do not expect any lawyer who appears before me to be  
22 running a case.

23 I turn now to the subject of core participants.  
24 I have already made clear to the solicitors for the six  
25 claimants in the judicial review proceedings that

1 I intend to designate each of those claimants a core  
2 participant, provided that each consents to being so  
3 designated. I have asked the solicitors to provide some  
4 further information to me before I formally make that  
5 designation. I hope that that information can be  
6 provided as soon as possible.

7 I will consider in due course the designation of  
8 other bodies or individuals as core participants.

9 The core participants and their lawyers are hear to  
10 assist me in respect of the matters set out in the terms  
11 of reference. This is a fundamental point, which will  
12 underpin all of the Inquiry's work. Decisions as to the  
13 work of the Inquiry have been and will continue to be  
14 mine and mine alone.

15 The Inquiry hopes and expects to receive cooperation  
16 from all persons or organisations with relevant material  
17 or evidence, including in particular all agencies of  
18 Government and the State. However, should that  
19 cooperation not be forthcoming, the Inquiry will not  
20 hesitate to use its compulsory powers in relation to the  
21 production of documents and the attendance of witnesses  
22 to give evidence, should it decide that such use is  
23 required for the effective discharge of its duties of  
24 fairness, thoroughness and impartiality.

25 Public hearings.

1           As I have already said, this is a public Inquiry.  
2           This means that the hearings will be conducted in public  
3           and in an open and transparent manner. There may,  
4           exceptionally and only for good reason, be occasions  
5           when some particular piece of evidence cannot be heard  
6           in public or has to be given in a manner which will  
7           preserve the anonymity of the witness. The same  
8           considerations may arise in relation to written  
9           evidence. Whether any of this will arise once the  
10          public hearings begin, I do not yet know. If it is  
11          argued in relation to any evidence or witness that they  
12          do, the argument will have to be considered and ruled  
13          upon by me as and when it arises.

14          Representatives of the media will be welcome at all  
15          of the Inquiry's hearings. The Inquiry Secretary will  
16          make arrangements to accommodate the media's attendance  
17          and to facilitate full and proper reporting of the  
18          Inquiry's proceedings.

19          There are requirements imposed upon me as chairman,  
20          under the Inquiries Act 2005, in respect of public  
21          access to proceedings and information. Those  
22          requirements apply equally to members of the press.  
23          I would, however, take this opportunity to point out  
24          that in terms of the Act, no recording or broadcasting  
25          of the proceedings at the Inquiry may be made, except at

1 my request or with my consent and in accordance with any  
2 terms in which such permission is given.

3 In addition, the Inquiry will make full use of its  
4 website so as to put evidence considered by it and the  
5 transcripts of its hearings into the public domain.  
6 Transcription of the evidence will be using the  
7 Transcend system. It will be made available in redacted  
8 form, if necessary, to represented parties each day.

9 The evidence will be placed on the website daily  
10 unless, of course, it has been taken in camera. Subject  
11 to what I am about to say, the Inquiry will assume that  
12 information, documents and statements provided to it may  
13 be distributed to the core participants and referred to  
14 at the Inquiry's public hearings.

15 However, should the private address, telephone  
16 number or other contact details of any individual appear  
17 in any document or statement provided to the Inquiry,  
18 those details will be deleted prior to distribution to  
19 the core participant and no reference to these details  
20 will be made in the course of the full hearing or in any  
21 material made public by the Inquiry.

22 Where a person or organisation considers that any  
23 other personal details or other information or any part  
24 of a document or statement should not be disclosed to  
25 the core participants or made public, the Solicitor to

1 the Inquiry should be informed without delay. Reasons  
2 for the objection taken should be provided in writing.  
3 I will consider all such representations and make  
4 appropriate decisions, either on the basis of the  
5 representations or, as necessary, following a dedicated  
6 oral hearing.

7 I am not yet in a position to identify the precise  
8 format of the Inquiry. I anticipate that, as has been  
9 done before, the Inquiry will be broken down into  
10 modules, but the identification of those modules must  
11 await the formulation of the preliminary list of issues  
12 upon which the Inquiry team is currently working.

13 As to procedure, all witnesses will be the Inquiry's  
14 witnesses. They will be called and examined by Counsel  
15 to the Inquiry. The Inquiry intends to be directly and  
16 closely involved in the taking of witness statements.

17 I wish to make it clear that witnesses are not  
18 necessarily core participants. There are provisions in  
19 the legislation through which an individual witness's  
20 legal or financial interests are protected in  
21 appropriate circumstances. I may allow examination of  
22 witnesses by other parties but only on notice in  
23 accordance with Rule 10 of the Inquiries Rules 2006.  
24 I shall not permit the same topic to be canvassed by  
25 more than one party and where this requires prior

1           consultation and cooperation between the parties,  
2           I shall expect it to have been carried out.

3           In due course I will publish the procedures to be  
4           adopted for notification of possible criticism of core  
5           participants and/or witnesses.

6           We are, of course, at a very preliminary stage in  
7           this Inquiry. At the appropriate time I will have to  
8           consider the exercise of my powers under Section 21 of  
9           the Inquiries Act 2005 to require the attendance of  
10          witnesses and the production of documents, and, when the  
11          core participants are designated, the issue of legal  
12          representation. As must be apparent, it is too early to  
13          deal with such matters today.

14          I would ask that anyone who has any relevant  
15          information to contribute should provide it as soon as  
16          possible to the Inquiry's solicitor. Anyone who has any  
17          suggestions to make about a possible line of Inquiry is  
18          also asked to do the same as soon as possible.

19          These are two important requests because the  
20          evidence and the issues to be considered will be  
21          prepared and presented by Counsel to the Inquiry.  
22          Theirs is a neutral role, as is appropriate for lawyers  
23          whose task it is not to argue a case but to place before  
24          me all the evidence and considerations which have any  
25          relevance to the issues of fact which I shall have to

1           decide. I should like to stress that I embark upon my  
2           task without any preconception as to where the truth  
3           lies.

4           The full hearings will take place in this room at  
5           Finlaison House, 15/17 Furnival Street, London,  
6           EC4A 1AB. At this stage it is difficult to say  
7           precisely when the hearing of evidence will begin,  
8           bearing in mind the time needed to enable the Solicitor  
9           and Counsel to the Inquiry to gather and prepare the  
10          evidence and for the core participants to consider it.  
11          As soon as it is possible to do so, the Inquiry will  
12          announce the date of the commencement of its full  
13          hearings.

14          At the beginning of the full hearings, there will be  
15          an opening statement by Counsel to the Inquiry.  
16          Thereafter, the Inquiry may invite the representatives  
17          of the core participants to make short opening  
18          statements. It is likely that all such opening  
19          statements will follow the delivery of written  
20          submissions in advance of the full hearing and will be  
21          time-limited in accordance with a timetable for the full  
22          hearings which will be produced and published in due  
23          course.

24          Subject to the need to retain some flexibility to  
25          meet circumstances which may arise, my aim is to sit on

1 Mondays to Thursday, generally from 10 am until 4.15 pm,  
2 breaking off for lunch from 1 pm to 2 pm.

3 I will now ask Mr Acton Davis to set out in summary  
4 form the work that needs to be done before the Inquiry  
5 can begin its full hearings. This is so that all  
6 present will understand the extent and range of the  
7 investigation which will need to be conducted even  
8 before the oral evidence is heard. This is the next  
9 stage of the work, which will take us from here until  
10 the start of the full hearings.

11 Mr Acton Davis will outline the Inquiry's plans in  
12 relation to that work.

13 Mr Acton Davis.

14 Opening statement by LEADING COUNSEL TO THE INQUIRY

15 MR ACTON DAVIS: Sir, before I do so, may I first mention  
16 the question of representation. As you know, Sir, the  
17 three of us are here on behalf of the Inquiry. To my  
18 left is Mr O'Connor, who is instructed by PIL, and to my  
19 right is Ms Melanie Cumberland, who is here on behalf of  
20 the Ministry of Defence.

21 Sir, thank you for that introduction. The work to  
22 be done includes the following tasks. I emphasise the  
23 word "includes" because, as you have outlined, we find  
24 ourselves in this Inquiry in unusual circumstances. It  
25 is important to highlight, as you have done, that the

1 terms of reference first require investigation of the  
2 wide range of allegations and denials.

3 The first step is the preparation of a list of  
4 issues of the matters which will be considered within  
5 the terms of reference. I am able to tell you that the  
6 work has already begun on that, although it is of  
7 a preliminary nature thus far. Requests for assistance  
8 have been made to PIL, who were the solicitors for the  
9 claimants in the administrative court proceedings, and  
10 the MoD as to the issues which they consider ought to be  
11 included in that list. I am very glad to say that we  
12 have already received some assistance from PIL and  
13 through Mr O'Connor I would like to express my gratitude  
14 to PIL for that assistance.

15 In terms of documents, the Inquiry team has the  
16 bundles of documents used in the Administrative Court  
17 and the documents already received from PIL and the MoD.  
18 PIL have also provided a helpful briefing note and  
19 a selection of documents. The MoD have provided over  
20 8,000 documents. Those documents are now on  
21 a computerised document management system. Work must  
22 begin on reading and analysing those documents.  
23 Inevitably, during the course of consideration of those  
24 documents, it will become necessary to ask for further  
25 material. May I respectfully echo the request that all

1 persons or organisations with relevant material or  
2 evidence provide that material to us, the Inquiry team.

3 I am glad to say that the Inquiry has engaged the  
4 services of an investigative team. The team has been  
5 provided by Gifford Owen and includes experienced former  
6 police officers. It has its own administrative support.  
7 The team currently numbers four, but should that prove  
8 insufficient for the task, that number can be increased.  
9 It is headed by a former detective chief superintendent,  
10 Stephen Condon, who sits there, who, during his police  
11 career, led one of the murder squads at Scotland Yard,  
12 where he managed up to 12 simultaneous murder  
13 investigations. Subsequently, his experience includes  
14 advising the defence team of a former Prime Minister of  
15 Kosovo who had been indicted on 38 counts of war crimes.  
16 Which included 40 allegations of murder. His team are  
17 equally distinguished.

18 It has been decided that what is required in the  
19 particular circumstances of this Inquiry is  
20 a police-style investigation to ensure that the Inquiry  
21 has available to it as much of the factual matrix as is  
22 possible when the oral hearings take place.

23 Part of the role of the investigative team will be  
24 the taking of witness statements, although I anticipate  
25 that lawyers will also be required for that task. It

1           may prove necessary for members of the investigative  
2           team to give evidence about their work when the hearings  
3           begin and the team will approach its task on that basis.

4           I must make clear that the scale of the taking of  
5           witness statements should not be misunderstood. It is  
6           potentially very large indeed. I anticipate that it  
7           will be necessary to obtain and take witness statements  
8           from those at the battlefield, which was not one  
9           discrete area but spread over at least two defined  
10          locations, and, of course, at Camp Abu Naji and the  
11          divisional temporary detention facility at Shaibah  
12          Logistics Base. The relevant time period is between  
13          14 May and 23 September 2004.

14          Steps will have to be taken first to identify, then  
15          to locate and, third, to interview Iraqi nationals.  
16          Similar steps will have to be taken in relation to  
17          serving and former members of HM Armed Forces, some of  
18          whom will have left the army and some of whom will be  
19          engaged on operations overseas. You will understand  
20          from that outline, Sir, that there is much to be done  
21          before any oral hearings can begin.

22          Once the work on the documents has been completed by  
23          the Inquiry team, disclosure of those documents and  
24          subsequently witness statements to the core participants  
25          can begin. I am afraid that I think it unlikely that

1 the Inquiry team will be in a position to begin  
2 disclosure of documents before September of this year.

3 Additionally, there will be procedural matters for  
4 consideration by the team and probably in due course by  
5 you. They include the following as potential issues:

6 "(i), anonymity applications;

7 (ii) such undertakings as may be appropriate from  
8 the Attorney General and other public authorities;

9 (iii) issues over redaction of material on national  
10 security/PII or other legal grounds;

11 (iv) issues over the obligation to make disclosure  
12 of documents and electronic communications. That issue,  
13 of course, played such a large part in the proceedings  
14 before the Administrative Court.

15 As I have said, there is much to be done by the  
16 Inquiry team. It is likely that complexities and  
17 practical difficulties lie ahead before any hearings can  
18 commence. However, I know that you wish us to proceed  
19 as quickly as is reasonably possible. Without in any  
20 way wishing to offer any commitment, because I cannot do  
21 so, I express the hope that I will be in a position to  
22 open this Inquiry to you later this year.

23 Last, and in that context, may I repeat something  
24 which you have already said, in order to seek  
25 cooperation and help. This is not an adversarial

1 process. It is inquisitorial. The team which I lead  
2 will need the cooperation of those who are represented  
3 today as well as those who will be represented at future  
4 hearings. Our role is not to run any particular case or  
5 argument but to put all the facts and context that we  
6 can uncover before you in a neutral manner so that you  
7 may meet your terms of reference.

8 THE CHAIRMAN: Thank you, Mr Acton Davis.

9 Mr O'Connor, I have received a note from you, which  
10 I have read. Would you like to speak to that note and  
11 add any other matter that you wish to raise?

12 Remarks by MR O'CONNOR

13 MR O'CONNOR: Sir, just very generally, we thank you, Sir,  
14 and Counsel to the Inquiry for all your remarks, and  
15 although our clients are at some distance from here, we  
16 are confident that they will gain comfort from them as  
17 to their faith in the future process in this very  
18 important Inquiry.

19 We do not feel it is appropriate to explore further  
20 practical matters which we put in writing. We feel,  
21 Sir, unless you suggest otherwise, it is far better for  
22 us to explore it in correspondence. We are anxious to  
23 get on with the job of putting ourselves in a position  
24 to assist you to the maximum and we want to do so as  
25 soon as possible, but consistently with your wishes.

1 All we can do is really repeat our gratitude for your  
2 comments.

3 THE CHAIRMAN: Thank you very much, Mr O'Connor. It may  
4 help you to know that my understanding is that the draft  
5 Section 40 determination -- that is to say the  
6 determination by the Secretary of State under Section 40  
7 of the 2005 Act -- is currently either before him or  
8 about to be placed before him, and we anticipate that it  
9 will be issued in the very near future.

10 MR O'CONNOR: Thank you very much.

11 THE CHAIRMAN: Thank you very much.

12 Ms Cumberland, is there anything you wish to raise  
13 by way of any other business?

14 MS CUMBERLAND: Sir, no, I am very grateful.

15 THE CHAIRMAN: In that case, unless anybody else wishes to  
16 raise anything, that concludes today's proceedings.  
17 Thank you all very much. Thank you all very much for  
18 attending.

19 (11.00 am)

20 (The proceedings concluded)

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