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Case No: CO/4633/2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Date:11 April 2008

Before:
Mr Justice Collins
- - - - - - - - - - - - -

Between:

(1)R(Catherine SMITH)	Claimant
- and -	
The Assistant Deputy Coroner for Oxfordshire	Defendant
- and –	
Secretary of State for Defence	
	Interested Party

Ms Jessica Simor (instructed by **Messrs Hodge, Jones & Allen**) for the **Claimant**
Ms Sarah Moore (instructed by **The Treasury Solicitor**) for the **Interested Party**

(2) The Secretary of State for Defence	Claimant
- and -	
The Assistant Deputy Coroner for Oxfordshire	Defendant
- and -	
Catherine Smith	Interested Party

- - - - - - - - - - - - -

(Transcript of the Handed Down Judgment of
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- - - - - - - - - - - - -

Ms Sarah Moore (instructed by the Treasury Solicitor) for the **Claimant**
Ms Jessica Simor (instructed by Messrs Hodge, Jones & Allen) for the **Interested Party**
Hearing date: 17 March 2008
- -

Judgment

Mr Justice COLLINS :

1. The two claims before me seek to quash the inquisition of the defendant (the coroner) given on 5 January 2007 following an inquest held into the death of Mrs Smith's son, Jason George Smith. The coroner, who did not take any active part in the hearing, conceded that the inquisition should be quashed and that a fresh inquest should be held before a different coroner. The concession was based on two of the seven grounds relied on by Mrs Smith in her claim. Notwithstanding that there has been a consent to the quashing of the inquisition (and it is clear that the consent has properly been given), each of the claimants contends that it is desirable that I should reach a decision on grounds advanced by them in order to give guidance to the coroner who will hold the subsequent inquest. Perhaps unsurprisingly, each counsel contends that the grounds she wishes to have me decide need to be considered to judgment whereas those raised by her opponent do not.

2. The deceased, Jason Smith, was a private soldier in the Territorial Army. He had joined on 2 October 1992. In June 2003, he was mobilised for service in Iraq. He arrived in Basra on 18 June 2003, but spent until 26 June 2003 in a tented camp in the desert in Kuwait for the purpose of acclimatisation. He then moved to his base, which was an old athletic stadium with a concrete structure comprising terraces, office and accommodation space. It is said that the room which he was assigned was large and airy, but there was no air conditioning. By August 2003, shade temperatures reached in excess of 50^{o} centigrade, the maximum that available thermometers could measure.

3. On 9 August 2003, the deceased reported sick, complaining that he could not stand the heat. Over the next few days, he carried out various duties off the base. On 13 August at about 7 p.m. he was found lying face down outside the door of a room in which two colleagues were. He was short of breath and in a confused and erratic state. An ambulance was called and he was taken to the accident and emergency department of the medical facilities, but he sustained a cardiac arrest and was pronounced dead at 8.10 p.m. Death was caused by hyperthermia.

4. Following the death, a Board of Inquiry (BOI) was convened. It seems there was an investigation by the Special Investigations Branch of the Royal Military Police (SIB) but any reports have not been disclosed to Mrs Smith. The BOI reported on 24 May 2004. It was considered that the investigation had not dealt sufficiently with the standards used in judging the fitness of personnel for particular roles and so the Board reconvened and produced a supplementary report on 23 August 2004. That supplementary report was the only one provided to the Coroner. It was not until the last day of the hearing that the existence of the first report was made known when the President of the BOI gave evidence confirming its existence. Mrs Smith's advisers had believed that the report which had been provided, namely what turned out to have been the supplementary report, did not cover matters which it would have been expected to deal with and so there must be another report. They and the Coroner had been assured that the entire report had been produced. That was inaccurate. But when the existence of the first report was disclosed, the Coroner decided that it was not necessary to consider it since he was persuaded by the evidence of the President that it would contain nothing which was likely to take matters further.

5. The failure to produce the full BOI report was, to say the least, unfortunate. A statement has been produced on behalf of the MOD in which the officer then

responsible for the policy and coordination of army BOIs explains that a mistake was made because it must have been assumed that the first report was a draft and it had not been appreciated that the supplementary report was indeed supplementary so that the two had to be read together. I have no reason to conclude that the explanation is incorrect, but the effect on the family, who had faced what seemed to be obstruction and delay by the MOD in other respects, was obviously most upsetting. It seems, in addition, that the medical notes of the deceased which covered a crucial part of the relevant period in Iraq have been lost: certainly they have not been produced. Further, disclosure to the family has been less than forthcoming. The MOD has insisted that there be redaction of parts of the various reports and statements and the Coroner was not prepared himself to disclose anything when the MOD through a Major Logan objected. It has seemed to the family that the Army was concerned to cover up any shortcomings and to protect its reputation. That may not be a correct conclusion, but it is not surprising that it has been reached.

6. Grounds 2 and 3 of Mrs Smith's claim which have led to the consent of the quashing of the inquisition asserted that the Coroner erred in law in:-

> "2. Holding that he had no power to provide disclosure of documentation and that Rule 37 of the Coroners Rules precluded him from exercising a discretionary power to do so.
>
> 3. Closing the inquest prior to receiving a copy of the BOI report, which dealt with the circumstances in Iraq leading up to Private Smith's death."

I should add that those representing Mrs Smith were placed at a great disadvantage in that they had no advance disclosure of the statements of the witnesses to be called. Furthermore, the LSC had refused funding (it is clear that it was wrong to have done so) so that counsel and solicitors were obliged to appear without any funding being in place. They are to be commended for that and fortunately funding has subsequently been approved, but not until the Minister had been approached.

7. The matters which Ms Simor wishes me to deal with are three. First, in Ground 1 she asserted that the Coroner erred in holding that the procedural obligations implicit in Article 2 of the ECHR did not apply to the inquest. This included an argument that the concession made by the MOD as to the application of the ECHR was too narrow. It was made on the following basis:-

> "1. The relevant circumstances leading to Private Smith's death took place within the geographical area of a British Army camp and a British Army hospital;
>
> 2. Private Smith was at all times acting within the scope of his military duties; and
>
> 3. No third party national was involved in his death."

Ms Simor contends that, since British soldiers are subject to U.K. jurisdiction while operating in Iraq, the Human Rights Act 1998 applies to them and so they are entitled to rely on the Articles of the ECHR which are set out in the Schedule to the Act. Thus the

Act applies wherever they may physically be, provided that they are not indulging in a frolic of their own. Secondly, Ms Simor submits that, despite the consent on Ground 2, it would be desirable for me to indicate what is the scope of any duty of disclosure. This will avoid any problems of disclosure at the fresh inquest. Thirdly, it was asserted in Ground 7 that section 8 of the Coroners Act 1988 required the coroner to sit with a jury. This could and should, Ms Simor submitted, be decided by me.

8. I can dispose of the third matter since in the end both counsel accepted that it would be for the coroner at the fresh inquest to decide whether a jury was needed. Reliance was placed on s.8(3)(d) of the 1988 Act which provides:-

> "If it appears to a Coroner, either before he proceeds to hold an inquest or in the course of an inquest begun without a jury, that there is reason to suspect … (d) that the death occurred in circumstances the continuance or possible recurrence of which is prejudicial to the health or safety of the public or any section of the public he shall proceed to summon a jury …"

9. There are arguments whether a soldier can be regarded as a section of the public. In addition, it will be impossible to decide whether the circumstances set out in s.8(3)(d) will in fact arise until detailed consideration is given to the available material. It is to be noted that juries have not normally been summoned in inquests on soldiers who have died overseas albeit there have been criticisms of some failures by the MOD which have been said to have contributed to the death. Both counsel accepted that in the circumstances it would not be helpful for me to reach any conclusion on this ground.

10. Almost all claims, both domestic and before the ECtHR, which have alleged breaches of the Convention outside the territory of the U.K. or dependent territories to which the Convention has been expressly applied have been made by those who were not citizens of the U.K. Ms Moore has indeed relied on the absence of claims by U.K. citizens as an indication that only if extra-territorial acts can be brought within the ground for accepting jurisdiction laid down in *Bankovic v Belgium* (2001) 11 BHRC 435 will the court have the jurisdiction to consider the application of the Convention. The Court in *Bankovic* made it clear that its jurisdiction is based on the territorial notion set out in Article 1. Any other basis is exceptional and requires special justification. Such exceptional circumstances include those where a State has as a result of military action exercised effective control of an area outside its national territory or the activities on board craft and vessels registered in or flying the flag of the State. It was this narrow basis which led to the House of Lords in *R(Al-Skeini) v Secretary of State for Defence* [2007] 3 W.L.R. 33 to decide that one of the claimants who had met his death in a detention unit at the British Army's base in Basra was within the jurisdiction for the purposes of Article 1 of the Convention. The other claimants who had been killed by British soldiers carrying out operations in Basra were not. It was in reliance on this extension of jurisdiction that the concession was made by the MOD and so it was limited to what occurred in the base and the hospital.

11. Article 1 of the ECHR provides:-

> "The High Contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention."

The travaux preparatoires show that the draft recorded an undertaking "to ensure to all persons residing within their territories" the Convention rights. This was regarded as too narrow and the right of protection should exist in favour of individuals of whatever nationality who complained of violation of their human rights on the territory of the relevant States. So the concept of territoriality has been applied. In *Bankovic v Belgium* (supra) the Court discussed the meaning of the words 'within the jurisdiction'. It noted (Paragraph 60) that 'a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other State's territorial competence. In addition, a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying state, in which case it can be found to exercise jurisdiction in that territory, at least in certain respects.

12. At the material time, the Coalition Provisional Authority in Iraq (following the ouster of the government of Saddam Hussain) had issued an order whereby the Multinational Force (of which British troops formed a part) should be "immune from Iraqi legal process" and that all personnel should be "subject to the exclusive jurisdiction of their sending States": see section 2 1) and 3). Thus the U.K.'s jurisdiction over its own nationals was clearly maintained. In any event, members of the armed forces remain at all times subject to the jurisdiction of the U.K. It would obviously be wholly artificial to regard a soldier sent to fight in the territory of another state as subject to the jurisdiction of that state.

13. That a member of the armed forces should remain within the jurisdiction of the U.K. for the purposes of the Human Rights Act 1998 is supported by the reasoning of the majority in the *Al-Skeini* case (supra). The question to be decided by a court in this country is whether the 1998 Act has the necessary extraterritorial effect and so applies in the circumstances of a particular case. In Paragraphs 46 to 55, Lord Rodger of Earlsferry discussed the approach to be adopted to considering whether a particular statute or statutory provision should have extraterritorial effect. In Paragraph 46, he observed:-

> "Subjects of the Crown, British citizens, are in a different boat. International law does not prevent a state from exercising jurisdiction over its nationals travelling or residing abroad since they remain under its personal authority. So there can be no objection in principle to Parliament legislating for British Citizens outside the United Kingdom, provided that the legislation does not offend against the sovereignty of other states."

In Paragraph 47, he said:-

> "… (T)he question is whether, on a fair interpretation, the statute in question is intended to apply to them only in the U.K. or also, to some extent at least, beyond the territorial limits of the U.K. Here, there is no doubt that Section 6 [of the 1998 Act] applies to public authorities such as the armed forces within the U.K., the only question is whether, on a fair interpretation, it is confined to the U.K. "

14. In *Al-Skeini*, the question was whether the actions of the soldiers, themselves to be regarded as agents of a public body, as they affected a national of Iraq, fall within the ambit of Section 6. Here I am concerned with the actions of the army as a public body on an individual soldier, himself a British citizen and at all times subject to the jurisdiction of the U.K.

15. In Paragraphs 53 – 55 of *Al-Skeini*, Lord Rodger said this:-

> "53. In the first place, the burden of the legislation falls on public authorities, rather than on private individuals or companies. Most of the functions of United Kingdom public authorities relate to this country and will therefore be carried out here. Moreover, exercising their functions abroad would often mean that the public authorities were encroaching on the sovereignty of another state. Nevertheless, where a public authority has power to operate outside the United Kingdom and does so legitimately – for example, with the consent of the other state – in the absence of any indication to the contrary, when construing any relevant legislation, it would only be sensible to treat the public authority, so far as possible, in the same way as when it operates at home.
>
> 54. The purpose of the 1998 Act is to provide remedies in our domestic law to those whose human rights are violated by a United Kingdom public authority. Making such remedies available for acts of a United Kingdom authority on the territory of another state would not be offensive to the sovereignty of the other state. There is therefore nothing in the wider context of international law which points to the need to confine sections 6 and 7 of the 1998 Act to the territory of the United Kingdom.
>
> 55. One possible reason for confining their application in that way would, however, be if their scope would otherwise be unlimited and they would, potentially at least, confer rights on people all over the world with little or no connexion with the United Kingdom. There is, however, no such danger in this case since the 1998 Act has a built-in limitation. By section 7(1) and (7), only those who would be victims for the purposes of Article 34 of the Convention in proceedings in the Strasbourg court can take proceedings under the 1998 Act. Before they could sue, claimants would therefore have to be "within the jurisdiction" of the United Kingdom in terms of Article 1 of the Convention. Whatever the precise boundaries of that limitation, it blunts the objection that a narrow construction of the territorial application of the Act is the only way to prevent it having extravagant effects which could never have been intended. The requirement for a claimant to be within the jurisdiction of the United Kingdom is a further assurance that, if the Act were interpreted and applied in that way, the courts in this country would not be interfering with the sovereignty or integrity of another state."

16. This reasoning confirms that the 1998 Act does apply to the claimant. He is 'within the jurisdiction' of the U.K. and there is no question of that having extravagant effects. This is entirely consistent with the approach of the House of Lords in *Lawson v Serco Ltd* [2006] 1 CR 250 in which the 'legislative grasp' of the Employment Rights Act 1996 extended to an employee summarily dismissed from his employment at a MOD military establishment in Germany. And in *Al-Skeini* at Paragraph 140, Lord Brown of Eaton-under-Haywood made the point that if the British soldier who had ill-treated Mr Mousa had been court martialled in Iraq, there would have been no good reason for requiring that soldiers' Article 6 rights to have had to have been taken to Strasbourg rather than to the courts of the U.K. That presupposes that the ECHR applied to the soldier.

17. As I have said, Ms Moore suggested that the absence of any case from Strasbourg which positively recognised jurisdiction in circumstances such as arise in this case indicated that there was in truth no jurisdiction. This was, she submitted, because of the territorial limit on jurisdiction. But there is a case which points in the direction of jurisdiction. In *Martin v U.K.* (Application 40426/98), in which judgment was given on 24 October 2006, the applicant was a member of the family of a soldier serving in Germany who had been tried by court martial in Germany for the murder of a young woman. He was subject to military law by virtue of section 70(1) of and Paragraph 5 of Schedule 5 to the Army Act 1955. It was not suggested in that case (albeit no question of jurisdiction within Article 1 of the Convention was raised) that the Convention did not apply so that the applicant succeeded in establishing a breach of Article 6 of the Convention. Furthermore, in *W v Ireland* (No: 9360/81), the Commission, dealing with admissibility, observed (Paragraph 14):-

> "As stated by the Commission in Application 6780/74 and 6950/75, the authorised agents of the State, including diplomatic or consular agents and armed forces, remain under its jurisdiction when abroad …."

In any event, the absence of any case dealing with circumstances such as arise here cannot help to determine the correct answer. Thus such cases and observations as there are are consistent with the existence of jurisdiction in a case such as this.

18. Ms Moore submitted that it was impossible to afford to soldiers who were on active service outside their bases the benefits of the Human Rights Act. If the Act was to apply, it had to apply in all aspects. The circumstances of any particular case will determine whether an Article is breached. I am concerned with Article 2. This reads, so far as material:-

> "1. Everyone's right to life shall be protected by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

19. Article 2 covers the taking of life by state agents. But it also imposes a positive obligation to protect life. Thus where there is a known risk to life which the State can take steps to avoid or to minimise, such steps should be taken. What can reasonably be done will depend on the circumstances of a particular case. It is obvious that sending members of the armed forces to fight or to keep order will expose them to the risk of death. Article 2(2)(c) as drafted seems to be aimed at internal strife within a State and the possibility of deaths occurring as a result of the use of force by police or army to maintain order. But, having regard to the extension of the protection of the Article both in its application outside the territory of a State and its obligation to protect life, it does no violence to the language of Article 2(2)(c) to recognise that the lives of members of the armed forces when sent to fight or to keep order abroad cannot receive absolute protection. This accords with the approach of the Court of Appeal in *Mulcahy v Ministry of Defence* [1996] 2 All ER 758, where a soldier serving in the Gulf War who suffered hearing loss due to the negligent firing of a gun when he was in front of it failed in his claim because no duty of care was in the circumstances owed to him. The court decided that in battle conditions it would be impossible to impose a duty of care. As Sir Iain Glidewell observed at p.772h:-

> "It would be highly detrimental to the conduct of military operations if each soldier had to be conscious that, even in the heat of battle, he owed such a duty to his comrade."

This applied too to an allegation that there was a failure to maintain a safe system.

20. But the soldier does not lose all protection simply because he is in hostile territory carrying out dangerous operations. Thus, for example, to send a soldier out on patrol or, indeed, into battle with defective equipment could constitute a breach of Article 2. If I may take a historical illustration, the failures of the commissariat and the failures to provide any adequate medical attention in the Crimean War would whereas the Charge of the Light Brigade would not be regarded as a possible breach of Article 2. So the protection of Article 2 is capable of extending to a member of the armed forces wherever he or she may be; whether it does will depend on the circumstances of the particular case.

21. There is a procedural obligation arising under Article 2 that there should be some form of official investigation. In *Jordan v U.K.* 37 EHRR 52 the Court spelt this out in the context of a killing by state agents. In paragraph 105 it said:-

> "The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal

> complaint or to take responsibility for the conduct of any investigative process. ”

This will apply equally to a case where the death may have occurred as a result of a failure by the State or its agents to protect life: see *R(Middleton) v West Somerset Coroner* [2004] 1 A.C. 182, which concerned the suicide of an inmate of a prison. Furthermore, as the Court made clear in *Jordan v U.K.* at paragraph 109, whatever the degree of public scrutiny required, “in all cases … the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests”.

22. In *Middleton’s* case, the House of Lords recognised that an inquest constituted the means by which the state ordinarily discharges the procedural obligation (unless there were a criminal prosecution or a public inquiry) and that a verdict which did not express the jury’s or the coroner’s conclusions on major issues canvassed at the inquest could not satisfy or meet the expectations of the deceased’s family or next of kin – see paragraph 18. Paragraph 19 is of importance. This was said:-

> “The second consideration is that while the use of lethal force by agents of the state must always be a matter of the greatest seriousness, a systematic failure to protect human life may call for an investigation which may be no less important and perhaps even more complex … It would not promote the objects of the Convention if domestic law were to distinguish between cases where an agent of the state may have used lethal force without justification and cases in which a defective system operated by the state may have failed to afford adequate protection to human life.”

23. It was common ground that the circumstances of Private Smith’s death gave rise to concerns that there may have been a failure by the army to provide an adequate system to protect his life. Thus the *Middleton* approach to the inquest, namely that in deciding how the deceased met his death, the coroner should consider in what circumstances death resulted, should prevail. On the last day of the inquest, the coroner asked for argument whether the evidence justified a finding that there was even arguably a breach of Article 2. He decided that no such finding was justified. It seems he thought that a conclusion on this was needed since it would dictate the contents and form of the verdict he would announce.

24. In my view, he was wrong to entertain the argument. The procedural obligation under Article 2 was to hold the necessary inquiry and to find the necessary facts. If those facts showed that there was no breach of the substantive obligation and that nothing different need be done in the future to protect life, that should be indicated by the verdict. The family needed to know what were the conclusions on the important issues. Thus the inquest is not the means whereby a substantive breach of Article 2 is to be established – indeed, as will become apparent, a verdict which appeared to determine this would be likely to be contrary to Rule 42(b) of the Coroners Rules 1984. It is to decide by what means and in what circumstances the deceased met his death.

25. Ms Moore drew attention to the medical negligence cases decided both in Strasbourg and domestically. In *Powell v U.K.* [2000] 30 EHRR CD 362, the Court was

concerned with the death of a baby due to the negligence of the doctors responsible. The court stated:-

> "… where a Contracting State had made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a 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."

Powell was an admissibility decision and so the court was concerned to see whether there had been an arguable breach of Article 2. But it went on to make clear that the procedural obligation extended to "the need for an effective independent system for establishing the cause of death of an individual under the care and responsibility of health professionals and any liability on the part of the latter". As *Jordan* established, that obligation rested upon the state and it should not be left to a private individual to take the necessary action. However, the application in *Powell* was ruled inadmissible because a civil claim had been made and settled. As the court said, "Where a relative of a deceased person accepts compensation in settlement of a civil claim based on medical negligence he or she is in principle no longer able to claim to be a victim in respect of the circumstances surrounding the treatment administered to the deceased person or with regard to the investigation carried out into his or her death". *Powell* does not support a contention that the procedural obligation is to be met by the possibility of civil action: it was based on its own facts.

26. Ms Moore submits that the procedural obligation only arises if there is material which supports a breach of the substantive obligation. The need for that link was accepted by Richards J in *R(Goodson) v Bedfordshire & Luton Coroner* [2005] 2 All ER 791, a hospital death case. Thus he decided that where a death in hospital raised no more than a potential liability in negligence no procedural obligation arose. He felt able to distinguish *R(Khan) v Secretary of State for Health* [2003] 4 All ER 1239 on the basis that the allegation in that case, which concerned a death in hospital, was much more serious than simple negligence. However, gross negligence is not required to establish a breach of Article 2; it is sufficient, to quote the ECtHR in *Osman v U.K.* 29 EHRR 245 at Paragraph 116, "to show that the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge". Authorities in this context will include agents of the State. Thus negligence could suffice. The procedural requirement arises, as Lord Bingham said in *Middleton*, when 'it appears that one or other of the … substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated'. The threshold is low.

27. Ms Moore placed considerable reliance on *R(Takoushis) v Inner North London Coroner* [2006] 1 W.L.R. 461, a decision of the Court of Appeal. The deceased in that case had been brought to St. Thomas Hospital, having been seen apparently attempting to jump off Tower Bridge with a view to committing suicide. He was a long term schizophrenic. The nurse in charge of triage at the A&E Department was informed of the circumstances, but the deceased was left on his own in a cubicle and took the opportunity to leave. His body was later found in the river. The claim related to

various decisions made by the coroner, but the court considered the applicability of Article 2. This had been accepted before Elias J at first instance but that concession was withdrawn before the Court of Appeal.

28. Contracting States have different systems in relation to the investigation of death. In our system, the inquest is the normal means whereby an obligation to investigate will be fulfilled. In certain circumstances, a satisfactory system whereby the death can be properly investigated by civil, criminal, disciplinary or other procedures or a combination of them may suffice. But the obligation rests on the state, as *Jordan* makes clear, and it must not be left to individuals to take the necessary steps. However, if they do, they cannot thereafter complain that there has been a failure to comply with the procedural obligation: see *Powell.*

29. Counsel for the coroner in the *Takoushis* case submitted that the jurisprudence of the ECtHR showed that there was a distinction drawn between death in hospital and deaths in custody. Thus in ordinary cases of medical negligence, the existence of a civil remedy sufficed to discharge any procedural obligation. The court in *Takoushis* analysed Richards J's judgment in *Goodson* and a number of ECtHR cases. It made the point, citing *Sieminska v Poland* (Application No. 37002/97) (a case where death resulted from alleged negligence of ambulance staff), that the Convention imposed a "minimum requirement that where a State or its agents potentially bear responsibility for loss of life, the events in question should be subject to an effective investigation or scrutiny, which enables the facts to become known to the public, and in particular to the relatives of any victims." Thus in Paragraph 98, the Court made it clear that, in order to comply with Article 2, the State must set up a system which involves a practical and effective investigation of the facts. In Paragraphs 99 and 100 this was said:-

> "99. If, as in our opinion is the case, the system must be practical and effective, we are not persuaded that the mere fact that the state has made it possible in law for the family to begin a civil action against those said to be responsible is by itself a sufficient discharge of the state's obligation in every case. For example, it may not be practicable for the family to procure an effective investigation of the facts by the simple expedient of civil proceedings. Their claim may be for a comparatively small sum, as for example where the only claim is that of the estate of the deceased, such that it would not make practical or economic sense for civil proceedings to be begun, especially for a family who is not able to obtain legal aid.
>
> 100. Another possibility is that the facts may be such that liability has been admitted, with the result that, at any rate under the adversial system in operation in England, there can be no trial and thus no independent investigation of the facts as part of the civil process."

30. In Paragraphs 106 and 107, the Court concluded as follows:-

> "106. The question is whether the system in operation in England in this case meets those requirements. In our opinion it does. The system includes both the possibility of civil process and,

> importantly, the inquest. We can understand the point that the possibility of civil proceedings alone might not be sufficient because they do not make financial sense and may not end in a trial at which the issues are investigated. However, in the context of the other procedures available, an inquest of the traditional kind, without any reading down of the 1988 Act by giving a wider meaning to "how" as envisaged in the *Middleton* case [2004] a A.C. 182, and provided that it carries out the kind of full and fair investigation which is discussed earlier in this judgment and which (we hope) will now take place, in our opinion satisfies the requirement that there will be a public investigation of the facts which will be both practical and effective. Moreover, the family will be able to take a full part.
>
> 107. In these circumstances, while Article 2 is engaged in the sense described above, the present system including the inquest does not fall short of its requirements in any way. On the contrary it complies with it."

31. I confess that I have considerable doubts about the court's conclusion that the existence of other procedures means that a traditional form of inquest may be all that is needed. If it appears that there may have been a breach of a substantive obligation, the need for an investigation by an independent body arises. As I have said, in our system, the inquest is the normal means whereby that obligation can be met. The inquiry will establish the circumstances which may or may not indicate a systemic failure or fault by individuals. One of the purposes of the inquiry is to enable the next of kin to understand why the deceased died. Furthermore, in *Jordan* the ECtHR stated (Paragraph 107):-

> "The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard."

32. The limitations on the verdicts which can result from an inquest create problems in meeting the standards laid down, but it is clear that the investigation must be full. Once the procedural obligations are in place at the commencement, they must dictate the form of the inquest so that the extension of 'how' laid down in *Middleton* must prevail. It is not in my view right to say that the existence of a possible civil claim or disciplinary proceedings in the future can serve to limit the scope of the inquest. That would be to fail to apply *Jordan* and *Middleton* properly. However, as the Court in *Takoushis* recognised, it may in many cases make little difference provided that the inquest does

investigate what happened so that the evidence is available for anyone to use in any civil or other proceedings.

33. In the circumstances, I have no doubt that the fresh inquest must be one which accords with the procedural obligation arising under Article 2. I am told that this is of particular importance in that legal aid is only readily available for families if it is an Article 2 inquest. I have no doubt that (subject to financial eligibility) a failure to provide legal aid for the family in this case would be likely to breach their rights.

34. The public body in question, in this case the MOD, must disclose to the coroner all relevant material. This will include all the statements provided to the Board of Inquiry and the reports of the Board. It is said that some relevant medical notes have gone missing. No doubt searches will be made for them and all other relevant documents must be disclosed. In a letter to the coroner's office, the Treasury Solicitor has explained the MOD's practice in relation to disclosure of the Board of Inquiry and the SIB reports. It is said that the BOI is a fact-finding exercise and does not seek to apportion blame. This, it is said, helps to ensure that 'people are prepared to provide complete and open statements'. It is suggested that if they were aware that the statements and reports could be disclosed to interested parties, such as families of the deceased, there might not be the same willingness to provide such statements. Since most witnesses will be serving members of the armed forces, I find that suggestion unpersuasive. It is also said that the MOD's obligations under the Data Protection Act 1998 and at common law mean that the identity of the witnesses should be protected and so not disclosed.

35. All statements and documents produced routinely redact the names of any person. This makes it very difficult and sometimes impossible for interested parties to make preparations to deal with the evidence of a particular witness or to understand how that witness fits in to the whole picture. This redaction is taken to absurd lengths: thus the names have been redacted from correspondence which had been sent to the family or their representatives. In addition, all material which is said to be irrelevant is also redacted.

36. While I gather that the full material is sent to the coroner together with the redacted versions, it seems to me that there is no justification for the practice adopted. Naturally, any specific claim, that a witness's identity should not be disclosed because, for example, he or she might be put at risk of harm or because there was a particular request and need for confidentiality, can be made and should be considered by the coroner. Equally, any claim that material should not be disclosed on national security grounds must be considered by the coroner. His is an inquisitorial, not an adversial, process. He must have all the information, but he must, bear in mind the requirements of the procedural obligation which include enabling the family to play a proper and effective part in the process.

37. It may not always be necessary for there to be full disclosure to interested parties, in particular to the next of kin, of all reports and statements. In pre-*Middleton* days, the courts tended to uphold coroners when they decided against disclosure. Thus in *R v Lincoln Coroner ex p Hay* [2000] Lloyds Rep Med 204, we find the court through Brooke LJ observing that it was not prepared to rule that advance disclosure should be obligatory and it was for an individual coroner to decide "how best he should perform his onerous duties in a way that is as fair as possible to everyone concerned." In

R(Bentley) v HM Coroner for Avon (2001) 74 BMCRI, Sullivan J considered what should be the practice in relation to disclosure. It was his view, with which I entirely agree, that there must be a presumption in favour of as full disclosure as possible. Cost, if a problem, can be dealt with by a requirement that those who seek disclosure must pay all reasonable copying charges and it may be that all that is needed in some cases is that the party's representatives have access to the material and take copies only of that which is regarded as essential. But in an Article 2 case it will be difficult to justify any refusal to disclose relevant material.

38. I would only add that any disclosure should be made subject to the recipient giving an undertaking not to use it other than for the purposes of the inquest and, if considered necessary, to return it when it has served its purpose. This will help to avoid intrusive media attention since the undertaking will prevent disclosure to any third parties.

39. I come finally to the points raised by the MOD in its claim. It is said that the coroner's narrative verdict breached Rule 42(b) of the Coroner's Rules 1984, which reads:-

> "No verdict shall be framed in such a way as to appear to determine any question of … civil liability."

Since there is to be a fresh inquest, it may seem unnecessary to deal with this point. However, it is said that the issue is arising regularly in inquests on those killed in Iraq or in other places where British troops are deployed such as Afghanistan. It seemed to me to be desirable to deal with the point since the arguments were fully presented.

40. The narrative verdict was in these terms:-

> "On the 13th August 2003 Jason George Smith was on active service when found suffering with heatstroke at the Al Amarah stadium where he was stationed. He was taken to a medical centre at Abu Naji Camp where he died. Jason George Smith's death was caused by a serious failure to recognise and take appropriate steps to address the difficulty that he had in adjusting to the climate."

There was argument before the coroner that he should not use the words "serious failure". He had made clear in his ruling that his conclusion on the evidence was that the fault lay in the failure by individuals to follow the requisite procedures rather than any systemic failure. That was why there was in his view no substantive breach of Article 2. However, as I have already indicated, that was not for him to decide, but it does seem that the verdicts he gave would have sufficed for a *Middleton* type inquest with the formal addition of the conclusion that the failure was not systemic but of individuals.

41. While there was a somewhat faint argument that the word 'failure' was undesirable, the real attack by Ms Moore was directed at the adjective 'serious'. It is obvious that there is some tension between the prohibition contained in Rule 42(b) and the need for an Article 2 inquest to identify those responsible and shortcomings so that they can be remedied for the future to avoid similar deaths. Section 8(3)(d) of the 1988 Act, which requires a jury if the continuance or possible recurrence of the circumstances in which the death occurred is prejudicial to the health or safety of members of the public, creates

its own tension since there must be examination of and findings in relation to any shortcomings which led to the death and which may need to be addressed.

42. However, recently in *R(Hurst) v London Northern District Coroner* [2007] 2 W.L.R. 726 and *R(Jordan) v Lord Chancellor* [2007] 2 W.L.R. 754, the House of Lords has confirmed that the prohibition in Rule 42(b) must be honoured: see *Jordan* at paragraph 35. So much was confirmed in *Middleton* where, in paragraph 37, Lord Bingham identified the correct approach to Rule 42 thus:-

> "The prohibition in rule 36(2) of the expression of opinion on matters not comprised within sub-rule (1) must continue to be respected. But it must be read with reference to the broader interpretation of "how" in section 11(5)(b)(ii) and rule 36(1) and does not preclude conclusions of fact as opposed to expressions of opinion. However the jury's factual conclusion is conveyed, rule 42 should not be infringed. Thus there must be no finding of criminal liability on the part of a named person. Nor must the verdict appear to determine any question of civil liability. Acts or omissions may be recorded, but expressions suggestive of civil liability, in particular "neglect" or "carelessness" and related expressions, should be avoided. Self-neglect and neglect should continue to be treated as terms of art. A verdict such as that suggested in para.45 below ("The deceased took his own life, in part because the risk of his doing so was not recognised and appropriate precautions were not taken to prevent him doing so") embodies a judgmental conclusion of a factual nature, directly relating to the circumstances of the death. It does not identify any individual nor does it address any issue of criminal or civil liability. It does not therefore infringe either rule 36(2) or rule 42."

43. In *R v N. Humberside Coroner ex p Jamieson* [1994] 3 All ER 972, the Court of Appeal considered the scope of Rule 42 in the context of a verdict recording neglect or lack of care. It was noted that the prohibition in Rule 42 was fortified by consideration of fairness since an individual or body who might be identified as being liable was not afforded the safeguards to enable him to meet any such conclusion. There was no right to call evidence or to address the coroner or jury on fact nor was there then any right to receive disclosure of material evidence. It may well be that in the light of the obligations arising under Article 2 amendments are needed to the Rules to provide the necessary safeguards and a good start would be the removal of Rule 40 which prohibits an address by any party on fact. But *Jamieson* makes clear that the coroner and jury must explore facts bearing on criminal and civil liability and the coroner must ensure that the relevant facts are fully, fairly and fearlessly investigated. Factual conclusions not only may but must, if crucial, be recorded, but in a way which does not infringe Rule 42. As Lord Bingham said in Paragraph 37 of *Middleton*, acts or omissions may be recorded. It is obvious that otherwise the inquest would not be capable of complying with the procedural obligation under Article 2.

44. In *Jordan v Lord Chancellor* [2007] 2 W.L.R. 754, an appeal from Northern Ireland, the House of Lords had to consider the proper approach of a coroner in the light of the prohibition under the rules in force in Northern Ireland of bringing in a verdict of

unlawful killing. The decision itself rested largely on the conclusion that the Human Rights Act 1998 did not have retrospective effect and so the obligations under Article 2 did not apply to the death of the deceased who had been killed in 1992. But at paragraph 39, Lord Bingham said this:-

> " I also agree with the Northern Irish Courts, and with Mr Blake, that nothing in the 1959 Act or the 1963 Rules prevents a jury finding facts directly relevant to the cause of death which may point very strongly towards a conclusion that criminal liability exists or does not exist."

This is just as applicable to findings which may point to civil liability.

45. Ms Moore submits that a verdict which speaks of a failure is in danger of transgressing Rule 42(b) and the addition of the adjective serious crosses the line. It is, she says, not neutral but pejorative. But the coroner was recording the evidence of witnesses and concluding that that evidence was accepted. Ms Moore accepts that he would have been entitled to record that acts or omissions existed which were directly relevant to the cause of death. To identify them would have had much the same effect as describing them as failures. The prohibition is against framing a verdict in such a way as to appear to determine any question of civil liability. The word determine is important; a finding that there was a failure to act in a particular way does not appear to determine a question of civil liability. It no doubt will assist a potential claimant, but it is the evidence which is elicited which will in the end be material, not the verdict of the coroner or the jury. No doubt, assertions that there has been a breach of a duty of care or that there was negligence should be avoided, but I do not think that findings of fact, however robustly stated, can be forbidden.

46. The coroner should, if he believes action should be taken to avoid the recurrence of similar fatalities, make a report to the relevant authority, in this case the MOD: see Rule 43 of the 1984 Rules. So far as I am aware, there is nothing in the rules which prevents any such report being made public.

47. In the circumstances, I would have rejected the MOD's claim.

NOTE;

As a consequence of the Opinions of the Lords of Appeal for Judgment in the Causes in the House of Lords case, *R(Gentle & another) v The Prime Minster & Others* [2008] UKHL 20, given on 10 April 2008, Mr Justice Collins added observations to his judgment and distinguished the *Gentle* case and therefore his judgment in the above case, *Smith,* remains as handed down.

These observations are being transcribed by Merrill Legal Solutions and will form part of the subsequent hand down.