Neutral Citation Number: [2015] EWCA Civ 770

Case No: C1/2014/2564

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
Lord Justice Fulford & Mr Justice Leggatt
CO/7009/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 July 2015

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LEWISON
and
LORD JUSTICE UNDERHILL

- -

Between :

THE QUEEN ON THE APPLICATION OF LONG	**Appellant**
- and -	
SECRETARY OF STATE FOR DEFENCE	**Respondent**

- -
- -

Michael Fordham QC and Iain Steele (instructed by **Public Interest Lawyers**) for the **Appellant**
Daniel Beard QC, Gerry Facenna and Brendan McGurk (instructed by **The Government Legal Department**) for the **Respondent**

Hearing dates : 24 and 25 June 2015

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Approved Judgment

Master of the Rolls:

1. Corporal Paul Long was one of 6 British soldiers of the Royal Military Police ("RMP"), deployed as "C Section", who were unlawfully killed on 24 June 2003 by members of a crowd at an Iraqi police station in Majar-al-Kabir, South East Iraq. In these proceedings, his mother Mrs Pat Long ("the appellant") contends that the Secretary of State for Defence ("the respondent") is in breach of section 6 of the Human Rights Act 1998 ("the HRA"). Her case in summary is that there has not been a sufficient investigation into the circumstances of the death and that this constitutes a breach of article 2 of the European Convention on Human Rights ("the Convention").

2. An outline of the facts has been set out admirably at paras 3 to 29 of the judgment of the Divisional Court written by Leggatt J ([2014] EWHC 2391 (Admin)) which I attach as an annex to this judgment. I shall return to some of the detail later. The salient points are as follows:

   (1) On 24 May 2013 (i.e. a month before Paul Long's death) an order ("the Communications Order") was issued by the Commander of the Battle Group occupying Maysan Province requiring that all patrols (including RMP patrols) should be equipped with an iridium satellite phone.

   (2) C Section (in which Corporal Long served) was not equipped with an iridium phone on 24 June 2003. This was no isolated failure: it was normal practice.

   (3) It is not in dispute that, if the C Section soldiers had been equipped with an iridium phone on 24 June 2003, their lives might have been saved.

The issues

3. Three issues arise in the appeal. These are (i) whether there was an arguable substantive breach of article 2 of the Convention so as to trigger a duty to investigate the circumstances of the soldiers' deaths; if the answer to (i) is yes, (ii) whether the investigative duty has been discharged by steps already taken to investigate the circumstances of the deaths; and if the answer to (ii) is no, (iii) whether the investigative duty is still continuing.

4. The Divisional Court decided that (i) there was no arguable substantive breach of article 2 so as to trigger a duty to investigate the circumstances of the soldiers' deaths (paras 59 to 87); (ii) if there was an investigative duty, it was discharged by the combined effect of the investigation undertaken by the Army Board of Inquiry ("BOI") between March and June 2004 and the inquest conducted by the Oxfordshire Coroner in March 2006 (paras 88 to 101); and (iii) it would in any event not be reasonable to require the Secretary of State to undertake a further investigation now because there was no reasonable prospect of obtaining more illuminating answers to the relevant questions than the contemporaneous investigations had revealed (paras 102 to 108).

The first issue: was there an arguable substantive breach of article 2?

The law

5. It is common ground that a duty under article 2 to hold an investigation arises where there has been an arguable breach of a substantive obligation owed by the state under article 2. The substantive obligation is (i) not to take life without justification, and (ii) in certain circumstances to take steps to protect the lives of those within the state's jurisdiction. At its most general level, the positive obligation requires the state to have in place a framework of laws and systems which will, to the greatest extent reasonably practicable, protect life.

6. In the present case, the issue is whether there was an arguable breach of the state's positive obligation to safeguard the lives of members of its armed forces. As the Divisional Court noted at para 63, the leading domestic authority in the military context is *Susan Smith v Ministry of Defence* [2013] UKSC 41, [2014] AC 52 ("*Susan Smith"*) where the Supreme Court returned to certain issues previously addressed by it in *R (Catherine Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, [2011] 1 AC 1.

7. In *Susan Smith*, the issue of how the article 2 substantive duty applies in respect of soldiers on active service arose in the context of civil actions for damages for breach of article 2 and/or for common law negligence and the defendant's contention that the claims should be struck out as having no real prospect of success. The majority of the supreme Court (Lord Hope giving the judgment with which Lord Walker, Baroness Hale and Lord Kerr agreed) rejected that contention and held that the claims should proceed to trial. On the facts, the case concerned soldiers who were killed or seriously injured while on patrol in Iraq by the detonation of improvised explosive devices ("IEDs"). The article 2 claims were based on the argument that the soldiers should have been provided with better equipment than they were, including vehicles that were better armoured and had electronic counter measures to protect them against IEDs.

8. Lord Hope said at para 63:

> "….there is nothing that makes the Convention impossible or inappropriate of application to the relationship between the state and its armed forces as it exists in relation to overseas operations in matters such as, for example, the adequacy of equipment, planning or training…...there have been many cases where the death of service personnel indicates a systemic or operational failure on the part of the state, ranging from a failure to provide them with the equipment that was needed to protect life on the one hand to mistakes in the way they are deployed due to bad planning or inadequate appreciation of the risks that had to be faced on the other. So failures of that kind ought not to be immune from scrutiny in pursuance of the procedural obligation under article 2 of the Convention. "

9. And at para 76:

> "The guidance which I would draw from the Court's jurisprudence in this area is that the court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate. But it must give effect to those obligations where it would be reasonable to expect the individual to be afforded the protection of the article. It will be easy to find that allegations are beyond the reach of article 2 if the decisions that were or ought to have been taken about training, procurement or the conduct of operations were at a high level of command and closely linked to the exercise of political judgment and issues of policy. So too if they relate to things done or not done when those who might be thought to be responsible for avoiding the risk of death or injury to others were actively engaged in direct contact with the enemy. But finding whether there is room for claims to be brought in the middle ground, so that the wide margin of appreciation which must be given to the authorities or to those actively engaged in armed conflict is fully recognised without depriving the article of content, is much more difficult. No hard and fast rules can be laid down. It will require the exercise of judgment. This can only be done in the light of the facts of each case. "

10. The only other decision to which I should refer at this stage is that of the ECtHR in *Stoyanovi v Bulgaria* (App No 42980/04, unreported) 9 October 2010. The applicants were the relatives of a soldier who died during a parachute training exercise. They complained that the state had been responsible for the soldier's death and that the investigation of his death had been ineffective. The court said at para 61:

> "Positive obligations will vary therefore in their application depending on the context. It is primarily the task of the domestic systems to investigate the cause of fatal accidents and to establish facts and responsibility. In the present case, which concerns an accident during a military training exercise, the Court notes that while it may indeed be considered that the armed forces' activities pose a risk to life, this is a situation which differs from those "dangerous" situations of specific threat to life which arise exceptionally from risks posed by violent, unlawful acts of others or man-made or natural hazards. The armed forces, just as doctors in the medical world, routinely engage in activities that potentially could cause harm; it is, in a manner of speaking, part of their essential functioning. Thus, in the present case, parachute training was inherently dangerous but an ordinary part of military duties. Whenever a State undertakes or organises dangerous activities, or authorises them, it must ensure through a system of rules and through sufficient control that the risk is reduced to a reasonable minimum. If nevertheless damage arises, it will only amount to a breach of the State's positive obligations if it was due to insufficient regulations or insufficient control, but not if the

> damage was caused through the negligent conduct of an individual or the concatenation of unfortunate events (see, for comparison, Kalender v. Turkey, no. 4314/02, §§ 43-47, 15 December 2009)."

11. It is common ground that the failure to provide the soldiers with iridium phones on 24 June 2003 was not the result of a decision about "training, procurement or the conduct of operations....at a high level of command and closely linked to the exercise of political judgment and issues of policy" (see para 76 of *Susan Smith).* Nor was it a decision relating to "things done or not done when those who might be thought to be responsible for avoiding the risk of death or injury to others were actively engaged in direct contact with the enemy" (ibid). That is why, for the purposes of these proceedings, it is common ground that the Divisional Court was right to analyse the allegations in the present case as falling within what Lord Hope described in *Susan Smith* at para 76 as the "middle ground".

12. In deciding whether the circumstances of cases which fall within this middle ground do in fact disclose arguable substantive breaches of article 2 in the military context, it is necessary to have regard to such guidance as is to be found in *Susan Smith* and in *Stoyanovi.* Whether a case which falls within the middle ground engages or comes within the scope of article 2 is, as Lord Hope said, "much more difficult" (than deciding whether it falls within the middle ground at all). In saying that (i) no hard and fast rules can be laid down, (ii) it requires the exercise of judgment and (iii) this can only be done in the light of the facts of each case, Lord Hope provided little assistance as to how this difficult exercise is to be performed.

13. The following points can, however, be made. First, "the wide margin of appreciation which must be given to the authorities or to those actively engaged in armed conflict" must be fully recognised, but not to the extent of depriving the article of all content (paras 71 and 76 of Lord Hope's judgment). Allowing a margin of appreciation or discretion involves an exercise of judgment, but it is one with which the courts are now familiar. Secondly, "great care" is needed not to interpret and apply article 2 in a way which imposes an impossible or disproportionate burden on the authorities (paras 72 and 73). Thirdly, a case which involves no more than an allegation of "negligent conduct of an individual or the concatenation of unfortunate events" (see *Stoyanovi* para 61) will not engage article 2. But a case involving dangerous activities undertaken, organised or authorised by the state and which falls within the middle ground may engage article 2 if it is arguable that the death was caused by insufficient state systems, regulations or control.

14. As the Divisional Court pointed out at para 76 of its judgment, the court in *Stoyanovi* referred to the similar limit on the scope of article 2 which has been recognised in the field of medical care. Hospital authorities are required to adopt appropriate measures for the protection of patients' lives. As the ECtHR stated in *Powell v UK* (2000) 30 EHRR CD at p 364:

> "[the Court] cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a

> Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life."

15. When deciding whether a case which is in the middle ground engages article 2, the court must have regard to each of the factors to which I have referred above. I suggest that it will usually be sensible to start with the third factor. If it is clear that a case is outside the scope of article 2 because it involves no more than an allegation of individual human error or a concatenation of unfortunate events, then that should be sufficient to lead to the conclusion that article 2 is not engaged. I take the rather grandiloquent expression "concatenation of unfortunate events" to mean no more than a combination of events over which the state has no control and for which it cannot be held responsible. Even if the death is caused by only one such event, that may be sufficient to take the case outside the scope of article 2.

16. On the other hand, the first two factors are likely to be relevant (and may be decisive) if it is arguable that the death was caused by a failure to "ensure through a system of rules and through sufficient control that the risk is reduced to a reasonable minimum" (*Stoyanovi* para 61).

17. The fact that a death in military operations was arguably caused by a failure of control is a necessary, but not sufficient, condition for the engagement of article 2. Before concluding that there has been an arguable breach of article 2 in such a case, the court must always bear in mind the cautionary words of Lord Hope in *Susan Smith* that the court must avoid imposing positive obligations on the state which are unrealistic or disproportionate.

The reasoning of the Divisional Court

18. The Divisional Court agreed that the present case falls within Lord Hope's middle ground (para 69). They concluded that the safeguarding duty did not arise on the facts of this case because it was one which related to the "human error" of one or more individuals and for that reason fell on the wrong side of the line identified in cases such as *Stoyanovi.* They said:

> "72. The complaint in this case is not that the MOD failed to provide British forces operating in Iraq with effective communications equipment. As discussed earlier, iridium satellite phones were reasonably effective and were available to the Battle Group. Moreover, the importance of having such a phone when out on patrol had been identified by the Battle Group Commander when he issued the Communications Order. The allegation said to require further investigation is that there was a lack of care or competence on the part of one or more individuals in the chain of command in failing to ensure that the Communications Order was implemented by the RMP. We do not think it arguable that article 2 renders the state responsible for human error of this kind or gives a soldier on active duty the right to be safeguarded against the risk of such error.

> 73. This is not to condone in any way lack of competence or efficiency in the armed services. As an organisation which depends on discipline, the Army has every incentive to ensure that orders are complied with and that failures to do so are appropriately addressed. But these are matters for the military authorities. We reject the notion that article 2 of the Convention gives a member of the armed forces a civil right to be protected by the state against errors, including negligent errors, in the military chain of command in carrying out an order relating to the conduct of operations in theatre where such an error creates or increases the risk of loss of life.
>
> 74. In the first place, the possibility of human error including negligent error is inherent in any institution, including the armed services. The state can be expected to take reasonable steps to reduce the likelihood of such error by providing suitable training for soldiers and by taking appropriate remedial action when errors occur. But it would be wholly unrealistic to expect the state to prevent such errors from occurring at all and correspondingly unjustified to impose an obligation on the state to protect the lives of soldiers which is broken whenever such an error is made by an individual soldier which increases or fails to mitigate a risk to the lives of other soldiers. That is so even in the comparatively predictable and controlled context of military training. It is all the more obviously so in the context of deployment on active service."

The facts in more detail

19. It is known that the Communications Order, requiring that RMP patrols should be equipped with an iridium phone was not implemented as a matter of practice. The Divisional Court said at para 46:

> "The Board of Inquiry found that iridium phones, although in relatively short supply, were physically available. However, an erroneous impression appeared to have been formed that the Communications Order did not apply to the RMP and it had become normal practice for RMP patrols to deploy without an iridium phone. The Board also found that the booking out of RMP patrols was poorly controlled and coordinated. RMP patrols often failed to book out with the PARA company desk in whose area of responsibility they were operating and rarely, if ever, had an iridium phone. The Board attributed these failings to the relative inexperience of the officer in command of the RMP platoon and noted that the RMP officers course had very little emphasis on platoon commander's skills, infantry operations and particularly command of an independent detachment. They considered that the competing demands of police training and garrison policing were precluding the RMP from having the time available to achieve anything more than a basic level of military training and skills."

20. The terms of reference of the BOI were to "investigate the circumstances surrounding the deaths [of the 6 soldiers]". In particular, the Board was to

> "investigate all the circumstances and record all the evidence relevant to the Inquiry, save that the Board is not to attribute blame, negligence or recommend disciplinary action".

21. The court's summary of the findings of the BOI has not been challenged by either side. The BOI identified a number of events which "may potentially have had a bearing on the eventual deaths of the 6 RMP". These included:

> "e. The Board has a serious concern over the Command Relationships operating in the B[attle] G[roup] at the time and believes that this led to a degree of confusion and resulted in the RMP element of the BG 'falling through the cracks' when it came to Command and Control…
>
> …..
>
> h. The Board has concerns over the briefing, booking out and coordination and control of all RMP C/Ss, less A Sect, which was based at the Stadium. Briefings were ad hoc, booking out was poorly controlled and uncoordinated….The relative inexperience of the RMP PlComd resulted in the RMP Sects being able to operate independent of the BG controls. The Sects often failed to book out with the PARA Coy desk in whose A[rea] O[f] R[esponsibility] they were operating in and they rarely, if ever, had an iridium phone.
>
> ….
>
> k. Due to difficulties of CNR communications the Board is of the opinion that it became accepted practice, within some C/Ss, to depart on patrol without carrying out a radio check. This certainly appeared to be the practice for the RMP C/Ss."

22. At para 110 of its report, the BOI made ten detailed recommendations to address the shortcomings that it had identified. In particular, the Board recommended that:

> (i) Command relationships needed to be clearly articulated in operational orders and the whole chain of command clearly briefed as to whom they report to;
>
> (ii) Any Operations Room operating in such an environment should adopt a uniform booking out system and arrange regular checks to ensure that it is being complied with; and
>
> (iii) A review should be conducted of RMP officer training to ensure that their young officers were better trained to command small isolated detachments, with particular thought being given to the RMP carrying out more infantry training.

23. These recommendations were accepted by the Army command and measures set in place to implement them.

24. The report was released to the families of the soldiers. On 17 November 2004, there was a meeting between amongst others members of the families, the president of the BOI and Mr Hoon, the Secretary of State. Mr Hoon said in answer to a question from a family member:

> "The Report is saying that it was not simply this patrol or your brother or his leadership who caused this. This was a failing across the RMP, that all of the three sections who went out routinely went out without an iridium phone. So [the BOI] were not blaming your brother in any way whatsoever. He was simply behaving in the way in which practice in this part of Iraq at this time had developed, and I'm not excusing that practice. As far as I can say, it seems to me to have been wrong. But it is not him that is being blamed. The system—and this is why it is more complicated than any one individual's responsibility—the system, and Mr Hyde put it very well, was failing to supervise the way in which these patrols were being conducted and that is the key issue… "

Discussion

25. The distinction between (i) system or framework failures or failures of state control and (ii) individual human error is not always easy to apply. All errors which fall within (i) are "human" in the sense that they are made by human beings. In general terms, the distinction is clear enough. A case falls within Lord Hope's middle ground where there has been an arguable failure of a systematic nature, i.e. a failure to provide an effective system of rules, guidance and control within which individuals are to operate in a particular context. A case does not fall within the middle ground where the death is due to an individual's failure to operate properly within the system provided by the state. In the military context, I see no reason to limit individual failure to operational error by the service men and women on the ground. It may include individual error by those who are responsible for supervising or giving instructions to such men and women. An isolated lapse by a supervisor is just as much beyond the reach of article 2 as an isolated operational lapse by a man or woman on the ground.

26. In this case, the Communications Order represented the considered decision of the state as to what communications equipment should be taken on patrol in South East Iraq. This was an element of the communications system that had been adopted. Although iridium phones were far from perfect, there has been no criticism of the Communications Order.

27. The question is whether the failure on 24 June 2003 to equip the RMP platoon with iridium phones should be considered as (i) an individual error in disregard of the system or practice required by the Communications Order or (ii) a systematic failure of control or the implementation of a different practice or system of communication. Isolated departures from the Communications Order would not come within the scope of article 2. The Divisional Court said at paras 72 and 73 that the failure to carry

iridium phones was the result of human error in the chain of command in carrying out the Communications Order and that errors of this kind do not fall within article 2. The first of these conclusions is well-founded on the evidence and has not been challenged. But I respectfully disagree with the second conclusion.

28. In my view, it is clear from the evidence that the failure of the RMP to comply with the Communications Order was a failure of system or control. It was the result of the introduction (or at least the routine acceptance) of a *different* practice somewhere in the chain of command. This practice was not occasional or sporadic. It was the *normal* practice. It is not surprising that the Secretary of State told the families on 17 November 2004 that the failing (i.e. the failure to provide the RMP with iridium phones) was a *system* failure and more complicated than any one individual's responsibility. As we shall see, the BOI and the Coroner did not consider that this was a case of individual human error either. The failure was, in effect, the adoption of an unsafe practice or a failure by those in command to ensure that the safe practice embodied in the Communications Order was carried into effect. In a sense, it was the result of human error. But for the reason I have already given, it is unhelpful merely to characterise it as the result of human error. The human error was not an isolated failure of an individual to comply with the order issued by the Commander of the Battle Group occupying Maysan Province. It was a system failure by the military authorities to permit soldiers routinely to disregard the order.

29. For all these reasons, I do not agree with the assessment of the Divisional Court that article 2 was not engaged because this was a case of individual human error. I accept the submission of Mr Fordham QC that there are clear indications that this is a case of *systemic* insufficiency of control and not mere negligent control by an individual. A one-off failure by a patrol leader to pick up an iridium phone on his way out of the base would probably fall into the latter category. But the normal practice that was adopted here, by which an order came to be routinely disregarded, has all the hallmarks of the former category.

30. As we have seen, at para 74 of the judgment, the Divisional Court also said that it would be unrealistic to expect the state to prevent such an error from occurring. In other words, even if the case *prima facie* was within the scope of article 2, it would be unreasonable and disproportionate to hold that it was in fact within the scope of article 2 because it would be unreasonable and disproportionate to hold the state responsible for such errors.

31. The difficulty with this part of the Divisional Court's reasoning is that it does not explain why it would be disproportionate and unreasonable to hold the state responsible for the practice of disregarding the Communications Order. No attempt has been made by the respondent to justify the practice of failing to equip the RMP with iridium phones. It has not been suggested that it was the result of a decision taken under pressure in difficult circumstances. It is accepted that the explanation lies in error on the part of someone in the chain of command as a result of lack of experience. I do not see why it would be unrealistic to hold that it is arguable (no more is required than arguability) that the state is responsible for such an error. This is not a difficult case such as *Susan Smith* involving a challenge to a decision as to the type of equipment provided to soldiers. Iridium phones were available and the Communications Order required that they be made available to soldiers when they

went out on patrol. An investigation of the question why a practice developed whereby this order was routinely ignored is not disproportionate or unreasonable.

32. I should add that it has not been argued by Mr Beard QC (nor did it form any part of the reasoning of the Divisional Court) that article 2 was not engaged because the lives of the 6 soldiers would not have been saved if they had been provided with iridium phones. It is not a condition of the engagement of article 2 that it is shown that, but for the failing or omission on the part of the state, the deaths would not have occurred. It is sufficient to show a failure to take reasonable measures which could have had a real prospect of avoiding the deaths: see, for example, *E v UK* (2003) 36 EHRR 31 at para 99 (an article 3 case) and *Opuz v Turkey* (2010) 50 EHRR 28 at para 136 (an article 2 case).

33. For all these reasons, I conclude that an article 2 compliant investigation was required in this case.

The second issue

34. The Divisional Court held that, insofar as there was an arguable breach of the state's substantive obligations under article 2, such investigations as had already occurred, viewed in their totality, were sufficient to discharge the state's investigative obligation under article 2. This was for the following reasons.

35. First, the BOI had investigated the issue, pointed to causes and made recommendations to address the causes and thereby reduce the risk of a similar incident occurring again (para 89).

36. Secondly, although the BOI was an internal Army investigation which took place out of the public eye, the families of the deceased soldiers did have some involvement in the process. They were given the opportunity to raise questions for the Board to consider, they were briefed on the progress of the inquiry and were provided with the report and all the materials which accompanied it, albeit with names redacted. The Board's conclusions were also published (para 90).

37. Thirdly, all the evidence taken by the Board (including transcripts of the oral evidence) and its report were provided to the Coroner and was considered or available to be considered in the course of the Inquest. Moreover, the Coroner brought out for public scrutiny mistakes made, including the failure to ensure compliance with the Communications Order. If the Board lacked the necessary institutional independence to satisfy article 2, this shortcoming was made good by the Inquest (para 91).

38. I should at this stage repeat what is said in the Annex to this judgment about the BOI and the Inquest. The Board received evidence from 157 witnesses (over 100 of whom gave oral evidence) over three months. It made a series of recommendations regarding lessons to be learnt and actions that should be considered in the light of its findings. The Inquest lasted three weeks. The families of the soldiers were represented by a solicitor. The Coroner heard evidence from around 20 witnesses with many more witness statements being admitted in evidence. He gave a summing up on 31 March 2006 and recorded a verdict that the six soldiers had been unlawfully killed.

39. I have set out at para 20 above the Divisional Court's summary of the BOI findings and at para 22 above a summary of some of the key recommendations.

40. The Coroner's summing up included the following passage:

> "What [the six RMP soldiers] did not have was an iridium telephone. I am clear that [the Battle Group Commander] had ordered that all patrols were to be equipped with them. Clearly, a person commanding some 1,500 troops cannot personally ensure that his orders are meticulously obeyed. Such an order would be passed down the chain of command, but I think that at some point there is need for one of the links to be pro-active rather that reactive and to ensure there has been compliance with orders. It is not for me to identify the particular link, but it is a matter which I shall cover in the Rule 43 letter."

41. Rule 43 of the Coroners Rules provides that:

> "Where –
>
> (a) a coroner is holding an inquest into a person's death;
>
> (b) the evidence gives rise to a concern that circumstances creating a risk of other deaths will occur, or will continue to exist, in the future; and
>
> (c) in the coroner's opinion, action should be taken to prevent the occurrence or continuation of such circumstances, or to eliminate or reduce the risk of death created by such circumstances,
>
> the coroner may report the circumstances to a person who the coroner believes may have power to take such action."

42. As anticipated in his summing up, the Coroner sent a report under Rule 43 to the respondent by a letter dated 13 April 2006. In his letter the Coroner raised three points, one of which was the following:

> "Communication – nearly every witness told me that the Clansman [radio] was almost useless in the Iraq conditions. I was told that its replacement Bowman is much more capable, although it was not issued in 2003, it is now apparently becoming available. The use of an iridium phone might have dealt with some of the Clansman deficiencies and [the Battle Group Commander] had issued a clear order that all patrols should be equipped with it. Although supplies were not abundant, I was told that the Royal Military Police could have had one. Clearly, they did not and there may be some conflict as to how persistent they were in requesting it. It appears to me that, not only should they have had an iridium phone, but that there is a responsibility in the chain of command to check that

> they have it and, if necessary, prevent them going on patrol without one."

The appellant's case

43. Mr Fordham submits that the Divisional Court was wrong to rely on the combined effect of the BOI investigation and the Coroner's inquest as discharging article 2. He says that it is wrong in principle to conclude that one body can supply investigative breadth and depth while lacking independence, while another can supply independence without breadth and depth: article 2 requires a coincidence of components. He relies on *R (Amin) v SSHD* [2003] UKHL 51, [2004] 1 AC 653, *Al-Skeini v UK* (2011) 53 EHRR 18 and *R (Ali Zaki Mousa) v Secretary of State for Defence (No 2)* [2013] EWHC 1412 (Admin).

44. The appellant's solicitor expressly accepted that the Inquest was an article 2 compliant investigation. Mr Fordham has not sought to argue otherwise. His fundamental complaint is that, even if (which he disputes) it is legitimate to take account of the combined effect of the BOI and the Inquest, the investigation has been inadequate because the full facts have not yet been unearthed and important questions remain unanswered. He submits that it is insufficient merely to say that there was a failure somewhere in the chain of command to check that the soldiers were equipped with iridium phones and, if necessary, to prevent them from going on patrol without one. He asks rhetorically: how did it come about that it became normal practice for the Communications Order to be disregarded? How could lessons be learnt without knowing how this obviously dangerous practice occurred? Mr Fordham made it clear that an article 2 compliant investigation does not require the name of the person in the chain of command who was responsible to be identified. But it does require it to be established at what level in the chain of command the error was made. In short, he says that simply accepting that responsibility lay with someone in the chain of command was not good enough. There is a duty on the state under article 2 to hold an independent investigation to identify whose responsibility it was to ensure compliance with the Communications Order and to hold those individuals accountable.

Discussion

45. A striking feature of this appeal is the limited scope of the additional investigation the appellant now seeks. This is not surprising in view of the extensive scope of the BOI investigation and the Inquest. Mr Fordham submits that all that is now required is that there be a further investigation into the question of how the Communications Order came to be disregarded so that it became normal practice to allow patrols to go out without iridium phones. This would not necessarily require the name or names of the person or persons in the chain of command to be identified. But it would require sufficient information to enable the families to have a full understanding of how this happened and the lessons to be learned.

46. Mr Fordham relies particularly on what Lord Bingham said in *Amin* at para 31:

> "The state's duty to investigate is secondary to the duties not to take life unlawfully and to protect life, in the sense that it only arises where a death has occurred or life-threatening injuries have occurred: *Menson v United Kingdom*, page 13. It can

> fairly be described as procedural. But in any case where a death has occurred in custody it is not a minor or unimportant duty. In this country, as noted in paragraph 16 above, effect has been given to that duty for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."

47. But as Mr Beard points out, there were material differences between the circumstances of *Amin* and those of the present case. *Amin* was a case where a young offender was "wantonly murdered" by his violent cellmate in circumstances where the specific risk of such violence was known and where a positive operational duty to take preventative steps to protect life was engaged. Lord Bingham's comments were made by specific reference to cases "where a death has occurred in custody". In *Amin* there had been no inquest at all, a fact which Lord Bingham described as being "very unfortunate…since a properly conducted inquest can discharge the state's investigative obligation" (para 33). The police investigations into the criminal culpability of the cellmate and the Prison Service were conducted in private and without participation by the family. The Advice Report on which counsel based his advice not to prosecute the Prison Service or any of its members was "written in an objective and independent spirit, but it raised many unanswered questions and cannot discharge the state's investigative duty" (para 34). The trial of the cellmate for murder was directed solely to establishing his mental responsibility for the killing which he had admittedly carried out. It involved little exploration, such as would occur in some murder trials, of wider issues concerning the death (para 35).

48. *Amin* is therefore a very different case and does not provide assistance in a case which is not a death in custody case. It also differs from the present case in that here (i) there were extensive and detailed investigations by both the BOI and the Coroner; (ii) the families of the soldiers were represented at the Inquest by a solicitor and, although they were not admitted to the BOI hearings, they received briefings about the progress of the inquiry and were given a copy of the report (with names redacted); (iii) the Inquest supplied the requisite institutional independence; and (iv) the investigations did not raise many unanswered questions.

49. It is important to have in mind that the nature and scope of the investigation required by article 2 depends on the circumstances. As Lord Phillips said in *R (L) v Secretary of State for Justice* [2009] AC 588 at para 31:

> "The duty to investigate imposed by article 2 covers a very wide spectrum. Different circumstances will trigger the need for different types of investigation with different characteristics. The Strasbourg court has emphasised the need for flexibility and the fact that it is for the individual state to

> decide how to give effect to the positive obligations imposed by article 2."

50. In my view, neither *Al-Skeini* nor *Ali Zaki Mousa (No 2)* takes the matter any further. In *Al-Skeini*, the ECtHR said at paras 164-165 that the investigative obligation under article 2 will vary according to individual circumstances, with proper regard to the very real practical difficulties where a death occurs in "circumstances of generalised violence, armed conflict or insurgency". Discharge of the investigative duty must be considered against "the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war" (para 168).

51. In *Ali Zaki Mousa (No 2)*, the issue was whether the Iraq Historic Allegations Team ("IHAT") that was introduced to investigate allegations of abuse of Iraqi citizens by UK armed forces was sufficiently independent to discharge any article 3 investigative obligation, or whether a further public inquiry was required. It was held by the court that a further public inquiry was unnecessary. The contrast between that case and the present case is striking. First, there had been no coronial-type investigation in any of the Iraqi civilian cases. Secondly, the cases involved particularly grave allegations of wrongdoing by members of the armed forces against civilians.

52. Thirdly, the Government emphasised when setting up IHAT that there was a strong public interest in getting to the bottom of such allegations because of the uncertainty they create and the corrosive impact they may otherwise have on the morale and reputation of our armed forces. By contrast, the present case is one where the facts have been extensively investigated. It has been found that the mistake which occurred here was the result of a failure in the chain of command to ensure that the Communications Order was complied with. The relative inexperience of the officer in command of the RMP platoon led to confusion and lack of control of the booking out of equipment to patrols. This was the conclusion of the BOI. The conclusion of the Coroner (although expressed in less detail) was entirely consistent with this.

53. Nor do I accept Mr Fordham's submission that it is contrary to article 2 to have regard to the institutional independence of the Inquest in order to compensate for the lack of institutional independence of the BOI. The Divisional Court put the matter correctly at para 96:

> "The second point to bear in mind is that article 2 does not require there to be a single unified investigatory procedure which fulfils all the relevant aims of the investigative duty. The adequacy of the state's response is to be judged by viewing the procedures as a whole: see e.g. Pearson v United Kingdom (2012) 54 EHRR SE11, para 71. Although an inquest is the principal means by which the circumstances of an unnatural death are investigated in the UK, it is not the function of an inquest to consider issues of culpability. Indeed, the coroner is specifically prohibited from framing a determination in such a way as may appear to determine any question of criminal liability (including, in the case of a member of the armed services, liability in respect of a service offence) or civil liability: see section 10 of the Coroners and Justice Act 2009.

> Thus, although an inquest can serve to bring out relevant facts and identify lessons to be learned, it is not a mechanism by which individuals can be held to account. That part of the investigative duty is fulfilled by making appropriate provision for: (1) criminal prosecution; (2) disciplinary action; and (3) a civil claim."

54. In any event, as I have said, the real focus of Mr Fordham's case now is not so much on the lack of independence of the BOI investigation, but rather on the fact that even now the appellant does not know how it became normal practice for the RMP to disregard the Communications Order. In my view, the facts have been sufficiently revealed by the BOI investigation and the Inquest to discharge the article 2 obligation in the circumstances of this case. It has been established that this was not a case of isolated human error on the part of the soldiers. It has also been established that there was confusion and lack of control and coordination in the booking out of RMP patrols. This was the result of the relative lack of experience of the RMP platoon command. One of the objects of the article 2 investigative obligation is to enable lessons to be learnt. I repeat that the Board made a series of recommendations regarding lessons to be learnt.

55. In short, the investigations of the BOI and the Inquest have revealed why iridium phones were not provided to C Section of the RMP on 24 June 2003, what went wrong and what lessons were to be learnt. In my judgment, article 2 does not require more.

56. Before leaving the second issue, I think it is worth returning to *Stoyanovi.* The ECtHR said that the article 2 investigative duty arose in the circumstances of that case. At para 62 it said that: "there should be an appropriate legal, regulatory and judicial framework such that the cause of the accident should be determined and provision made for establishing any liability and affording appropriate redress". Two official inquiries had already taken place. One was an internal inquiry carried out by a joint commission of the Ministries of the Interior and Defence. The court concluded that the commission possessed the necessary expertise and impartiality and that its investigation was comprehensive and its conclusions "adequate, tenable and convincing". The court said that, even if the commission's members were officials of the Ministries, it saw no reason to question its impartiality (para 64). The other investigation was conducted by the prosecuting authorities. The court was critical of this investigation. But it said that, although the conclusions of the prosecuting authorities as to the causes of the fatal accident "did not provide a convincing explanation", it did not necessarily follow that they erred in not applying criminal sanctions (para 66).

57. At para 67, the court said that the two inquiries allowed the applicants to acquaint themselves with the evidence concerning their son's death and the internal inquiry concluded that the responsibility for their son's death lay on the state. On the basis of the factual findings of the two inquiries, it was open to them to bring civil proceedings. In these circumstances, there was no failure on the part of the state to comply with article 2. The court rejected the complaint that the investigations were ineffective and did not satisfy article 2.

58. As I have already said, the scope of the article 2 investigative obligation depends on all the circumstances. It follows that one should be cautious about making too much of the outcome of one ECtHR decision. But the Supreme Court in *Susan Smith* clearly considered *Stoyanovi* to be an important case. It is striking that in *Stoyanovi* the court considered that a thorough and impartial investigation by the joint Commission of the Ministries of Defence and the Interior made up for the shortcomings in the investigation by the prosecuting authorities. The fact that the investigation was not conducted by an institutionally independent body seems to have counted for little. What mattered was that it was conducted by an impartial body which had the information and skill to conduct an effective investigation.

59. The other important point is that the court considered that the investigation provided the applicants with the information that they needed to enable them to bring civil proceedings. The possibility of taking such a course is relevant to the question whether the state has complied with article 2. So too in the present case it was open to the appellant to make a civil claim arising out of the death of Paul Long and she did so.

60. The approach of the ECtHR in *Stoyanovi* reinforces the conclusion that I had already reached that article 2 does not require a further investigation for the limited purpose for which Mr Fordham contends.

The third issue

61. In view of my decision on the second issue, the third issue does not arise. I will, therefore, deal with it quite shortly.

62. It was common ground that the duty to investigate under article 2 binds the state "throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it": see *Silih v Slovenia* (2009) 49 EHRR 37 at para 157 and *Re McCaughey* [2012] 1 AC 725 at para 47.

63. The Divisional Court concluded at para 102 that, even if a duty arose to carry out a further investigation of the kind sought by the appellant, it was not reasonable to expect the state to institute such an investigation now, more than a decade after the soldiers' deaths and some eight years after the Inquest. This was because (i) there was no real prospect of more illuminating answers (para 105) or learning of lessons (para 106) than those previously revealed; and (ii) it would not be fair to expose individuals to the risk of findings of fault (para 107).

64. Mr Fordham relies on *Amin* to challenge the court's assessment that it was unrealistic to suppose that further significant or useful information could be obtained by a further investigation. At para 39 of *Amin*, Lord Bingham rejected the submission that a further inquiry was unlikely to unearth new and significant facts. That was because the papers before the House of Lords "raise questions which any legal representative of the family would properly wish to pursue and the discovery of further new facts of significance may well be probable". This conclusion was reached in circumstances where the prior investigations had revealed serious article 2 shortcomings and where there had been no inquest.

65. In my judgment, even if the investigative duty has not been fully discharged in the present case, it has been *substantially* discharged. The facts here are materially different from those in *Amin.* The Divisional Court in the present case considered that (i) it would be unrealistic to suppose that further significant or useful information could be obtained by questioning the RMP officers and those who were responsible for ensuring compliance with the Communications Order about their recollection of these matters again so many years after the event; and (ii) there was no reasonable prospect that there could be *further* lessons to be learnt from the events of 24 June 2003 that were of current or future relevance at this distance in time. I entirely agree with this assessment.

Overall conclusion

66. Having seen Mrs Long throughout this two day appeal, I am only too aware of the anguish that she continues to suffer over the death of her son on that fateful day in June 2003. It is entirely understandable that she wishes to leave no stone unturned in her quest to discover precisely how the RMP soldiers were not provided with iridium phones when they should have been. But for the reasons that I have attempted to give, I am satisfied that, as a matter of law, she is not entitled to any further investigation into this tragic affair.

ANNEX

Background to the deaths on 24 June 2003

3. The invasion of Iraq by a coalition of armed forces, led by the United States and including a large force from the UK, began on 20 March 2003. Major combat operations were formally declared complete on 1 May 2003 but coalition forces remained in occupation of Iraq until 28 June 2004, when authority was formally transferred to an Iraqi interim government.

4. In June 2003 Maysan Province in South East Iraq was the responsibility of a Battle Group under the command of 1 (UK) Armoured Division, consisting of 1,200 men, most of whom were from the 1st Battalion of the Parachute Regiment ("1 PARA") but also including 1 Platoon, 156 Provost Company of the Royal Military Police ("RMP"). The RMP platoon was split into three sections, one of which was C section in which Corporal Long served.

5. The mission of the RMP was to help restore and maintain law and order. Their primary task within the Battle Group was to rebuild the local police force.

6. Majar-al-Kabir is the second largest town in Maysan Province. According to the report of the British Army Board of Inquiry into the circumstances leading up to the deaths of the six soldiers (para 15):

   "There was always a somewhat hostile atmosphere in the town, mainly due to the high regeneration expectations of the population that were not being met. Stoning of patrols by children continued and there was strong evidence to suggest that it was being instigated by anti-coalition elements. … Against this background PARA patrols regularly visited the town and often based themselves at the police station. The RMP often visited the town and had a good relationship with the local police."

7. On 21 June 2003 it was decided to place soldiers from 1 PARA in the police station in Majar-al-Kabir for a few days in order to gain a better understanding of what was happening in the town and to better integrate British forces into the local community. Accordingly, on 22 June 2003 a section of 12 soldiers from 1 PARA, referred to as "call sign 20A", went to Majar-al-Kabir to take up residence at the police station.

8. Within a few hours of their arrival, a hostile crowd gathered which began to stone their vehicles and break the windows of the police station. Warning shots were fired above the crowd with little effect. A soldier on the roof of the police station used an iridium satellite phone to contact headquarters and request assistance from the Battle Group's "Quick Reaction Force". After a while a local militia leader managed to disperse the crowd and, by the time the Quick Reaction Force arrived, the disturbance had ended.

9. On 23 June 2003 officers of 1 PARA met the local Town Council to discuss this incident. At this meeting an agreement was reached with the Town Council to suspend weapons searches which were a source of tension. The British officers believed that this agreement had resolved the situation.

The events of 24 June 2003

10. On 24 June 2003 two sections of 1 PARA (call signs 20A and 20B) went to Majar-al-Kabir to conduct a joint patrol with the local militia, arriving at about 0930 hours. C Section of the RMP planned to visit three local police stations that morning, the first of which was the police station in Majar-al-Kabir where they arrived at about 0940 hours. It appears that there was no coordination between the two expeditions and that the two paratroop call signs were unaware that the RMP section was also visiting Majar-al-Kabir that morning.

11. At about 1020 hours call sign 20B while patrolling through the town was attacked by a crowd, at first with stones and then with gunfire. The soldiers managed to withdraw from the town centre in their vehicles. They drove north and took up a defensive position where they remained, under heavy fire, for about 1½ hours before the Quick Reaction Force was able to rescue them at about 1250 hours with light armoured vehicles, after an initial failed attempt to do so using helicopters.

12. At about 1025 hours, after hearing gunfire, call sign 20A went to assist call sign 20B. At about 1030 hours, as call sign 20A approached a crossroads in their lorry, they saw call sign 20B heading north in their two vehicles. On reaching the crossroads, call sign 20A came under small arms fire and dismounted from their lorry. They were able to contact the Battle Group Operations Room using an iridium phone. At about 1040 hours the soldiers of call sign 20A remounted their vehicle and drove north, out of the town. The crossroads where call sign 20A had dismounted was at about 200 metres distance and within sight of the police station. However, call sign 20A did not know that the six soldiers of C Section were in the police station, or indeed that they were in the town.

13. Shortly after call sign 20A had left the crossroads, an armed crowd began to gather outside the police station. For reasons relating to the inadequacy of their communications equipment which we will come to later, C Section was not able to contact either of the call signs in Majar-al-Kabir or the Operations Room. They also had little ammunition. The mob invaded the police station and the six RMP soldiers were assaulted and shot. The Coroner later found that they were killed shortly after 1030 hours and before 1100 hours. Their bodies were afterwards recovered by an Iraqi doctor.

Army investigations

14. As accepted in the claimant's statement of facts in these proceedings, there has been a great deal of factual investigation into the events of and surrounding 24 June 2003. The first investigation was a "Joint Commander's Investigation" commissioned within a few days of the murders. Its purpose was to establish "a clearer understanding of the context and circumstances of the incident" and any immediate lessons to be learned. The report of the investigator, Colonel Capewell, was submitted to the Chief of Joint Operations on 8 July 2003.

15. An investigation was also begun by the Special Investigation Branch of the RMP ("the SIB"). The purpose of this investigation was to interview witnesses and gather evidence with a view, if possible, to identifying and prosecuting the perpetrators. The

SIB investigation took place against the background of a difficult security situation. Attempts were subsequently made, which continued over many years, to secure the arrest and prosecution of suspects by the Iraqi authorities. It appears that seven suspects were ultimately charged but none was convicted.

16. The Land Accident Prevention and Investigation Team investigated the deaths of the six RMP soldiers and produced a report dated 12 March 2004. The aim of the report was "to provide an accurate record of the events leading up to the incident in order to assist a future Board of Inquiry". The report was described as adding to the Capewell report but as subsidiary to the SIB investigation.

17. The Army convened a Board of Inquiry on 15 March 2004. The purpose of the Board of Inquiry was to investigate the circumstances surrounding the deaths of the soldiers and to draw conclusions / recommendations, but not to attribute blame or to recommend disciplinary action. The Board received evidence from 157 witnesses (over 100 of whom gave oral evidence) over three months, and completed its investigation on 18 June 2004. Members of the families were not admitted to the hearings, although they received briefings about the progress of the inquiry and were given a copy of its report with names redacted. The Board made a series of recommendations regarding lessons to be learnt and actions which should be considered in the light of its findings.

18. Following the Board of Inquiry, the Army considered whether disciplinary action against any individual in the chain of command was appropriate and concluded that it was not. The view was taken, however, that administrative action for misconduct might yet be appropriate, and a Brigadier was appointed to report on this question. The main aim of administrative action for misconduct is to safeguard the efficiency and operational effectiveness of the service rather than to punish individuals for wrongdoing.

19. In his report submitted in December 2004, the Brigadier recommended that administrative action should not be taken against two individuals but should be considered in the case of two others. However, the latter recommendation was not accepted by the senior Army command. The reasons were expressed by the Chief of Staff in the relevant area of command as follows:

    "… [The Brigadier] failed to identify anything extraordinary that would require action over and above that already in hand as a result of the recommendations of the Board of Inquiry. It is my view that to pursue this would not result in either a proportionate or appropriate outcome for those involved, not least because administrative sanction would be seen as apportioning blame for the deaths. Whilst the Board of Inquiry highlights a number of areas that did not go right, this tragic incident resulted from a coincidence of many factors for which the censure of everyone whose performance left questions unanswered, whether living or dead, would clearly be inappropriate. There is a distinction between any corporate failings and individual responsibility.

    Finally, it is my judgment that the imposition of administrative sanctions – themselves not originally designed for the operational context – may actually harm long-term operational effectiveness because of the signal that it would send to others: that we are not prepared to tolerate mistakes. We expect our people to take risks on operations

and we empower them, through mission command, to make decisions. If we send out a message that we are not prepared to support our people under such circumstances, we will become too risk averse and our doctrine will be undermined. The best way to enhance operational effectiveness is to take forward the recommendations of the Board of Inquiry, especially those concerning training and procedures which are in hand."

20. The decision that no administrative action should be taken was explained to the families of the deceased soldiers in a letter dated 9 February 2005. The individuals against whom the possibility of such action had been considered were also informed of the decision.

The inquest

21. An inquest into the deaths of the six RMP soldiers was opened by the Oxfordshire Coroner in 2004. The Coroner received a large amount of documentary material including evidence collected by the SIB and all the evidence (including transcripts of the oral evidence) taken by the Board of Inquiry and the findings of the Board. The inquest hearing began on 14 March 2006 and lasted three weeks. The families of the soldiers were represented by a solicitor, Mr John Mackenzie. The Coroner heard oral evidence from around 20 witnesses with many more witness statements being admitted into evidence. He gave a summing up on 31 March 2006 and recorded a verdict that the six RMP soldiers had been unlawfully killed.

22. In his summing up and in a report made to the Secretary of State under Rule 43 of the Coroners Rules, the Coroner raised an issue about lack of effective communications equipment to which we will revert.

Requests for further investigations

23. Following the inquest, Mr Mackenzie wrote on behalf of the soldiers' families to the Metropolitan Police to ask them to investigate whether the evidence taken at the inquest showed default by military personnel in failing to take steps to protect the soldiers which constituted a criminal offence. On 21 August 2006 the Metropolitan Police informed Mr Mackenzie that they would not carry out an investigation. They did, however, in a letter dated 12 October 2006 refer the matter to the Attorney General, who in turn referred it to the Adjutant General as the appropriate senior military authority.

24. Members of the soldiers' families had a meeting with the Adjutant General on 23 February 2007 at which they presented a written submission criticising the Board of Inquiry and its findings and raising a number of issues. These included allegations that several named individuals (including those against whom administrative action had been considered) had been "culpably negligent". The Adjutant General appointed Brigadier Monro to examine the families' submission and advise whether it contained any new evidence which merited further investigation or other action.

25. Brigadier Monro met the families on 22 May 2007 and presented the results of his review to the Adjutant General on 24 September 2007. Brigadier Monro's review addressed point by point the issues raised by the families. He concluded that there was

no new evidence which merited further investigation or other action. The Adjutant General informed the families of this conclusion in a letter dated 12 October 2007. He also held a further meeting with the families to discuss this conclusion on 15 November 2007.

26. On 31 August 2008 Mr Mackenzie on behalf of the families lodged an application with the European Court of Human Rights challenging the decision of the Metropolitan Police not to investigate the matter. A year and a half later, by a letter dated 23 March 2010, the Court conveyed its decision to declare the application inadmissible on the basis that domestic remedies had not been exhausted, as the complaint made in the application had not been raised in proceedings before the national courts.

27. On 7 June 2010 Mr John Miller, the father of one of the six soldiers, wrote a letter to Major General Wall, the Commander in Chief Land Forces, making a number of points about the events of 24 June 2003 and saying that he wanted "accountability for allowing my son to be put into such a situation". The reply dated 27 July 2010 stated that the Army's position was that no new evidence had come to light and that nothing could be achieved by any further investigation.

28. On 22 November 2010 Mr Miller wrote to the Minister of State for the Armed Forces, Nick Harvey MP, following a meeting with him on 26 October 2010, to request an independent inquiry into the soldiers' deaths. Mr Harvey did not accept that a public inquiry was appropriate but was concerned that there were points which Mr and Mrs Miller felt that the Board of Inquiry had overlooked or ignored. Mr Harvey asked officials to undertake a review of the relevant evidence, and to check whether each point raised had been appropriately considered. The review took many months to complete. Its findings were eventually set out in a report of July 2012. In his covering letter to Mr and Mrs Miller dated 8 August 2012, the Minister said that he was satisfied that the report provided a detailed response to each of the points raised. He made it clear that he did not accept that any new investigation was either necessary or appropriate.

Civil Proceedings

29. Corporal Long's widow and the claimant have each made a civil claim in negligence against the Ministry of Defence in relation to his death. Each of those claims has been settled in, respectively, October 2006 and April 2009.

Lord Justice Lewison:

67. Time, they say, is a great healer. But it was clear during the hearing of this appeal that time has done little to heal Mrs Long's grief over the murder of her son at the hands of an Iraqi mob. The question raised by this appeal is whether the United Kingdom has an obligation to conduct further investigations into the reasons why her son died.

68. I agree with the Master of the Rolls that what is at issue in this appeal is the "middle ground" described by Lord Hope in *Susan Smith*. In so far as the court is required to accord a margin of appreciation to the military, that seems to me to go to the decision whether or not the RMP should have been provided with iridium phones. The Communications Order clearly stated that they should. That, as it seems to me, exhausts the margin of appreciation. I agree also with the Master of the Rolls that the normal practice of disregarding that order by the RMP cannot be brushed aside as mere human error. Something systemic clearly went wrong. Accordingly I agree with him, for the reasons that he gives, that article 2 is engaged.

69. The procedural obligation that arises under article 2 is that there should be an investigation into what steps the state ought reasonably to have taken in order to avoid the risk to life. As the ECtHR made clear in *Stoyanovi v Bulgaria* the investigation need not be conducted in a single forum: it is the totality of avenues of investigation provided by the state's legal system that counts. In this jurisdiction a coroner's inquest is the usual means for investigating how, why and in what circumstances the deceased came by his death. As the Master of the Rolls has explained there have been two investigations: the first by the Army Board of Inquiry and the second by the coroner. The families were legally represented at the coroner's inquest, and there is no suggestion that their legal representative was prevented or inhibited from raising any question that the families thought to be relevant.

70. To the questions "how" and "why" there can be answers at differing levels of detail and remoteness from the death which is the subject-matter of the investigation. The immediate cause of Corporal Long's death was the murderous behaviour of the Iraqi mob. The Board of Inquiry considered with conspicuous care whether the deaths might have been avoided by better intelligence; whether the RMP patrol should have been accompanied by paratroopers; whether the RMP patrol ought to have had more ammunition; and whether they ought to have been provided with iridium phones. Two of the specific questions that the Board of Inquiry were asked to consider were:

    i) Why did the RMP not have iridium phones and

    ii) Would having had iridium phones have made a difference.

71. The Board gave a number of reasons in answering the first of those questions. There was a combination of poor command relationships, poor briefing, booking out and control of the RMP; the relative inexperience of the platoon commander, who did not report concerns higher up the chain of command, exacerbated by the fact that RMP officers did not undergo enough basic infantry training; and limited intelligence being provided to the RMP.

72. In answering the second question the Board concluded that if the patrol had had an iridium phone they could have notified the ops room "which may have allowed the

RMP to extract". The coroner was, in my judgment, much more sceptical about the possibility of an extraction even if the RMP patrol had been equipped with an iridium phone. But it was not argued that this prevented article 2 from being both substantively and procedurally engaged.

73. The case for Mrs Long is that more detailed answers are required to the first of these questions. In his rule 43 letter the coroner said that there had been a failure in the chain of command. It is the alleged vagueness of that conclusion that is the principal focus of challenge. However, in my judgment the coroner's more generally expressed conclusion cannot and should not be read without regard to the very detailed investigation by the Board of Inquiry, which gave a number of answers to both the "how" and the "why" questions. In addition, since the families had ample opportunity to raise questions at the coroner's inquest I would hold, in agreement with the Master of the Rolls and for the reasons that he gives, that the state has substantially discharged its investigative obligation under article 2.

74. I, too, am satisfied that Mrs Long cannot require the Secretary of State to hold another inquiry.

Lord Justice Underhill:

75. I agree.