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Case No: CO/7009/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2014

Before:

LORD JUSTICE FULFORD & MR JUSTICE LEGGATT

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Between:

The Queen on the application of Long	**Claimant**
- and -	
Secretary of State for Defence	**Defendant**

- -
- -

Michael Fordham QC & Iain Steele (instructed by **Public Interest Lawyers**) for the **Claimants**
Daniel Beard QC, Gerry Facenna & Brendan McGurk (instructed by the **Treasury Solicitor**) for the **Defendant**

Hearing dates: 5 & 6 June 2014

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Approved Judgment

Mr Justice Leggatt (giving the judgment of the Court):

Introduction

1. The Claimant (Mrs Pat Long) is the mother of Corporal Paul Long, one of six British soldiers of the Royal Military Police murdered by an armed mob when visiting a police station in Iraq on 24 June 2003. Although there have been extensive investigations into the deaths of the soldiers, it is the claimantôs case that the United Kingdom has an obligation under article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ñthe Conventionò) to investigate her sonôs death which has still not been discharged. On this claim for judicial review she seeks an order requiring the Secretary of State to conduct an effective independent investigation into Corporal Longôs death in compliance with article 2 of the Convention.

2. The claim raises issues concerning the scope of a stateôs duty under article 2 of the Convention to investigate the death of a member of its armed forces and, by implication, about the scope of a stateôs substantive obligations under article 2 to safeguard the lives of its soldiers when on active service. The claim also raises issues about when a claim alleging breach of a duty to investigate can or should be brought and whether there has in this case been undue delay which should lead the court either to refuse to entertain the claim or to refuse the relief sought.

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 (ñ1 PARAò) but also including 1 Platoon, 156 Provost Company of the Royal Military Police (ñRMPò). 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):

> ñThere 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. é 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.ò

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 ñcall sign 20Aò, 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 Groupôs ñQuick Reaction Forceò. 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 claimantôs 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 ñJoint Commanderôs Investigationò commissioned within a few days of the murders. Its purpose was to establish ña clearer understanding of the context and circumstances of the incidentò 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 (ñthe SIBò). 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 ñto provide an accurate record of the events leading up to the incident in order to assist a future Board of Inquiryò. 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:

> ñé [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 ï themselves not originally designed for the operational context ï 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.ò

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 soldiersô 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 soldiersô 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 ñculpably negligentò. The Adjutant General appointed Brigadier Monro to examine the familiesô 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 Monroôs 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 ñaccountability for allowing my son to be put into such a situationò. The reply dated 27 July 2010 stated that the Armyôs 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 soldiersô 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 Longôs 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.

These proceedings

30. Notice of the intention to bring the claim for judicial review made in these proceedings was first given by a letter sent by the claimantôs solicitors under the pre-action protocol on 13 January 2012. The claim form was filed on 4 July 2012, seeking a declaration that the Secretary of State has acted in breach of article 2 and an order requiring him to conduct an effective independent investigation into Corporal Longôs death in compliance with article 2 of the Convention, or alternatively just satisfaction for the alleged breach.

31. Permission to proceed was refused by Mr Justice King on 22 October 2012 on the grounds of delay in bringing the claim. On 22 November 2013 the claimant renewed her application before a Divisional Court (Goldring LJ and Leggatt J), who ordered that the question of permission and the substantive merits should be considered at a rolled-up hearing.

Territorial jurisdiction

32. When this action was begun, it was defended by the Secretary of State on the ground, amongst others, that UK armed forces serving abroad are not within the territorial jurisdiction of the UK for the purposes of the Convention, except when on a UK military base. At that time the objection was unanswerable in any court below the Supreme Court as a result of its decision in R (Smith) v Oxfordshire Assistant Deputy Coroner [2011] 1 AC 1 (ñthe Catherine Smith caseò). In that case the question arose whether an inquest into the death of a soldier serving in Iraq was required to comply with article 2 of the Convention. The soldier had died (of heatstroke) on a UK military base and the Secretary of State conceded that in these circumstances an inquest should be held which complied with article 2. However, both the claimant and the Secretary of State asked the courts to decide what the position would have been if the soldier had died outside his base. The Supreme Court held (by a majority of six to three) that the Convention would not have applied in those circumstances.

33. However, after the Catherine Smith case was decided by the Supreme Court, the European Court of Human Rights in Al-Skeini v United Kingdom [2011] 53 EHRR 18 comprehensively restated the principles which govern the territorial scope of jurisdiction under the Convention. In Smith v Ministry of Defence [2014] AC 52 (ñthe Susan Smith caseò) the Supreme Court adopted the principles stated in the Al-

Skeini case and held that the jurisdiction of the UK under the Convention extends to securing the protection of article 2 to members of the armed forces when they are serving outside its territory. In so holding, the Supreme Court departed from its own previous decision in the Catherine Smith case. The decision in the Susan Smith case has therefore cleared the way for the claimant to advance arguments before us based on article 2.

Article 2

34. Article 2 of the Convention states that ñeveryoneôs right to life shall be protected by lawò and that (with certain specified exceptions) ñno one shall be deprived of his life intentionallyò. The case law of the European Court of Human Rights has interpreted these provisions as imposing on member states two substantive obligations: an obligation not (through its agents) to take life without justification; and also, in certain circumstances, a positive obligation to take steps to protect the lives of those within the stateôs jurisdiction.

35. At a basic level, the positive obligation imposed by article 2 requires the state to have in place a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life. This may require the state, in relation to particular categories of person under its control, to take appropriate practical measures to protect such persons from a kind of risk to life to which they are known to be especially vulnerable. For example, it has been held that there is a duty to take measures to prevent suicides among prisoners, hospital patients suffering from mental illness and young conscripts doing national service: see Savage v South Essex NHS Trust [2009] 1 AC 681, paras 25-39. In addition to this general duty to have appropriate systems in place, the European Court has held that there is also, in certain circumstances, an ñoperationalò duty on state authorities to do all that can reasonably be expected of them to protect a particular individual or individuals from a ñreal and immediate risk to lifeò of which the authorities knew or ought to have known: see e.g. Osman v United Kingdom (1998) 29 EHRR 245, para 115; Van Colle v Chief Constable of the Hertfordshire Police [2009] 1 AC 225, paras 28-32; Van Colle v United Kingdom (2013) 56 EHRR 23, paras 88, 91. For example, as recognised in the Osman case, such a duty may lie on the police to protect an individual who has been threatened. Whether and, if so, when an ñoperationalò duty may arise in relation to soldiers on active service is a question to which we will return.

The duty to investigate

36. The European Court has also interpreted article 2 as imposing on member states an obligation to hold an effective investigation into any death where it appears that one or other of the stateôs substantive obligations has been, or may have been, violated and that agents of the state are, or may be, in some way implicated: see e.g. R (Middleton) v West Somerset Coroner [2004] 2 AC 182, para 3 (and the cases there cited). This óproceduralô obligation has been inferred from the stateôs substantive duty to protect the right to life under article 2, read in conjunction with the stateôs general duty under article 1 to ñsecure to everyone within their jurisdiction the rights and freedoms defined in [the] Conventionò: see e.g. Jordan v United Kingdom (2003) 37 EHRR 52, para 105; Al-Skeini v United Kingdom (2011) 53 EHRR 18, para 163.

37. The duty to investigate is triggered where there is an ñarguable breachò by the state of one of the substantive obligations imposed by article 2 (see e.g. R (Gentle) v The Prime Minister [2008] AC 1356 at paras 6, 11, 40 and 54) or where there are ñgrounds for suspicionò that a death may involve such a breach (see e.g. the Catherine Smith case at paras 70 and 84). Where the duty is triggered, however, the purpose of the investigation is not limited to determining whether the state is in breach of its substantive obligations under article 2. It also serves wider purposes. As stated by Lord Bingham in R (Amin) v Secretary of State for the Home Department [2004] 1 AC 653, para 31:

> ñThe 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.ò

38. The case law establishes that, in order to comply with article 2, the investigation must be effective, albeit that this is ñnot an obligation of result, but of meansò, and must have the following characteristics: (1) it must be undertaken by a person or body independent of the state agents who may bear responsibility for the death; (2) it must be reasonably prompt; (3) it must involve ña sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theoryò; and (4) the victimôs next of kin must be involved to the extent necessary to safeguard their legitimate interests. See e.g. Jordan v United Kingdom (2003) 37 EHRR 52, paras 106-109; R (Amin) v Secretary of State for the Home Department [2004] 1 AC 653, para 20; Al-Skeini v United Kingdom (2011) 53 EHRR 18, paras 166-167; R (Smith) v Oxfordshire Assistant Deputy Coroner [2011] 1 AC 1, para 64.

39. The duty to investigate applies even in difficult security conditions, including in the context of armed conflict: Al-Skeini v United Kingdom (2011) 53 EHRR 18, para 164.

The role of the coroner

40. The principal means by which the state investigates deaths in England and Wales ï and has done for hundreds of years ï is through the coroner system, including where necessary the holding of an inquest. The purpose of a coronerôs investigation is to ascertain who the deceased was and how, when and where the deceased came by his or her death: see section 5(1) of the Coroners and Justice Act 2009.[1]

41. In R (Middleton) v West Somerset Coroner [2004] 2 AC 182, the House of Lords considered whether the regime for holding inquests in England and Wales met the requirements of the Convention where a duty to investigate a death is imposed by article 2. The opinion of the appellate committee was that, with one modification, it did. Previous authority had interpreted the question of ñhowò the deceased came by

[1] The coroner must also ascertain the particulars (if any) required by law to be registered concerning the death: ibid.

his or her death narrowly as meaning ñby what meansò and not ñin what broad circumstancesò: see R v Coroner for North Humberside and Scunthorpe, ex p Jamieson [1995] QB 1, 24. In the Middleton case the House of Lords held (para 35) that, in order to comply with article 2, the broader interpretation must be adopted. This holding has since been embodied in section 5(2) of the Coroners and Justice Act 2009, which states:

> ñWhere necessary in order to avoid a breach of any Convention rights é , the purpose [of a coronerôs investigation] is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death.ò

The House of Lords further indicated in the Middleton case that, to record the conclusions of the coroner or the jury (if there is one) on this broader question, a narrative verdict rather than a traditional short form verdict may be required.

42. In the Catherine Smith case, Lord Phillips PSC (with whose judgment on this point four of the other eight Justices agreed) questioned the extent to which an inquest, even a ñMiddleton inquestò, will necessarily be the appropriate process for discharging the article 2 duty of investigation (para 69). Lord Phillips indicated two reasons for this. The first was that grounds for suspecting that the state may have breached a substantive obligation under article 2 may emerge only from the evidence given at the inquest itself, and Lord Phillips had ñdifficulty with the concept that the inquest itself may in midstream undergo a significant change in characterò (para 78). The more general point underlying this concern is that grounds for suspecting a breach of article 2 may arise (or be removed) as and when more information is known. The second reason indicated by Lord Phillips is that whether an inquest is the appropriate vehicle for investigating an arguable breach of article 2 will depend on the nature of the obligation that is alleged to have been broken (paras 81 and 86). In relation to deaths of members of the armed forces, he said (para 81):

> ñAn inquest can properly conclude that a soldier died because a flack jacket was pierced by a sniperôs bullet. It does not seem to me, however, that it would be a satisfactory tribunal for investigating whether more effective flack jackets could and should have been supplied by the Ministry of Defence. If the article 2 obligation extends to considering the competence with which military manoeuvres have been executed, a Coronerôs inquest cannot be the appropriate medium for the enquiry.ò

The scope of the inquest in this case

43. It is not necessary for us to decide whether there was in this case a duty under article 2 to investigate the deaths of the six RMP soldiers which required the Coroner to conduct the wider form of inquest identified by the House of Lords in the Middleton case. The reason is that the claimant did not challenge at the time, and does not seek to criticise now, the extent of the investigation undertaken by the Coroner. Rather, the claimantôs case as advanced before us by Mr Fordham QC is based on a matter which the Coroner expressly raised but regarded as outside his remit. It is said that this matter involves an arguable breach of the UKôs substantive obligations under article 2 which must therefore be investigated.

The matter said to require an investigation

44. The matter which is said to require a further investigation is the failure of individuals in the RMP chain of command to ensure compliance with an order issued by the Commander of the Battle Group occupying Maysan Province that all patrols should have with them an iridium satellite telephone.

45. The question of communications was one of the areas looked into by the Board of Inquiry, who found that communications across the whole area in which the Battle Group was operating were poor. The vehicles used by the RMP were equipped with Clansman VHF and HF radios. However, buildings blocked the signal and these radios were therefore ineffective when operating within a town such as Majar-al-Kabir. The principal alternative means of communication with which the Battle Group was equipped was the iridium satellite phone. This too had limitations in that it needed to be used outdoors in order to make contact with a satellite, but it could be used in built up areas. According to the Board of Inquiry, such phones were, in June 2003, the only realistic form of communication available between patrols and the Battle Group Operations Room.

46. The Battle Group Commander had issued an order dated 24 May 2003 which required iridium phones to be used when radio communication was not possible. (As a shorthand, we will refer to this order as the ñCommunications Orderò.) 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 commanderôs 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.

47. The recommendations made by the Board of Inquiry included measures to address these shortcomings. 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.

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

48. On behalf of the claimant, Mr Fordham is unable to say that, if the soldiers of C Section had been equipped with an iridium phone on 24 June 2003, their lives would have been saved. He contends, however, that their lives might have been saved. This contention is supported by a finding of the Board of Inquiry that:

> ñThe RMP should ... have had an iridium phone. This would have allowed the BG Ops Room to know they were in the town and would have resulted in different actions being taken by the BG Ops Room, which may have allowed the RMP to extract.ò

49. The Coroner also considered this question. He thought it unlikely that the RMP soldiers could have been extracted even if they had been able to communicate with the Battle Group Operations Room or the paratroop patrols. He explained in his summing up that this was because, in the short time which elapsed from when a hostile crowd descended on the police station (just after 1030 hours) to when the soldiers were killed (before 1100 hours):

> ñthe only person who might, and I stress might, have been able to give assistance was [the officer in command of PARA call sign 20A], although given the numbers and armaments of the mob, I think it quite possible that, had he endeavoured to help, I would be holding an inquest into the deaths not of six brave men but of 18.ò

The Coroner nevertheless pointed out in his summing up:

> ñWhat [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.ò

50. Rule 43 of the Coroners Rules provides that:

> ñWhere ï
>
> (a) a coroner is holding an inquest into a personôs 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 coronerôs opinion, action should be taken to prevent the occurrence or continuation of such circumstance, 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.ò

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

> ñCommunication ï 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.ò

52. In his response dated 1 June 2006, the Secretary of State replied to this point by saying that, as a result of the communications problems identified with the Clansman radio system, the Ministry of Defence was in the process of introducing a new radio system (Bowman), and that;

> ñAs a result of recommendations made by the Board of Inquiry, standard operating procedures for all UK road patrols in Iraq state that they must carry two separate forms of functioning communications equipment in two separate vehicles, including satellite phones, insecure mobile phones and Bowman radios.ò

The letter from the Secretary of State did not address the question of whether, and if so where, there had been fault in the chain of command in failing to ensure compliance with the Communications Order. No doubt that was because a Rule 43 report is directed not at attributing responsibility for past failures but at steps that should be taken to prevent a recurrence.

53. The question of responsibility was, however, raised by relatives of the deceased soldiers in their subsequent requests (referred to in paragraphs 23-28 above) for further investigations in which individual officers in the chain of command would be held to account for the deaths of the six soldiers. In a letter dated 19 May 2008 replying to questions asked by the father of one of the soldiers, the Secretary of State wrote:

> ñé the chain of command is responsible for ensuring orders are adhered to. This applies at all levels within the chain. In principle, therefore, it follows that the answers to your questions, ówas it not the responsibility of someone in the chain of command to ensure that they had a satellite phone and, if not, that they did not go on patrol without one?ô are respectively yes and yes.ò

54. On behalf of the claimant, Mr Fordham submitted that simply accepting that responsibility lay with ñsomeone in the chain of commandò was, and is, not good enough. There is, he submits, 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 occurred and to hold those individuals accountable.

The legal issues

55. Mr Fordham QC developed the claimantôs case that such an investigation should be ordered, with admirable clarity, in three logical stages. First, he submitted that the failure to ensure compliance with the Communications Order involved arguable breaches of a positive obligation imposed on the state by article 2 of the Convention to take measures to safeguard the lives of its soldiers, and thus triggered a duty under article 2 to hold an investigation. He submitted that such an investigation must meet the requirements identified earlier, including the requirements that it must be independent, have sufficient public scrutiny and allow the families of the soldiers to play an appropriate part. It must also be effective in exposing relevant facts and holding those responsible to account. Second, Mr Fordham submitted that this duty to investigate has not been discharged and is still continuing. Third, Mr Fordham submitted that there has been no undue delay in bringing this claim which should lead the court either to refuse to permit the claim to proceed or to refuse the relief sought.

56. On behalf of the Secretary of State, Mr Beard QC took issue with these arguments at each stage. He put first the question of delay and submitted that permission to proceed or alternatively the relief sought by the claimant should be refused on the ground that any claim alleging breach of a duty to investigate the soldiersô deaths should have been made years ago. Mr Beard further submitted that there was in any event no arguable breach of the stateôs substantive obligations under article 2 in this case which triggered a duty to investigate; alternatively, any such duty has either been discharged or has lapsed.

Our approach to the issues

57. The question whether a claim for judicial review has been brought within the time limit specified by CPR 54.5(1) and, if not, whether an extension of time should be granted is usually a matter to be decided at the outset in considering whether the claim should be permitted to proceed. However, in this case the question whether there has been undue delay in bringing the claim is closely bound up with the questions of whether and, if so when, any duty to investigate arose, whether any such duty is still continuing and when (if at all) a breach of any such duty may be said to have crystallised. The existence of a duty to investigate in turn depends on whether there is an arguable breach of the stateôs substantive obligations under article 2. It was because these issues are inter-related, as well as their importance, that the court

directed that the question of permission and the substantive merits of the claim should be considered at a rolled up hearing.

58. All the issues have been fully argued and we think it right in the circumstances that we should give our decision on the substantive merits of the claim ï not least to avoid the risk of multiple hearings and appeals. We therefore grant permission to proceed and will address the issues in the order that Mr Fordham QC developed the claimantôs case.

Was a duty to investigate triggered?

59. 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. This is not a case of unlawful killing by state agents. What is claimed is that the soldiersô deaths may have resulted from a breach by the UK of a positive obligation to take measures to safeguard their lives. In order to determine whether a duty to investigate was triggered, it is therefore necessary to consider the scope of the stateôs positive obligation under article 2 to protect the lives of members of its armed forces. The three main cases bearing directly on this question are the two Smith cases decided by the UK Supreme Court and a decision of the European Court of Human Rights.

The Catherine Smith case

60. In R (Smith) v Oxfordshire Assistant Deputy Coroner [2011] 1 AC 1 (the Catherine Smith case), Lord Phillips expressed the view that there is ña major difficulty in identifying the substantive obligations that article 2 imposes on a state in relation to the safety of its armed forcesò (para 69), but did not consider that the facts of that case required the court to define the extent of those obligations (para 80). Lord Rodger, however, with whose judgment on this point Lords Walker, Brown and Kerr agreed, made some observations on this question (paras 117-127).

61. Lord Rodger drew a distinction between recruits during their initial military training, who should be regarded as vulnerable individuals for whom the military authorities have undertaken responsibility, and trained soldiers who have volunteered for a job in which the risk of injury or death is inherent. Lord Rodger further distinguished between risks such as death from heat stroke (as had occurred in that case) against which the army can be expected to protect a soldier and the risk of death in action. In relation to soldiers killed in action, Lord Rodger said (at para 125):

> ñOf course, it will often ï perhaps even usually ï be possible to say that the death might well not have occurred if the soldier had not been ordered to carry out the particular patrol, or if he had been in a vehicle with thicker armour-plating, or if the observation post had been better protected. But, even if that is correct, by itself, it does not point to any failure by the relevant authorities to do their best to protect the soldiers' lives. It would only do so if ï contrary to the very essence of active military service ï the authorities could normally be expected to ensure that our troops would not be killed or injured by opposing forces.ò

Stoyanovi v Bulgaria

62. The only case cited to us in which the European Court of Human Rights has considered a stateôs duty to safeguard the lives of members of its armed forces is Stoyanovi v Bulgaria [2010] ECHR 1782. The applicants in that case were the relatives of a soldier who died during a parachute training exercise. They complained that under article 2 of the Convention the state had been responsible for the soldierôs death and that the investigation of his death had been ineffective. The Court found that there was in that case no positive obligation on the state under article 2 to protect the soldier against any specific risk to his life. The Court observed (at para 61) that:

> ñé 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 amount to a breach of the stateôs 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.ò

The Susan Smith case

63. The leading authority is now Smith v Ministry of Defence [2014] AC 52 (the Susan Smith case), where the question of how the stateôs duty under article 2 to protect life applies to soldiers on active service arose in the context of civil claims for damages against the Ministry of Defence (ñMODò) and the MODôs contention that the claims should be struck out as having no real prospect of success. The claimants were members of the families of British soldiers who were killed or injured in action in Iraq. They fell into two groups. One claim involved an incident of ófriendly fireô by a Challenger tank on another similar tank. This claim alleged negligence at common law and was not based on the Convention. The other claims concerned deaths of soldiers travelling in lightly armoured Snatch Land Rovers who were killed by roadside bombs. These claims asserted breaches by the MOD of article 2 in allegedly providing inadequate equipment and taking inappropriate decisions as to its use.

64. As already discussed, the first issue which the Supreme Court had to decide in the Susan Smith case in relation to the Snatch Land Rover claims was whether the soldiers fell within the jurisdiction of the UK under article 1 of the Convention. Having unanimously decided that they did, the Court went on to hold (by a majority of four to three) that the question whether there was liability under article 2 for the soldierôs deaths could not be determined without a trial and that, accordingly, the claims should not be struck out.

65. Lord Hope (with whose judgment the other Justices in the majority agreed) considered that a blanket ruling that all deaths or injuries in combat that result from the conduct of operations by the armed forces are outside the scope of article 2 ñwould not be sustainableò (para 58) and that the extent to which the substantive obligation under article 2 applies to military operations will ñvary according to the contextò (para 64). Lord Hope emphasised that there is ña fundamental difference

between manoeuvres conducted under controlled conditions in the training area which can be accurately planned for, and what happens when troops are deployed on active service in situations over which they do not have complete controlò (para 64). Lord Hope observed (para 66) that this is ña field of human activity which the law should enter into with great cautionò, and said:

> ñVarious international measures, such as those contained in the 3rd Geneva Convention of 1929 to protect prisoners of war, have been entered into to avoid unnecessary hardship to non-combatants. But subjecting the operations of the military while on active service to the close scrutiny that may be practicable and appropriate in the interests of safety in the barrack block or in the training area is an entirely different matter. It risks undermining the ability of a state to defend itself, or its interests, at home or abroad. The world is a dangerous place, and states cannot disable themselves from meeting its challenges. Ultimately democracy itself may be at risk.ò

66. Lord Hope reiterated the distinction between the contexts of a training exercise on the one hand and active service on the other in paragraphs 71, 73 and 75 of his judgment, drawing support for this distinction from the Stoyanovi case mentioned above. At paragraph 76 he stated the following conclusions:

> ñThe 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.ò

Whether this guidance bears out the statement earlier in the judgment (para 67) that a positive obligation on the state to protect life applies ñin certain well defined circumstancesò may be open to doubt.

67. Lord Hope found that in the Snatch Land Rover cases it could not be determined with complete confidence based on the claimantsô statements of case alone and without knowing more about the facts whether the stateôs substantive obligation under article 2 was engaged (para 79). He therefore considered that the claims should not be struck out, while at the same time putting the claimants on notice (in para 81) that:

> ñthe trial judge will be expected to follow the guidance set out in this judgment as to the very wide measure of discretion which must be accorded to those who were responsible on the ground for the planning and conduct of the operations during which these soldiers lost their lives and also to the way issues as to procurement too should be approached. It is far from clear that they will be able to show that the implied positive obligation under article 2.1 of the Convention to take preventative operational measures was breached in either case.ò

Is there an arguable breach in this case?

68. Mr Fordham relied on the judgment of Lord Hope in the Susan Smith case, in particular the guidance at paragraph 76, and submitted that the present case falls within Lord Hopeôs ñmiddle groundò. Thus, the allegations which are said to require further investigation do not involve any decision taken ñat a high level of command and closely linked to the exercise of political judgment and issues of policyò. Nor do they relate to ñthings done or not done when ... actively engaged in direct contact with the enemyò. Mr Fordham submitted that the Susan Smith case establishes that there is room for claims to be brought in the middle ground between these two categories and that the claim that article 2 was breached in this case is therefore at least arguable.

69. We agree that the present case falls within the ñmiddle groundò referred to by Lord Hope. But we do not agree that the Susan Smith case is authority for the proposition that in every case within this middle ground it is arguable that there has been a breach of article 2. Far from it. All that Lord Hope said was that ñfinding whether there is room for claims to be brought in the middle ground é is much more difficultò, that no hard and fast rules can be laid down and that an exercise of judgment will be required in the light of the facts of the case.

70. It is also important to recognise that all that was actually decided by the Supreme Court in the Susan Smith case was that the question whether there was a breach of the UKôs positive obligation under article 2 in relation to the Snatch Land Rover claims could not be conclusively determined without further factual inquiry ï so that the claims should not be struck out. No encouragement was given to the claimants that, when more facts were known, the claims could be maintained. To the contrary, the judgment of Lord Hope is replete with statements about the difficulties which the claims faced and the ñwide margin of appreciationò which must be given to the state when soldiers are on active service.

71. In the present case the facts have been extensively investigated and the matter which is said to amount to a potential breach of the UKôs positive obligation under article 2 has been clearly identified. That matter is the failure to ensure that the soldiers of C Section of the RMP platoon were equipped with an iridium satellite phone on 24 June 2003. We cannot see how any further factual inquiries could affect the question of

whether or not this failure is capable of amounting to a breach of the stateôs substantive obligations under article 2. The court is therefore in a position to make the necessary exercise of judgment.

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.

75. There is, furthermore, no case law of the European Court of Human Rights which supports the claimantôs contention. Indeed, the Strasbourg case law is inconsistent with it. In the Stoyanovi case, mentioned earlier, where a soldier was killed in a parachute training exercise allegedly as a result of negligence in the way the jump was conducted, the European Court held that there was no breach of the stateôs positive obligation to protect life if the soldierôs death ñwas caused through the negligent conduct of an individualò. As we have emphasised, if that is the position in relation to a training exercise, the same principle must apply with all the greater force in the far more turbulent and unpredictable conditions experienced on active service.

76. The Court in the Stoyanovi case referred to the similar limit on the scope of article 2 which has been recognised in the field of health care. Article 2 requires hospital authorities to adopt appropriate measures for the protection of patientsô lives. It is clearly established, however, that negligent acts and omissions which result in the death of a patient do not in themselves amount to breach of the stateôs obligations

under article 2: see the Catherine Smith case at para 201; Savage v South Essex NHS Trust [2009] 1 AC 681. As the European Court stated in Powell v United Kingdom (2000) 30 EHRR CD 362 at p.364:

> ñ[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.ò

Again, if that is so in an ordinary civilian peacetime context, it must apply with all the greater force to soldiers fighting a war or conducting peacekeeping operations of the kind which the RMP were required carry out in Maysan Province when they were tasked with helping to restore security and rebuild the local police following the invasion and occupation of Iraq in 2003.

Combat immunity

77. There are also good reasons of public policy why mistakes made in the course of military operations, even if negligent, should not give rise to rights of action in the civil courts for death or injury. Such reasons underpin the doctrine of the common law referred to as combat immunity. That doctrine is best understood as a particular application of the general principle that the common law will not impose a legal duty of care unless it is fair, just and reasonable to do so: see the Susan Smith case at paras 89, 114, 163-4. There are some contexts in which the public interest is best served by not imposing such a duty. One such context is that of military operations.

78. When the countryôs armed forces are fighting a war or conducting international peacekeeping operations, the national interest is engaged in a way which must prevail over the interests of individual soldiers. The subordination of such individual interests is part of the sacrifice which members of the armed forces make and which is recognised in this country in the armed forces covenant between the people of the United Kingdom, the government and all those who serve or have served in the armed forces and their families. That covenant recognises a moral obligation owed to members of the armed forces in part because of the fact that military service requires them to forego legal rights that they would have in ordinary civilian life.

79. If a legal duty of care was owed in the execution of military operations, the prospect would exist of legal proceedings being brought whenever a soldier on active service is killed. As Lord Rodger noted in the Catherine Smith case, it will often ï perhaps even usually ï be possible to say that the death might well not have occurred if the soldier had not been ordered to carry out the particular patrol, or had been better equipped, or if there had been better intelligence or if support had been sent more quickly. It is likely that, when all the facts were exposed through evidence given at a trial and due allowance made for the exigencies under which soldiers sent to fight a war or attempt to keep the peace in dangerous and difficult conditions were operating, many claims of negligence which at first sight appeared tenable would fail. The process of investigating and litigating such claims, however, would involve a heavy burden of time and resources, diverting both manpower and money from the vital

work which the armed services are asked to perform in the national interest on a finite defence budget.

80. The costs of having to defend such claims are not merely financial. Other potential costs are more intangible. They include the risk of undermining the ethos of trust on which military service depends and encouraging in its stead a culture of risk aversion and blame.

81. Officers on active service are required on a daily basis to take decisions and act in ways which inevitably involve and may increase risks to the lives of those under their command. If commanders in the field have to be concerned in taking such decisions by the prospect of being sued for negligence if death or injury occurs, there is a danger that their calculation of risk may be distorted in a way which makes the British army less effective as a fighting force.

82. Imposing liability for negligence on an individual soldier who, in the context of military operations, has made a mistake or failed to perform his duties with the competence or efficiency that might have enabled lives to be saved would also encourage an attitude of recrimination when a soldierôs life is lost. It is all too easy and psychologically understandable after soldiers have been killed in tragic circumstances as happened in this case to think that, if only one or another action had been taken which was not in fact taken, these men would not have died. It is only a small further step to start blaming those who could, and perhaps should, have acted differently and to treat them as responsible for the deaths which have occurred. Such scapegoating of individuals, however, risks exaggerating the fault of those involved by losing sight of the fundamental moral distinction between intentionally killing another human being and omitting inadvertently to do something which might have enabled that personôs death to be avoided.

83. It could also lead to blaming individuals who have died themselves. We make it absolutely clear that there is no suggestion whatever in this case that C section of the RMP platoon were in any way responsible for the fact that, when they went on patrol on 24 June 2003, they were not issued with an iridium phone. But it is easy to envisage a different case in which, for example, a platoon commander who is killed in action along with other members of his platoon had failed to comply with a standing order as to the ammunition, weapons or other equipment which the platoon should have had and which might possibly have saved their lives. The logical consequence of recognising a duty of care is that there could in such a case have to be a determination of whether soldiers who died were themselves negligent or contributorily negligent.

84. As Lord Mance pointed out in the Susan Smith case (para 131), if a duty of care is owed in relation to the conduct of military operations, claims for breach of such a duty could be brought not only after, but during, and even before and in anticipation of hostilities. To allow such claims to be the subject of civil proceedings has the potential to corrode trust within the armed forces and damage their operational effectiveness. It is reasonable to think that efficiency is better secured by other means than having questions of the competence and care with which military operations are conducted decided by civilian judges at the instance of soldiers or their families in such proceedings.

85. The evaluation of public policy considerations of the kind which underpin the doctrine of combat immunity is, as it seems to us, an area in which national law and national courts must properly enjoy a wide margin of appreciation. In circumstances where it is judged not to be fair, just and reasonable for reasons of national interest to impose an obligation on the state or its agents to take steps to protect volunteer members of its armed forces from a risk to life to which they are exposed on active service, it would be exorbitant to conclude that the omission to take such steps infringes a fundamental human right.

86. The doctrine of combat immunity was considered by the Supreme Court in the Susan Smith case where it was relied on as a defence to all the common law negligence claims brought against the MOD. At paragraph 99 of his judgment Lord Hope emphasised that the same considerations which are relevant in determining whether article 2 of the Convention is engaged are just as relevant in the context of the common law claims. It seems to us that the converse must also be true. In this connection Lord Hope returned to the theme that:

> ñ[g]reat care needs to be taken not to subject those responsible for decisions at any level that affect what takes place on the battlefield, or in operations of the kind that were being conducted in Iraq after the end of hostilities, to duties that are unrealistic or excessively burdensome.ò

Lord Hope went on to say (para 100) that:

> ñit is of paramount importance that the work that the armed services do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong.ò

87. In our view, for the reasons given, to impose on the state in the factual circumstances of this case a duty to protect the lives of individual soldiers by safeguarding them from the risk of a negligent failure in the chain of command to ensure compliance with a particular order would be to a impose a duty that was wholly unrealistic, excessively burdensome and calculated to impede the work done by the armed services in the national interest. We conclude that the matter which the claimant wishes to have investigated does not disclose an arguable breach of the stateôs substantive obligations under article 2. It follows that there is no duty under article 2 to hold an investigation.

Has any duty been discharged?

88. Even if (contrary to our view) the failure to ensure that the RMP soldiers did not go on patrol on 24 June 2003 without an iridium phone arguably amounts to a breach of the stateôs substantive obligations under article 2, the fact is that there have in this case been detailed investigations of the circumstances in which the soldiers died which identified this failure and learned lessons from it.

89. As described earlier, the existence of the Communications Order, the failure to ensure that it was complied with by the RMP and how that came about were all matters which were investigated by the Board of Inquiry, who took evidence all from all the

surviving individuals involved. The Board pointed out what it believed to be the causes of that failure and made recommendations to address those causes and thereby reduce the risk of a similar incident happening again.

90. Although the Board of Inquiry 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 they were provided with the Boardôs report and all the materials which accompanied the report, albeit with names redacted. The Boardôs conclusions were also published. There has subsequently been a further detailed review, at the direction of the Minister of State for Defence, Mr Harvey, of whether points raised by the soldiersô families were appropriately considered by the Board.

91. On behalf of the claimant, Mr Fordham submitted that the Board of Inquiry and other internal Army and MOD investigations lacked the necessary institutional independence, degree of public scrutiny and extent of family involvement to satisfy the requirements of article 2. It is unnecessary for us to decide that question as the inquest undoubtedly satisfied those requirements. As mentioned earlier, all the evidence taken by the Board of Inquiry was provided to the Coroner and was therefore 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 and to ensure that the RMP patrol was equipped with a satellite phone which the soldiers could have used to call for help. Lamentable as that was, it is also important not to lose sight of the Coronerôs finding that the speed of events was such that, even if the soldiers had been able to make a call for help, it is improbable that they could have been rescued.

92. The claimantôs case that the coronerôs investigation was inadequate is based on the contention that it is not enough to attribute responsibility to ñthe chain of commandò and that it is a requirement of an effective investigation that it should seek to identify particular individuals who were or may have been at fault and hold them to account. In support of this contention Mr Fordham relied on case law of the European Court which describes one of the essential purposes of an investigation under article 2 as being, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. He quoted, for example, a statement of the European Court in Jordan v United Kingdom (2003) 37 EHRR 52, para 115, that the investigation required by article 2 ñmust be able to lead to the identification and punishment of those responsibleò.

93. In considering this argument, we think it important to bear in mind two points. First, the nature of the investigation required by article 2, where a duty to investigate arises, depends on the circumstances, including the nature of the substantive obligation of which there is a possible breach. As stated by Lord Phillips in R (L) v Secretary of State for Justice [2009] AC 588, para 31:

> ñThe 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.ò

94. There is a significant distinction in this respect between cases where the suspected breach is of a positive obligation to protect life and cases where state agents are suspected of unlawful killing. In cases of the latter type a key purpose of the investigation is to identify whether crimes have been committed and, if so, to prosecute and punish those responsible. Many of the authorities in which the article 2 investigative duty has been considered have been cases of this kind ï for example, the Jordan case referred to above. Statements in those authorities about the need to identify and punish individuals must be seen in that context.

95. On the other hand, as stated by the European Court in Pearson v United Kingdom (2012) 54 EHRR SE11 at para 70:

> ñif the infringement of the right to life or to personal integrity was not caused intentionally, the obligation imposed by art.2 to set up an effective judicial system does not necessarily require the provision of a criminal law remedy. In the case of deaths following a decision to release prisoners or through alleged medical negligence (whether in the public or private sector), the Court has found that that obligation may be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any civil liability to be established and appropriate civil redress to be obtained, such as an order for damages and for the publication of the decision, to be obtained, together with the additional possibility of disciplinary measures é ò

See also Ġilih v Slovenia (2009) 49 EHRR 37 at para 194. If (contrary to our view) negligence in the execution of military operations may amount to a breach of the positive obligations imposed by article 2, it seems to us that similar mechanisms are in principle sufficient to provide appropriate accountability for a breach of this nature.

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 stateôs 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.

97. In the present case the Board of Inquiry did not consider that there was evidence that any military offence might have been committed so as to warrant referral to the Army

Prosecuting Authority. It has not been suggested that there is any basis for questioning that decision.

98. The possibility of taking administrative action for misconduct against individuals was considered by the Army in late 2004 and the decision was taken that such action was not appropriate. As indicated earlier (see paragraph 18 above), two main reasons were given for this decision. First, it was not considered fair to point the finger at individual servicemen for failing to make sure that the RMP soldiers were issued with a satellite phone or for other shortcomings exposed in hindsight as to do so would have been perceived as blaming British servicemen for the soldiersô deaths when the blame should lie squarely with the people who murdered them. Second, the view was taken that such blaming of individuals could damage long-term operational effectiveness.

99. Those reasons seem to us to be entirely proper reasons which are similar to some of the reasons which underpin the principle of combat immunity considered earlier. The decision that administrative action was inappropriate is not one that could reasonably have been challenged. It cannot therefore be said that there was a failure to provide effective accountability.

100. Finally, there was the possibility of civil proceedings. In our view, for the reasons given earlier, the facts of this case did not disclose any potential civil liability on the part of the MOD either for negligence at common law or for breach of a positive obligation under article 2. It was, however, open to the claimant to make a civil claim in which this question could be determined, as indeed she did.

101. In these circumstances the procedures adopted in this case, viewed in their totality, were in our opinion adequate to discharge the stateôs duty of investigation if and in so far as such a duty was owed under article 2.

Is there a continuing duty?

102. It is common ground that the duty to investigate under article 2 binds the state ñthroughout 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 itò: see Ġilih v Slovenia (2009) 49 EHRR 37, para 157; Re McCaughey [2012] 1 AC 725, para 47. Even if (contrary to our view) a duty arose in this case to carry out a further investigation of the kind which the claimant seeks, we do not think it reasonable to expect the state to institute such an investigation now, more than a decade after the soldiersô deaths, and some eight years after the inquest.

103. Although we accept that a court should be very slow to find that where previous investigations did not comply fully with the article 2 investigative duty no new investigation should be ordered, we nevertheless consider that this would be the right conclusion in the circumstances of this case.

104. In reaching that conclusion we have in mind, first, the width and depth of the investigations carried out following the soldiersô deaths, in particular the Board of Inquiry held in 2004 and the inquest which concluded in 2006. Those investigations, even if imperfect in some respects, also had the inestimable advantage of being prompt ï an advantage which any further investigation held now must inevitably lack.

105. We do not underestimate the importance to the claimant of wanting to know why her son found himself in a police station on 24 June 2003 where he and the others who died with him were attacked and shot by an armed mob and were unable to call for help. We do not consider, however, that there is any real prospect of obtaining more illuminating answers to those questions than the contemporaneous investigations revealed. The RMP officers and others whose responsibility it was to ensure compliance with the Communications Order were questioned by the Board of Inquiry in 2004 about their knowledge and understanding of the order and reasons why it was not implemented. At that stage matters were reasonably fresh in their minds. It is unrealistic to suppose that further significant or useful information can be obtained by questioning them about their recollection of these matters again some 10 years later.

106. The time for learning any lessons from failings in this area has also long passed. As mentioned, recommendations were made by the Board of Inquiry and by the coroner to address such failings and were acted on at the time. New and better communications equipment was subsequently introduced and new standard operating procedures regarding the use of such equipment were put in place. It is to be hoped that the systemic weaknesses identified by the Board of Inquiry in the training of RMP officers were also remedied. Many other changes will have taken place in the RMP and the circumstances in which they are operating since 2003. We see no reasonable prospect that there could be further lessons to be learned from the events of 24 June 2003 that are of current or future relevance at this distance in time.

107. As for holding people to account, we have already mentioned that the possibility of taking administrative action against individuals for misconduct was considered by the Army in 2004 and the decision was taken that such action was not appropriate. Both the individuals concerned and the families of the deceased soldiers were informed of that outcome at the time. We have also stated that the reasons given for the decision seem to us to be entirely proper ones. There can in any event be no question of reopening or reconsidering the decision now. Whether or to what extent it is fair to expose or hold people responsible for culpable conduct long after it occurred must depend on the gravity of what is alleged. There is a fundamental difference in this respect between unlawful killing, for which no time bar is apt, and negligent errors or omissions which resulted in an increased risk to life. In the present case the allegations are not of unlawful killing by British soldiers but of a lack of competence or care in ensuring compliance with an order about the issuing of communications equipment. To embark on a new investigation of whether individual soldiers who were serving in Iraq in June 2003 were at fault for failing to ensure that such an order was carried out would in our view be unfair to the individuals concerned.

108. In these circumstances, even if we had found that there has been a breach of an investigative duty under article 2 in this case, we would not have regarded it as reasonable to require the Secretary of State to undertake another investigation at this stage so long after the relevant events.

Delay

109. Separate from the question of whether there is an obligation to investigate which is still continuing, although inter-related with it, is the question whether relief should be refused on the ground of delay in bringing the claim. This latter question is governed by subsections 31(6) and (7) of the Senior Courts Act 1981. These provisions state:

> ñ(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant ï
>
> (a) leave for the making of the application; or
>
> (b) any relief sought on the application,
>
> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.
>
> (7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made.ò

110. The rule of court limiting the time within which an application for judicial review may be made is CPR 54.5(1). This states:

> ñThe claim form must be filed ï
>
> (a) promptly; and
>
> (b) in any event not later than three months after the grounds to make the claim first arose.ò

CPR 3.1 gives the court a power to extend this time limit.

111. In applying these provisions, the questions which need to be considered are: (1) when did the grounds to make the claim first arise; (2) was the claim form filed within three months of that date; (3) if not, is there a good reason to extend time; and (4) has there in any event been undue delay in making the claim which should lead the court to refuse to grant the relief sought?

112. In principle, the grounds to make a claim complaining of a breach of duty arise when the alleged breach occurs. A breach of the duty to hold an investigation under article 2 of the Convention occurs when (1) grounds for suspecting a substantive breach of article 2 arise which trigger the duty to investigate, and (2) the state fails to perform that duty by holding an effective investigation.

113. Since, as discussed earlier, the holding of an inquest is the usual means by which the state discharges any investigative duty under article 2 in England and Wales, we do not think that a duty to hold a further investigation could be said to have arisen before the inquest. If (contrary to our view) there was a duty to investigate whether and, if so, where in the chain of command individuals failed to comply with the Communications Order, it seems to us that the duty arose when the Coroner raised this issue in his summing up and in his Rule 43 letter. The Secretary of State would accordingly have been in breach of such a duty when, following receipt of the Coronerôs Rule 43 letter, no investigation of this issue was begun with reasonable promptness. We would identify that date as being in or around June 2006, when the Secretary of State responded to the Coronerôs letter but made no arrangement for any further investigation to take place.

114. The claim form in these proceedings was not filed until July 2012, more than six years later. There has accordingly been very considerable delay in making the claim. It is not suggested that any new evidence has come to light during this time which has affected the case for a further investigation. The matters relied on by the claimant were known to the soldiersô families at the conclusion of the inquest and indeed formed the basis of their request to the Metropolitan Police to open a criminal investigation.

115. It is true that the law regarding whether soldiers serving overseas are within the territorial jurisdiction of the UK for the purposes of the Convention has since been clarified. Mr Fordham, however, quite rightly did not seek to maintain that this provided a good reason to grant an extension of time. The fact that there exists case law which is adverse to a claim cannot justify delay in bringing it; and by the same token, the fact that later cases develop the law in a way more favourable to the claimant cannot justify such delay in retrospect. In any event, at the time when this action was begun the legal landscape was in fact worse from the claimantôs point of view than it had been previously. The decision of the Supreme Court in the Catherine Smith case which for a while presented a stumbling block to the claim was given in June 2010 and remained binding on lower courts when these proceedings were commenced in July 2012. Previously, both the judge at first instance in the Catherine Smith case (in April 2008) and the Court of Appeal (in May 2009) had held that a soldier serving in Iraq was within the scope of the Convention. So it cannot be said that, in the period before the Supreme Court reversed those decisions, a judge would have been bound to dismiss the claim.

116. Mr Fordham accepted that the claimant could after the inquest, and at many later stages before this action was begun, have brought a claim for judicial review seeking the relief which is sought in these proceedings. But he argued that the claimant has never waived her right to insist on an investigation complying with article 2 and that the families of the deceased soldiers should not be criticised for pursuing other avenues before resorting to litigation ï particularly when as late as November 2010 the MOD demonstrated a willingness to carry out a further review (the Harvey review) which was not completed until August 2012.

117. We accept that there has been no waiver of any rights by the claimant. Equally, however, the families of the soldiers have never been led to believe that the Secretary of State or any other state authority accepted any obligation to hold a further investigation. It seems to us that a significant point came when the families were told at the end of 2007 by the Adjutant General of his conclusion, following Brigadier Monroôs review, that no further investigation or other action was warranted. The families clearly recognised at that time that the only recourse left was through the courts, as the next step taken on their behalf (in August 2008) was to lodge an application with the European Court of Human Rights. However, before resorting to the European Court, it was necessary first to bring proceedings in the English courts and to exhaust domestic remedies. At the latest, in our view, a claim for judicial review should have been made at that time.

118. Another significant date in the chronology is March 2010, when the European Court rejected the familiesô application expressly because proceedings in the national courts had not been brought, and yet still no claim for judicial review was made in the English courts. The fact that Mr Harvey later arranged for there to be a review of the

Board of Inquiry findings is not a matter which assists the claimant, as the Minister made it clear that the review would not involve any fresh investigation.

119. Mr Fordham emphasised the paramount importance of the right to life and of ensuring that the stateôs obligations under article 2 including its investigative duty do not go unmet. He submitted that, even if the court considers that there has been undue delay, these factors justify granting an extension of time. Mr Fordham drew attention in this regard to cases involving Iraqi civilians who were killed by British soldiers, or who died in the custody of British forces in suspicious circumstances, in 2003 and 2004. In R (Ali Zaki Mousa) v Secretary of State for Defence (No 2) [2013] EWHC 1412 (Admin), the Divisional Court considered a group of such cases and held that there was an urgent need for investigations complying with article 2 to be carried out. There was no suggestion that the claims in any of these cases should be dismissed or relief refused on account of the passage of time. Mr Fordham submitted that the same approach should be taken in the present case.

120. We would have agreed with this submission if we had found that there was in this case a duty under an article 2 to hold an investigation which has not been performed and which is still continuing. The European Court has emphasised that the article 2 duty to investigate, where it arises, is a duty which rests on the state authorities to act of their own motion, and not merely when the next of kin of the deceased lodge a complaint: see e.g. Jordan v United Kingdom (2003) 37 EHRR 52, para 105; Al-Skeini v United Kingdom (2011) 53 EHRR 18, para 165. In circumstances where there is a duty on the state which it ought to be performing even if no claim to enforce performance of the duty is made at all, it is hard to see how it could be right to refuse to require the duty to be performed because a claim was not made sooner. Accordingly, if there is a duty to investigate which is still continuing and of which the state is in continuing breach, it seems to us that a court should generally be willing to entertain a claim brought by someone with a sufficient interest for an order requiring an investigation to be held irrespective of the length and reasons for the delay in making the claim.

121. The position is different, however, where there is no continuing duty and the claim is therefore confined to obtaining compensation for a past breach of the stateôs substantive or procedural obligations under article 2. In such circumstances we do not consider that the importance of the right to life can by itself justify granting an extension of time for bringing a claim where there has been very significant delay for which no legally acceptable explanation has been given.

122. Given our conclusion, therefore, that there is no duty on the Secretary of State to hold a further investigation into the soldiersô deaths, the very substantial delay in bringing this claim has the consequence that the claim must be dismissed and that the other relief sought should in any event be refused even if the claimant had been able to show a historic breach.

Conclusions

123. No one who reads or hears about the events of 24 June 2003 could be unmoved, not only by the deaths of the six RMP soldiers who were killed on that day, but by the horrible circumstances in which they died. We recognise the strength of the claimantôs feelings that, despite all the investigations that have taken place, no full

explanation has ever been given of her sonôs death which makes sense of it for her and that people in the British army or civil service should be blamed for what happened. We cannot attempt to assuage those feelings. All that we can decide is whether Mrs Long is owed a right in law to have another investigation held into her sonôs death.

124. For the reasons given in this judgment, we find that she does not have such a right. We have held that the right of a soldier under article 2 of the Convention to have his life protected by law does not include a right to be safeguarded from human error, including negligent error, in the conduct of military operations which results in the risk of death on active service being greater than it would otherwise have been. There is in these circumstances no arguable breach of duty by the state which requires a further investigation. We have also held that the investigations already carried out, including in particular the inquest held in 2006, have discharged any investigative duty which the state had under article 2 and that there is in any event no warrant for holding a further investigation now with the aim of casting blame on individual servicemen for actions which they should have taken that might (although they probably would not) have averted the death of Corporal Long. We have further held that, in circumstances where there is no current duty to hold an investigation, any other relief must be refused and the claim dismissed because it has been brought so many years out of time.