



Neutral Citation Number: [2013] EWHC 95 (Admin)

Case No: CO/9180/2011

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**DIVISIONAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 1 February 2013

Before:

**Lady Justice Hallett DBE**

- and -

**Mr Justice Collins**

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Between:

**Haidar Ali Hussein**

Claimant

- and -

**Secretary of State for Defence**

Defendant  
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**Mr Tim Owen Q.C. & Mr Danny Friedman** (instructed by **Public Interest Lawyers Ltd**)  
for the **Claimant**

**Mr Richard Whittam Q.C., Mr Samuel Wordsworth & Ms Amy Sander** (instructed by  
the **Treasury Solicitor**) for the **Defendant**

Hearing dates: 18 & 19 December 2012  
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**Judgment Approved by the court  
for handing down  
(subject to editorial corrections)**

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**Mr Justice COLLINS :**

1. This claim challenges the lawfulness of an element of the policy of the Defendant dealing with questioning of persons captured by UK Armed Forces. Persons captured are known by the acronym CPERS. The questioning takes two possible forms. One is what is known as interrogation, which is questioning by trained personnel in a controlled environment. The other is known as tactical questioning (TQ) which generally covers questioning by personnel immediately or very shortly after capture. While there should be no real distinction between the approaches in either form of questioning, at present the techniques which are challenged are not used in TQ because there is an insufficient number of properly trained personnel to undertake such questioning. The approaches are due to be deployed in TQ in Afghanistan this coming year.
2. When this claim was lodged, the Claimant was Ramzi Saggar Hassan. He was an Iraqi national. He had been arrested in April 2007 and questioned. He alleged that he had been ill-treated both physically and in being shouted at for substantial periods in the course of the questioning. Not only did he make this claim but he had been a co-claimant in a previous successful claim which sought a public inquiry into UK detention policy and practices in Iraq and had also made a private law claim (which the claimant has settled in private law proceedings) for damages for the ill-treatment which he alleged he had suffered.
3. By an order made by consent on 12 November 2012 the present Claimant was substituted. He too is an Iraqi national. He had been arrested in December 2004 and, he alleges, was physically ill-treated both before and during his questioning and was subjected to substantial periods of shouting. He was a co-Claimant in the same proceedings as Ramzi Hassan and has also made a private law claim for damages.
4. Since there is now no possibility that the Claimant or his predecessor or indeed anyone in Iraq could be affected by the present policy, it is not surprising that the Defendant in his Acknowledgement of Service asserted that the Claimant Hassan lacked standing. Certainly neither Claimant is or could be affected by the policy. It was suggested that he might be a potential future victim since the UK continued to carry out military and intelligence co-operation with Iraq. That suggestion is in my view unsupportable. The reality is that the only possible basis for allowing this claim to proceed is if it could be said that the public interest required that the issue be determined by the court and, it was said, the Claimants by reason of their past experiences could be said to be "sufficiently representative of those who might have standing". Those words come from *Al Bazzouni v Prime Minister*, which concerned hooding. While the policy had changed, hooding was still the issue. Here, the policy has changed since the Claimants were questioned, but, it is said, there is still permitted shouting (one of the techniques which was regarded as objectionable) and so the claim should be considered on its merits.
5. When granting permission, Ouseley J indicated that the Defendant should be permitted to raise the threshold arguments, including standing, at the substantive hearing. The other threshold arguments I will deal with after setting out the factual background to this claim and the grounds relied on by the Claimant. I am far from persuaded that the Claimants did or do have standing. However, since I have no doubt that the claim must fail on its merits there is little point in relying on lack of standing as a separate basis for refusing relief to the Claimant.
6. In September 2003 Baha Mousa was taken into custody by British troops in Iraq and, in the course of being detained for the purposes of tactical questioning, died. He was subjected to physical ill-treatment, which on any view was unlawful, but

also to what was called a harsh approach. This sought to capitalise on the shock of capture and the anticipated vulnerability of the CPERS. It involved inter alia shouting in his face. This shouting might go on for some time and could involve personal abuse, taunting, making sarcastic comments and generally putting him in fear. In May 2008 an inquiry under the chairmanship of Sir William Gage was set up to "investigate and report on the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him ... and to make recommendations."

7. There can be no doubt that the practices carried out under the guidelines then in place were unacceptable. The harsh technique included the following elements which could be deployed as the questioner considered necessary. The shouting could be as loud as possible. There could be what was described as uncontrolled fury, shouting with cold menace and then developing, the questioner's voice and actions showing psychotic tendencies, and there could be personal abuse. Other techniques were described as cynical derision and malicious humiliation, involving personal attacks on the detainee's physical and mental attitudes and capabilities. He could be taunted and goaded as an attack on his pride and ego and to make him feel insecure. Finally, he could be confused by high speed questioning, interrupting his answers, perhaps misquoting his replies.
8. Having seen extracts from the questioning of Ramzi Hassan, I am not in the least surprised that Sir William Gage concluded that the harsh technique was unacceptable. He said this: -

"The teaching of the 'harsh' permitted insults not just of the performance of the captured prisoner but personal and abusive insults including racist and homophobic language. The 'harsh' was designed to show anger on the part of the questioner. It ran the risk of being a form of intimidation to coerce answers from prisoners. It involved forms of threats which, while in some senses indirect, were designed to instil in prisoners a fear of what might happen to them, including physically. Insufficient thought was given to whether the harsh approach was consistent with the Geneva Conventions."

9. Before Sir William Gage reported, the Defendant issued some modifications to the harsh techniques policy. The court is concerned with the lawfulness of the policy as it now exists following Sir William's report, but it is to be noted that the MOD strategic detention policy statement of March 2010 requires the MOD and Armed Forces to -

"As a minimum, without prejudice to the legal status of a Detained Person, apply the standards articulated in Common Article 3 to the Geneva Conventions. Where other standards are applicable, they must be applied."

In the Joint Doctrine Publication 1-10, Captured Persons, second edition, October 2011, following publication of Sir William's report, it is made clear that all CPERS must be treated humanely in all circumstances and at all times. Minimum standards of humane treatment are identified. That approach has been maintained.

10. The present policies are dated 16 May 2012. There are two, one dealing with tactical questioning (TQ), the other with interrogation. As will be apparent when the relevant passages are referred to, there is no material difference between

them for the purposes of this claim. Each is to be applied worldwide wherever CPERS need to be questioned by British troops, albeit at present it is likely to be used mainly if not solely in Afghanistan. Each policy is to be reviewed biennially or more frequently if required. The purpose of each form of questioning is to obtain valuable information. This information may protect the lives of other members of the forces or civilians. An obvious example is the location of road side bombs where a person has been captured who may well know details of such bombs. TQ is routinely conducted at or close to the point of capture but may be carried out later if the circumstances so require. Interrogation is to be carried out by specialist trained troops in facilities approved for the detention of CPERS and equipped and authorised for interrogation. It will be used where an individual is believed to possess valuable information and may follow TQ where it becomes clear that the CPERS needs to be dealt with by a fully trained interrogator in more formal surroundings. It involves systematic longer term questioning of a selected individual by a trained and qualified interrogator.

11. The element of the policies under attack in this claim is what is called the Challenging Approach. This has been developed following Sir William Gage's report, has taken account of his recommendations and has sought to apply them so as to avoid the potential unlawfulness apparent in the 'harsh' approach. I have taken the relevant parts of the policies from the interrogation policy, but there are no material differences in the TQ policy. Minimum standards of treatment are specified. There are five prohibited techniques; namely a requirement to maintain physical postures which are extremely uncomfortable, painful or exhausting, hooding, exposure to excessive noise, sleep deprivation and deprivation of food or water. Treatment should be to an equivalent standard as would be expected for a member of the UK armed forces. The standards to be applied in questioning are these: -

**"2. As a matter of policy and by law, UK Armed Forces will as a minimum treat CPERS detained during international or non-international armed conflict or other military deployments in adherence to Common Article 3.** Additional protections are provided to entitled civilians by virtue of their protected status under Geneva Convention IV. Prisoners of War (PWs) are provided with additional protections under Geneva Convention III, the most pertinent article of which is Article 17:

*No physical or mental torture, nor any other form of coercion, may be inflicted on Prisoners of War to secure from them information of any kind whatever. Prisoners of War who refuse to answer must not be threatened, insulted or exposed to unpleasant or disadvantageous treatment of any kind.*

3. All approaches described in this Annex are compliant with this standard and are to be conducted in accordance with the prohibition against *outrage upon personal dignity, humiliation, and degrading treatment*. Despite being fully consistent with Geneva Convention III Art 17, MOD policy direction is that the Challenging approach is not to be used against those personnel who qualify for PW status; thereby mitigating the risk of a Tactical Questioner inadvertently breaching this Geneva Convention. All other approaches are authorised for use against PWs and are to be conducted in accordance with the prohibition against *threats, insults, or*

*unpleasant or disadvantageous treatment of any kind whatsoever.*

4. Significantly, not even Convention III Art17 prohibits attempts to extract information of military value; nor does it prevent deception or persuasion, both processes which are regarded as entirely legitimate."

12. The authorised approaches to questioning are identified. The Challenging Approach comprises two defined aspects, namely Challenge Direct and Challenge Indirect. It is not intended nor is it permitted to 'threaten, coerce, insult, humiliate or degrade the CPERS or place the CPERS in fear of violence'. Its purpose is specified in these words; -

"... each aims to refocus the CPERS attention to the reality of their situation and futility of intransigence. **The Challenging approach is only to be used once one or more of the alternate approved approaches have proven unsuccessful.** The Challenge Direct is a series of statements delivered as a verbal 'short sharp shock' during the course of questioning to encourage a CPERS to engage with a questioner. The Challenge Indirect is an approach designed to refocus an arrogant CPERS onto the futility of not talking, undermine their belief in their organisation and stimulate them to challenge their own actions. As a matter of policy, **the Challenging approach is not to be used against CPERS who qualify for Prisoner of War status, or any CPERS assessed as being vulnerable person.**"

13. The direct and indirect approaches are identified. Challenge Direct is said to involve a series of statements aimed to last no more than a short-lived period. This is said: -

"(1) The statements will comprise stern comments to the effect that the CPERS is not providing a plausible explanation, or is not acknowledging the importance of engaging with the questioner. A CPERS may have switched off or become so comfortable in a session that they are no longer taking the process seriously; the intention of the statements is to refocus the CPERS on the reality of their situation in order to promote/prompt/encourage engagement. The approach may be delivered loudly, incorporating stern comments, to rapidly bring a CPERS' attention back onto the process, but only from the front and never in the ear; it should not be so close to the CPERS face that they are put in fear of violence or threats thereof. It can also be slowly delivered in a low pitched tone to alert the CPERS they should be listening more attentively. The questioner may appear incredulous, frustrated, exasperated, disappointed or angry; or any combination of these. The approach exploits the inherent human attribute of wishing to please those in authority. The Challenge Direct approach is rhetorical in nature and is best employed in close co-ordination with the friendly or neutral approach where the contradiction will be most effective. The aim is to register with the CPERS the genuine seriousness of the circumstances of their situation and prompt them to defend

their behaviour. The Challenging Direct approach is not an information extraction approach; instead it seeks to stimulate the CPERS into engaging with the questioner, to elicit a response from the CPERS and increase the CPERS' attention to the questioning process. **The use of the Challenging Direct approach within Tactical Questioning and Interrogation is subject to the specific constraints detailed in paragraph 6."**

Challenge Indirect is identified thus: -

"(2) This approach challenges the aims, politics, actions, impacts, mistakes and conduct of the enemy forces, including the CPERS themselves, to prompt the CPERS to be responsive by refocusing them into the futility of not talking, undermine their belief in their organisation and challenge their own actions. The approach should only be employed until the desired effect has been achieved, noting that if an interpreter is used this may take longer. The questioner may use real or hypothetical examples, and should consider focusing the criticism on other enemy groups to instigate the debate before challenging the conduct and actions of the CPERS' own group and finally the CPERS themselves. The questioner may exhibit disbelief in what they are being told and seek to exploit weaknesses in a CPERS' narrative and position. They may adopt a scornful tone. Sarcasm as well as cynicism may be employed. The aim of this approach is to exploit an individual's desire to defend his ego or perceptions, particularly where the individual has held a position of authority, thereby encouraging a dialogue or debate which can be steered towards extracting intelligence. Concurrently, it seeks to persuade the CPERS to question their own allegiance to their organisation."

14. The use of Challenge Direct must be approved and observed by the local commander and the number of times it can be used and the extent of its use on any occasion are strictly limited.
15. In the course of argument, Mr Owen accepted that he could not establish that there was any unlawfulness in the Challenge Indirect approach. He maintained that the Challenge Direct was unlawful because it failed to deal with the deficiencies in the harsh policy in that an aggressive and intimidating approach was still permitted by the tactic of shouting at the CPERS being questioned. Limitations on the time during which any such shouting could continue did not in his submission overcome the objection to it.
16. It is to be noted that the challenging approach is not at present permitted for TQ in Afghanistan since there are an insufficient number of trained personnel available. Furthermore it has been used in interrogation on a very small number of occasions. Between August 2011 and September 2012 it was authorised on 44 occasions but used in only 12. During that period more than 9000 interrogations took place. It is intended to deliver a short sharp shock where a CPERS being interrogated appears to have deliberately disengaged from his questioner but there is a belief that he holds valuable information which the use of this tactic might elicit. The evidence before the court shows that it has achieved a result where a CPERS had ignored all attempts to question and was refusing to give any answers but, following its use, there was a re-engagement and the provision of

valuable information. In one case its use, following a failure in TQ to produce any information, resulted in information which enabled personnel to protect themselves from and to take actions to neutralise a lethal threat. TQ has been cleared subject to training and personnel will be deployed this year.

17. The court has had the advantage of seeing material extracts from the training video for those who are to be authorised to use the Challenging Approach and a number of actual interrogations. While I am conscious that I should be careful not to rely overmuch on any subjective view of what I saw in the interrogations, the sudden shouting did produce a shock for the listener, but no fear of what might thereafter happen was apparent in the reaction of the CPERS being interrogated. It was altogether different from the manner in which Mr Hassan's interview had been conducted in accordance with the harsh approach then permitted. One interrogator did slap his hand on a table when beginning to shout. He should not have done this: it was inconsistent with what had been covered in his training. But it did not appear to have intimidated the person being interrogated.
18. The first ground relied on by Mr Owen is that Challenge Direct involves the offence of common assault. This is linked to the use of this approach where the CPERS is likely to be suffering from what is described as shock of capture, manifesting itself in feelings of fear and vulnerability. This will, it is said, include fear of punishment or reprisals so that shouting at someone in those circumstances must necessarily involve foresight of the possibility that the CPERS would apprehend immediate violence. It is not nor could it be suggested that there is an intention to create a fear of imminent violence. What is relied on is alleged recklessness.
19. It is accepted by Mr Owen that the offence could only be established if it was proved that the questioner foresaw that his use of shouting would create a fear of immediate violence and he nonetheless proceeded to shout. Physical violence is expressly prohibited and it is in my view impossible to say that there is a reasonable possibility that Challenge Direct would amount to a common assault. There is nothing in the conduct of the questioning which could in my view lead to a fear of immediate violence. Provided that it is carried out by a properly trained questioner who complies with the policy, there is no real risk that an offence could be committed. This ground is in my view utterly without merit.
20. The second ground is based on an alleged failure to abide by the requirements of the Geneva Conventions, insofar as they are applicable. They are, it is submitted, part of international law which is incorporated into domestic law. It is said that the use of shouting in particular is not humane treatment. In the skeleton arguments, there has been much learning on whether the Conventions are to be regarded as incorporated into domestic law. The observations of Lord Denning, MR in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529, upon which Mr Owen particularly relies, are at p.554G. He concludes that 'the rules of international law, as existing from time to time do form part of our English law'. But there has not been universal acceptance of this in subsequent cases. However, it is not in my view necessary to determine the question. It is clear from the policies that the Defendant has accepted that CPERS must be treated in accordance with any applicable Geneva Convention and must in particular be treated at all times in a humane fashion. Thus whether the obligation to treat CPERS in such a manner applies as a matter of law does not need to be determined since as a matter of fact the Defendant has decided to do so. Any failure to comply with relevant obligations would constitute a breach of the approach that the Defendant is applying and so would be unlawful in public law terms.

21. The most material Geneva Convention is Number IV (GCIV) which may apply where suspected Taliban insurgents are captured in Afghanistan. Article 3, which is common to all the Geneva Conventions, provides as follows, so far as material: -

“Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum the following provisions:

- 1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b) taking of hostages;
- c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples.”

22. This contains the general requirement to treat persons captured humanely. ‘Protected persons’ within the meaning of Article 4 of GCIV are entitled to additional protection under Articles 27 and 31. Article 31 provides; -

“No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”

23. I have difficulty in the use of the adjective ‘moral’ but assume it is intended to cover such conduct as threats of what might happen for example to the family of the CPERS if the required information is not forthcoming. Article 27 repeats the need for humane treatment and requires protection ‘especially against all acts of violence or threats thereof and against insults and public curiosity’. In addition, a person’s honour, family rights, religious convictions and practices and manners and customs must be respected. It is not necessary to refer to Article 4 in detail. Suffice it to say that it seems to me that a CPERS may well be a protected person within the meaning of GCIV.

24. It will be noted that it has been decided that the Challenging approach should not be applied when questioning Prisoners of War (POWs). They are protected by



GCIII, which by Article 17 requires a POW to 'give only his surname, first names and rank, dates of birth, and army, regimental, personal or serial number, or, failing this, equivalent information.' There is no prohibition on questioning a POW, but he is not required to give any further information and Article 17 goes on to provide:-

"No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind."

25. Mr Owen has argued that the decision not to use the Challenging approach when questioning POWs is irrational since there is no material difference between the protection to be applied to them and to other CPERS. It is said that in the circumstances it must recognise that there is a real risk that Challenging Direct in particular could be contrary to the requirement of humane treatment. There is in my view no validity in this argument. It may be that Article 17 of GCIII does, as its wording indicates, give a greater protection in relation to questioning than that applicable in Article 31 of GCIV. But, whether or not that is so, the decision to provide greater protection to POWs cannot in my judgment properly be used to establish that there is some defect in the approach when used against other CPERS. While it may be that there is a right of silence to be attributed to POWs, there is no such right applicable generally to CPERS. The questioning is not for the purpose of self incrimination but to obtain valuable information which may protect lives. The right not to incriminate oneself and the so-called right of silence are by no means necessarily coterminous.
26. There is no prohibition on questioning CPERS or indeed POWs. When considering whether the treatment is humane or whether there is a breach of Article 31 of GCIV, it is necessary to bear in mind what is inevitably involved in being subjected to proper questioning having been captured. It is, I think, helpful to refer to observations of Barak P in the Israel Supreme Court in *Public Committee Against Torture v Israel* (2000) 7 BHRC 31. In paragraphs 22 and 23 on p.45 he said this;-

"22....Our concern, therefore, lies in the clash of values and the balancing of conflicting values. The balancing process results in the rules for a 'reasonable interrogation'. These rules are based, *on the one hand*, on preserving the 'human image' of the suspect and on preserving the 'purity of arms' used during the interrogation. *On the other hand*, these rules take into consideration the need to fight the phenomenon of criminality in an effective manner generally, and terrorist attacks specifically. These rules reflect 'a degree of reasonableness, straight thinking [right-mindedness] and fairness'. The rules pertaining to investigations are important to a democratic state. They reflect its character. An illegal investigation harms the suspect's human dignity. It equally harms society's fabric.

23. It is not necessary for us to engage in an in depth inquiry into the 'law of interrogation' for the purposes of the application before us. These vary from one matter to the next. For instance, the law of interrogation, as it appears in the context of an investigator's potential criminal liability, as

opposed to the purpose of admitting evidence obtained by questionable means. Here, by contrast, we deal with the 'law of interrogation' as a power activated by an administrative authority. The 'law of interrogation' by its very nature, is intrinsically linked to the circumstances of each case. This having been said, a number of general principles are nonetheless worth noting. *First*, a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever. There is a prohibition on the use of 'brutal or inhuman means' in the course of an investigation. Human dignity also includes the dignity of the subject being interrogated. This conclusion is in perfect accord with (various) international law treaties – to which Israel is a signatory – which prohibit the use of torture, 'cruel, inhuman treatment' and 'degrading treatment'. These prohibitions are 'absolute'. There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can potentially lead to the investigator being held criminally liable. *Second*, a reasonable investigation is likely to cause discomfort; it may result in insufficient sleep; the conditions under which it is conducted risk being unpleasant. Indeed, it is possible to conduct an effective investigation without resorting to violence. Within the confines of the law, it is permitted to resort to various machinations and specific sophisticated activities which serve investigators today (both for the police and GSS); similar investigations – accepted in the most progressive of societies – can be effective in achieving their goals. In the end result, the legality of an investigation is deduced from the propriety of its purpose and from its methods. Thus, for instance, sleep deprivation for a prolonged period, or sleep deprivation at night when this is not necessary to the investigation time-wise may be deemed a use of an investigation method which surpasses the least restrictive means."

27. Those observations come from one whose opinions in the field of considering what is permissible in the context of dealing with alleged terrorists are entitled to great respect and I have no reason to doubt their relevance and applicability in our domestic law. What is to be regarded as humane must be approached in the context of what are permitted interrogation techniques.
28. Mr Owen has relied heavily on conclusions reached by Sir William Gage and recommendations made by him following consideration of the harsh technique. The evidence before Sir William about the harsh technique involved, as he records:-

"... getting within an individual's internal space, within 2 or 3 inches of the face. It involves shouting loudly and aggressively and that, in essence, is the harsh. It is a technique not entirely designed to elicit a response from the detainee. It is more a technique that seeks to shock the detainee initially."

While violence of any sort was ruled out, threats of the possible consequences to non-cooperation to the detainee's family or of detention for a long period were acceptable.

29. Sir William indicated that it was not appropriate for him to rule on the legality of the harsh approach, albeit it must be apparent from what we have cited in the previous paragraph that it is not likely to have been compliant with GCIV. He made a number of recommendations about the TQ and interrogation policies, indicating that urgent consideration must be given to making clear what was and what was not permissible. Particular reliance has been placed by Mr Owen on Recommendations 23 and 24. These state: -

"Recommendation 23

**The harsh approach should no longer have a place in tactical questioning. The MoD should forbid tactical questioners from using what is currently known as the harsh approach and this should be made clear in the tactical questioning policy and in all relevant materials.**

The MoD's recent review of the harsh approach is welcome. But even as amended by the proposed new parameters and terminology, the risks of using the harsh approach in tactical questioning will remain and are too great.

Recommendation 24

**To the extent that the MoD considers that the harsh approach can still lawfully be used in interrogation:**

- (1) there is a need for very clear guidance within the interrogation policy and in training as to the proper limits of the harsh approach;**
- (2) the approach should be given a label which is less apt to be misinterpreted as permitting unlawful, threatening or intimidatory conduct;**
- (3) the approach should not include an analogy with a military drill sergeant; and**
- (4) in the light of the legal and other risks in the use of the harsh approach, specific Ministerial approval should be sought before the harsh approach is approved for use in any operational theatre. "**

30. Sir William had had the proposed amendments to the harsh approach set out in March 2011 drawn to his attention. He was unhappy with the continued use of the word 'harsh' and had reservations about the practicality of seeking to apply the amendments. In paragraph 16.208 of his report he said this: -

"I have carefully considered the 'strict parameters' necessary properly to control the use of the harsh approach.

Obviously they represent an improvement on the previous position. Nevertheless, I have considerable reservations as to how in practice instructors will be able to demonstrate and teach sarcasm and cynicism that does not lead and amount to insulting the prisoner, and greater reservations on the practicality of ensuring that such training is adhered to. For instance, the parameters for the 'loud harsh' prohibits 'intimidation' and 'coercion' of any kind. This will involve a questioner/interrogator in treading a fine line between what is legitimate and what is intimidation or coercion. It will also involve some subjective judgment by the instructions of the subject of the questioning and interrogation ..."

In his view, the risk remained and in any event for any amended approach Ministerial approval should be obtained.

31. In his skeleton argument, Mr. Owen submitted that the Challenging approach does not overcome the objections to the harsh approach. He went so far as to assert that, as he put it, the Defendant's failure to recognise the reality of his criticism reflected 'a state of institutionalised denial within the MoD and Armed Forces resulting in the continuing belief that it is permissible to treat CPERS in an aggressive and intimidatory fashion in order to obtain information from them.' It is no help to his case to put forward assertions such as those which bear no relation to the reality of what has been done and which totally ignore not only the terms of the present policy but the evidence from the Defendant's representatives put before the court. There can be no doubt that regard has been had to Sir William's concerns and the discarding of the word harsh is not mere window dressing. From what I have seen in the excerpts from the hearings and the training and the limitations and controls on the use of Challenge Direct it is clear that real efforts have been made to ensure compliance with the Geneva Conventions and to avoid any risk of non-compliance. In my judgment, those efforts have succeeded. I can well understand Sir William's reservations in the light of what was being done and what seemed to be likely to continue to be done under the harsh approach which he had seen and heard about in action. The present system must now be judged on its merits and it is not in my view helpful to look back to the defects of the harsh approach.
32. The question is whether the Challenging approach in the use of shouting over a short lived period subject to the controls set out in the policy is to be regarded as humane. It must be borne in mind that questioning is permissible and accordingly all legitimate interrogation techniques must be regarded as lawful. Mr Owen submitted that to shout was oppressive and that sufficed to indicate that it was not humane treatment. What is humane must be judged in the context of interrogation which will inevitably be to an extent oppressive for the person being interrogated.
33. The court has been referred to the commentaries on the Convention by Jean Pictet which have long been regarded as a valuable source for determining the correct construction of the various Conventions. In considering what is meant by humane treatment in Articles 3 and 27 of GCIV, this is said: -

"The expression "to treat humanely" is taken from the Hague Regulations and from the two Geneva Conventions. The word "treatment" must be understood here in its most general sense as applying to all aspects of man's life. It seems useless and even dangerous to attempt to make a list

of all the factors which make treatment “humane”. The purpose of this Convention is simply to define the correct way to behave towards a human being, who himself wishes to receive humane treatment and who may, therefore, also give it to his fellow human beings. What constitutes humane treatment follows logically from the principles explained in the last paragraph, and is further confirmed by the list of what is incompatible with it. In this connection the paragraph under discussion mentions as an example, using the same wording as the Third Geneva Convention, any act of violence or intimidation inspired not by military requirements or a legitimate desire for security, but by a systematic scorn for human values (insults, exposing people to public curiosity etc).

...

The requirement of humane treatment and the prohibition of certain acts incompatible with it are general and absolute in character, like the obligation enjoining respect for essential rights and fundamental liberties. They are valid “in all circumstances” and “at all times”, and apply, for example, to cases where a protected person is the legitimate object of strict measures, since the dictates of humanity and measures of security or repression, even when they are severe, are not necessarily incompatible. The obligation to give humane treatment and to respect fundamental rights remain fully valid in relation to persons in prison or interned, whether in the territory of a Party to the conflict or in occupied territory. It is in such situations, when human values appear to be in greatest danger, that the provision assumes its full significance.”

The ‘principles explained in the last paragraph’ cover respect for the person, respect for honour, respect for family rights, respect for religious convictions and respect for manners and customs.

34. It is in my view now apparent that whether or not treatment in interrogation can be regarded as unlawful will depend on whether it contravenes a prohibition on treatment which would be regarded as inhumane. A useful guide can be obtained from Article 3 of the ECHR since it is clear that any physical ill-treatment of a detainee is likely to contravene it and other forms of coercion may, if sufficiently serious. I have no doubt that if used in accordance with and applying the controls required by the policy the use of Challenge Direct cannot be regarded as a breach of the obligation of humane treatment.
35. Mr Owen submitted that even if the policy on its face appeared to be lawful, there was a real risk that it would be exercised in a way which was not lawful having regard to the circumstances in which it was to be used. Reliance was placed on the decision of the Court of Appeal in *R(Refugee Legal Centre) v Secretary of State for the Home Department* [2005] 1 WLR 2219. That case involved a challenge to the Secretary of State’s scheme for dealing in a speedy manner with certain asylum claims. The major concern was that the timetable for dealing with such claims was very short and, unless it was exercised in a sufficiently flexible manner so as to give extensions of time where such extensions were needed in the interests of an individual applicant, it would be unlawful. The risk that a perceived need to maintain the integrity of the system might mean that the need

for flexibility was not properly taken into account was recognised by the court. But it took the view that the system was not inherently unfair and therefore unlawful and clear written instructions would suffice to concentrate the officials' minds on the proper ingredients of fair procedure. Thus I do not think that this decision assists the Claimant. On the contrary, the necessary requirements to avoid any unlawfulness are fully detailed in the policy and so there is compliance with what the Court of Appeal considered to be appropriate to avoid a real risk of unlawfulness.

36. There is one further aspect which is relied on as a defect in the policies. It is stated in the policies that a Challenging approach must not be used against vulnerable persons. These are defined as "an individual who, by reason of mental or other disability, age or illness, is or may be unable to take care of himself or is unable to protect himself from significant harm or exploitation or is dependent on others for assistance in the performance of basic physical functions". It is submitted there are no mechanisms to enable whether a person is to be regarded as vulnerable to be properly determined and so there is a real risk that a person who should not have a Challenging approach used against him will be subjected to it. If there is doubt, the policy by the words "may be" makes it clear that any such doubt must be resolved in the CPERS's favour. Furthermore, those responsible for deciding whether in a given case it can be used will have had training and experience which will enable them to form a reasonable judgment. I do not think that there is any validity in this argument.
37. Reliance was placed on the ECHR. I am satisfied that there is no breach of Article 3. That follows from what I have said in dealing with the arguments based on the alleged failure of humane treatment. If there is any interference with the CPERS's private life, such interference would be proportionate within Article 8(2). Mr Owen accepted that Article 8 would not give any remedy if the interrogation was not in breach of GCIV.
38. It was suggested that to shout in the manner permitted was oppressive and would render any answers given inadmissible in criminal proceedings here. Whether or not that would be so does not seem to me to be material since the purpose of the questioning is not to obtain admissions for the purpose of prosecution but to obtain information which would be likely to save lives and assist in the pursuit of those hostile to the British forces. If (which I doubt) it could be regarded as oppressive, it is not, as I have said, sufficiently seriously oppressive so as to amount to treatment which is not humane. If there is a prosecution, the admissibility of any answers will be a matter for the court before which he is tried. It is to be noted that in defining oppression, the Court of Appeal has said that the ordinary dictionary meaning should be given. This is:-

"Exercise of authority or power in a burdensome, harsh or wrongful manner, unjust or cruel treatment of subjects, unfairness etc. the imposition of unreasonable or unjust burdens." (see *R v Furlong* [1987] QB 426).

In *R v Mushtaq* [2005] 1 WLR 1513 in paragraph 64 Lord Carswell said that oppression would be constituted by "questioning which by its nature, duration or other circumstances (including the fact of custody) excites hopes (such as hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent." None of these observations seem to me to show that any real oppression exists in the proper use of Challenge Direct.

39. It only remains to mention the threshold objections other than standing. It is said by the Defendant that whether or not there would be a breach of domestic criminal law is not justiciable. No doubt that is generally correct, but it is not a bar in all circumstances. A similar argument is raised in relation to the ground challenging breach of international law, essentially because it is not applied in domestic law. The attack here is on the policies. That attack does not depend on the application of the policies in given circumstances. Accordingly I do not think that the general bar to a challenge in relation to domestic criminal law would prevail. So far as international law is concerned, for the reasons given its applicability in domestic law is not relevant having regard to the Defendant's approach set out in the policies. Thus I would not have dismissed this claim on either of these threshold objections. Neither was pursued in argument before us.
40. I would for the reasons I have given dismiss this claim.

**Lady Justice Hallett:**

41. I am indebted to Collins J for his thorough and careful analysis of the facts, the Law and the relevant issues. I shall not repeat it. For the reasons that he has given, I agree that the claim should be dismissed.
42. I add only this. I have very real doubts as to the propriety of spending precious time and resources on this litigation. It was premature and in my view misconceived.
43. It was premature because at the time the litigation was proposed, the Ministry of Defence wisely wished to await the recommendations of Sir William Gage in the Baha Mousa Inquiry before finalising their new policy. Public funding was rightly refused at that time. Sir William reported and the then Secretary of State for Defence reacted to his recommendations by informing Parliament he accepted all of them save the proposal for a "blanket ban .... on the use of certain verbal and non physical techniques". Without waiting for the detail of the new policy to assess whether it did in fact properly reflect Sir William's concerns, public funding was granted and the claim issued. It remained premature. As the Ministry observed, the policy was still under review.
44. The amended and lengthy claim was misconceived for a number of reasons. It was in large measure simply a recitation of the history. Towards the end of the grounds complaint is made about both the Challenge Direct and the Challenge Indirect approaches. As my Lord has already observed, the complaint about the latter is no longer pursued; nor could it have been.
45. The complaint about the Challenge Direct is that shouting at a captured person during questioning, as proposed, is in effect the former "loud harsh" policy by another name. This is plainly wrong. Significant changes had been made to the policy to which my Lord has referred. Thus, the claimants faced an extraordinarily high hurdle in persuading the court that there was a sufficient public interest in hearing a challenge to it. Without the element of public interest, both Claimants were always likely to fail on the issue of standing. Both are Iraqi citizens who live in Iraq. Neither Claimant lives in Afghanistan, the only country where the policy is in use or likely to be used. Neither Claimant will be affected by it directly or indirectly. I was somewhat surprised in those circumstances that one Claimant was substituted for the other, without complaint, in an attempt to protect any damages the first Claimant may receive in his personal action against the Defendant from an order for costs.

46. Second, in my view, the claim was misconceived because no sensible analysis has been made of the new policy. Mr Owen did his skilful best but the fact is the new policy is very different from the old. The use of Challenge Direct is strictly controlled and limited. It is a technique of last resort. Personnel must be trained in its use. Its use in any theatre of operations must be authorised by ministers and on any specific occasion by the local commander. Restrictions are placed on the number of times it may be used in any one session. Details of its use must be recorded in a report. It may not be used on everyone. It has a clear purpose and can be effective. It can save lives without any resort to torture, cruel, degrading or inhuman treatment.
47. In essence, it simply allows the questioner to face the detained person and shout at them, at close (but not too close) quarters, in short bursts and for a limited period of time. We have seen footage of the technique in action and the detainees at the receiving end did not seem unduly fazed by it.
48. Shouting at someone, with nothing more, is not an assault. It does not amount to coercion or oppression and it is not threatening or abusive. Establishing whether or not a criminal offence has been committed will all depend on the circumstances, the mens rea of the alleged offender, the conduct of which complaint is made and the words used. It is a fact sensitive exercise.
49. The Claimant faced yet another high hurdle, therefore, in persuading the court that the policy created an unacceptable risk of the commission of a criminal offence or that this claim fell within any special category demanding action on the part of the court. In my view he did not come close. He has failed to persuade me that on its face, or in practice, the policy allows or in any way facilitates the commission of a criminal offence, a breach of international law or a breach of our international obligations.
50. Finally, I should mention the unnecessary documentation put before us: two thick lever arch files of "trial bundles" and three thick lever arch files of authorities. As is so often the case, we were referred to relatively few pages. With a proper spirit of co-operation on both sides, two bundles (one trial and one of authorities) would have sufficed.