

GLS Disclosure Webinar

CASE REFERENCE

R. (on the application of Al-Sweady) v Secretary of State for Defence

Divisional Court

02 October 2009

Westlaw Case Analysis 7 pages

Official Transcript 16 pages

Status:  Positive or Neutral Judicial Treatment

R. (on the application of Al-Sweady) v Secretary of State for Defence

Divisional Court

02 October 2009

Case Analysis

Where Reported

[2009] EWHC 2387 (Admin); [\[2010\] H.R.L.R. 2](#); [2010] U.K.H.R.R. 300; Times, October 14, 2009; [Official Transcript](#)

Case Digest

Subject: Administrative law **Other related subjects:** Civil evidence; Human rights; Armed forces

Keywords: Cross-examination; Disclosure; Duty to undertake effective investigation; Inhuman or degrading treatment or punishment; Judicial review; Prisoners' rights; Prisoners of war; Right to liberty and security; Right to life

Summary: In judicial review cases concerning disputed breaches of human rights under the European Convention on Human Rights 1950, it was vital for the parties to consider whether there were "hard-edged" questions of fact to resolve, of the kind described in [R. v Monopolies and Mergers Commission Ex p. South Yorkshire Transport Ltd \[1993\] 1 W.L.R. 23](#), as that would be relevant in determining whether the court needed to make orders for cross-examination and disclosure.

Abstract: The court considered issues of cross-examination and disclosure in stayed judicial review proceedings, in which the claimant Iraqi nationals principally sought an investigation into alleged violations of their rights under the European Convention on Human Rights 1950 art.2, art.3 and art.5 by British troops in Iraq in 2004. The first claimant contended that his nephew had been murdered while being detained by British soldiers, hence art.2 was engaged. The second to sixth claimants contended that they had been ill-treated, in breach of their art.3 rights, while being detained by British soldiers; and that their continued detention had been unjustified and breached art.5. They further contended that their transfer to Iraqi authorities also amounted to a breach of art.3. Finally they argued that there had not been a proper investigation of their claims. The defendant secretary of state contended that there had been no human rights violations and that in any event there had been a proper investigation by the Royal Military Police or that the hearing of the application itself constituted such an investigation. During the proceedings the claimants had made many applications seeking disclosure of documents by the secretary of state. During the hearing the secretary of state admitted that he might not have made full disclosure, and in effect conceded the claimants' claim for an inquiry; hence the proceedings were stayed while a full investigation was arranged.

Judgment accordingly. (1) The usual procedure in judicial review cases was for there to be no oral evidence, and in so far as there were factual disputes between the parties, the court was ordinarily obliged to resolve them in favour of the defendant, [R. v Board of Visitors of Hull Prison Ex p. St Germain \(No.2\) \[1979\] 1 W.L.R. 1401](#) considered. However, the position was different in many human rights cases because such cases tended to be very fact-specific,

[Tweed v Parades Commission for Northern Ireland \[2006\] UKHL 53, \[2007\] 1 A.C. 650](#) considered. In the instant case, cross-examination was appropriate as there were "hard-edged" questions of fact to resolve, of the kind described in [R. v Monopolies and Mergers Commission Ex p. South Yorkshire Transport Ltd \[1993\] 1 W.L.R. 23](#), which represented an important exception to the rule precluding the court from substituting its own view in judicial review cases, [R. v Monopolies and Mergers Commission, R. \(on the application of N\) v M \[2002\] EWCA Civ 1789, \[2003\] 1 W.L.R. 562](#), and [R. \(on the application of Wilkinson\) v Broadmoor Hospital \[2001\] EWCA Civ 1545, \[2002\] 1 W.L.R. 419](#) considered. For there to have been effective cross-examination, it was vital for full disclosure to occur, particularly as the allegations concerned some of the most important human rights. When it was clear that a judicial review application might depend on the determination of a factual dispute, urgent consideration should be given to ordering disclosure and cross-examination. (2) The secretary of state had persistently failed to comply with his duty of disclosure and that had led to an interim indemnity costs order being made against him. (3) The secretary of state had the following duties: (a) to ensure that any public interest immunity certificate was accurate; (b) to ensure that those involved in similar cases in the future were fully aware of their duty to ensure that proper disclosure be given where there was to be cross-examination or where the court made findings of fact; (c) to ensure that there was in force an adequate document retrieval system; (d) to give anxious and urgent consideration to implementing the reforms mentioned by the Provost Marshal in his witness statement. They included a review of case file management with a view to improving accountability of material collated during an investigation; the agreement and signing of an internal protocol on disclosure between the Royal Military Police, the Service Prosecuting Authority, the Ministry of Defence legal team and the ministry's operations directorate; and a bid for additional resources to expand the investigative capacity of the Royal Military Police Special Investigation Branch.

Judge: Scott Baker, L.J.; Silber, J.; Sweeney, J

Counsel: For the claimants: R Singh QC, M Fordham QC, D Squires, S Fatima. For the defendant: C Lewis QC, S Wordsworth, J Clement, R Wastell.

Related Cases

R. (on the application of Al-Sweady) v Secretary of State for Defence

[\[2009\] EWHC 1687 \(Admin\); Times, August 3, 2009; Official Transcript; DC](#)

Significant Cases Cited

Tweed v Parades Commission for Northern Ireland

[\[2006\] UKHL 53; \[2007\] 1 A.C. 650; \[2007\] 2 W.L.R. 1; \[2007\] 2 All E.R. 273; \[2007\] N.I. 66; \[2007\] H.R.L.R. 11; \[2007\] U.K.H.R.R. 456; 22 B.H.R.C. 92; \(2007\) 151 S.J.L.B. 24; Times, December 15, 2006; Official Transcript; HL \(NI\); 2006-12-13](#)

R. (on the application of N) v M

[\[2002\] EWCA Civ 1789; \[2003\] 1 W.L.R. 562; \[2003\] 1 F.L.R. 667; \[2003\] 1 F.C.R. 124; \[2003\] Lloyd's Rep. Med. 81; \(2003\) 72 B.M.L.R. 81; \[2003\] M.H.L.R. 157; \[2003\] Fam. Law 160; \(2003\) 100\(8\) L.S.G. 29; Times, December 12, 2002; Independent, December 13, 2002; Official Transcript; CA \(Civ Div\); 2002-12-06](#)

R. (on the application of Wilkinson) v Broadmoor Hospital

[\[2001\] EWCA Civ 1545](#); [\[2002\] 1 W.L.R. 419](#); [\[2002\] U.K.H.R.R. 390](#); [\(2002\) 5 C.C.L. Rep. 121](#); [\[2002\] Lloyd's Rep. Med. 41](#); [\(2002\) 65 B.M.L.R. 15](#); [\[2001\] M.H.L.R. 224](#); [\[2002\] A.C.D. 47](#); [\(2001\) 98\(44\) L.S.G. 36](#); [\(2001\) 145 S.J.L.B. 247](#); [Times, November 2, 2001](#); [Independent, December 10, 2001](#); [Daily Telegraph, October 30, 2001](#); [Official Transcript](#); CA (Civ Div); 2001-10-22

R. v Monopolies and Mergers Commission Ex p. South Yorkshire Transport Ltd

[\[1993\] 1 W.L.R. 23](#); [\[1993\] 1 All E.R. 289](#); [\[1993\] B.C.C. 111](#); [\[1994\] E.C.C. 231](#); [\(1993\) 143 N.L.J. 128](#); [Times, December 17, 1992](#); HL; 1992-12-16

R. v Board of Visitors of Hull Prison Ex p. St Germain (No.2)

[\[1979\] 1 W.L.R. 1401](#); [\[1979\] 3 All E.R. 545](#); [\[1979\] Crim. L.R. 726](#); [\(1979\) 123 S.J. 768](#); QBD; 1979-06-15

All Cases Cited

Tweed v Parades Commission for Northern Ireland

[\[2006\] UKHL 53](#); [\[2007\] 1 A.C. 650](#); [\[2007\] 2 W.L.R. 1](#); [\[2007\] 2 All E.R. 273](#); [\[2007\] N.I. 66](#); [\[2007\] H.R.L.R. 11](#); [\[2007\] U.K.H.R.R. 456](#); [22 B.H.R.C. 92](#); [\(2007\) 151 S.J.L.B. 24](#); [Times, December 15, 2006](#); [Official Transcript](#); HL (NI); 2006-12-13

R. (on the application of Middleton) v HM Coroner for Western Somerset

[\[2004\] UKHL 10](#); [\[2004\] 2 A.C. 182](#); [\[2004\] 2 W.L.R. 800](#); [\[2004\] 2 All E.R. 465](#); [\(2004\) 168 J.P. 329](#); [\[2004\] H.R.L.R. 29](#); [\[2004\] U.K.H.R.R. 501](#); [17 B.H.R.C. 49](#); [\[2004\] Lloyd's Rep. Med. 288](#); [\(2004\) 79 B.M.L.R. 51](#); [\[2004\] Inquest L.R. 17](#); [\(2004\) 168 J.P.N. 479](#); [\(2004\) 101\(15\) L.S.G. 27](#); [\(2004\) 154 N.L.J. 417](#); [\(2004\) 148 S.J.L.B. 354](#); [Times, March 12, 2004](#); [Independent, March 16, 2004](#); [Official Transcript](#); HL; 2004-03-11

R. (on the application of N) v M

[\[2002\] EWCA Civ 1789](#); [\[2003\] 1 W.L.R. 562](#); [\[2003\] 1 F.L.R. 667](#); [\[2003\] 1 F.C.R. 124](#); [\[2003\] Lloyd's Rep. Med. 81](#); [\(2003\) 72 B.M.L.R. 81](#); [\[2003\] M.H.L.R. 157](#); [\[2003\] Fam. Law 160](#); [\(2003\) 100\(8\) L.S.G. 29](#); [Times, December 12, 2002](#); [Independent, December 13, 2002](#); [Official Transcript](#); CA (Civ Div); 2002-12-06

R. (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs (No.1)

[\[2002\] EWCA Civ 1409](#); [Official Transcript](#); CA (Civ Div); 2002-10-30

R. (on the application of Wilkinson) v Broadmoor Hospital

[\[2001\] EWCA Civ 1545](#); [\[2002\] 1 W.L.R. 419](#); [\[2002\] U.K.H.R.R. 390](#); [\(2002\) 5 C.C.L. Rep. 121](#); [\[2002\] Lloyd's Rep. Med. 41](#); [\(2002\) 65 B.M.L.R. 15](#); [\[2001\] M.H.L.R. 224](#); [\[2002\] A.C.D. 47](#); [\(2001\) 98\(44\) L.S.G. 36](#); [\(2001\) 145 S.J.L.B. 247](#); [Times, November 2, 2001](#); [Independent, December 10, 2001](#); [Daily Telegraph, October 30, 2001](#); [Official Transcript](#); CA (Civ Div); 2001-10-22

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R. v Board of Visitors of Hull Prison Ex p. St Germain (No.2)

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Key Cases Citing

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All Cases Citing

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[\[2013\] EWHC 1412 \(Admin\)](#); [Official Transcript](#); DC; 2013-05-24

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European Convention on Human Rights 1950 Art.5
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European Convention on Human Rights 1950 art.3
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European Convention on Human Rights s..1 art.1
European Convention on Human Rights s.1 art.2
European Convention on Human Rights s.1 art.3
European Convention on Human Rights s.1 art.5

[Human Rights Act 1998 \(Commencement\) Order 1998 \(SI 1998/2882\)](#)

[Human Rights Act 1998 \(c.42\)](#)

Journal Articles

United Kingdom: in judicial review cases involving significant factual disputes, which will often be those concerning human rights issues, it may be necessary to depart from traditional judicial review procedure

Civil procedure; Facts; Human rights; Judicial review; Justiciability; Presumptions.

[Com. Lawyer 2011,20\(3\), 15-17](#)

Recent developments in public law: Part 2 (June)

Civil procedure; Consultation; Delay; Disclosure; Jurisdiction; Legitimate expectation; Penal notices; Reasons.

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Antisocial behaviour; Defences; Eviction; Gypsies; Local authorities' powers and duties; Notices to quit; Possession claims; Right to respect for private and family life; Traveller sites; Travellers.

[Legal Action 2010, Jun, 24-28](#)

R. (on the application of Al-Sweady) v Secretary of State for Defence: judicial review - disclosure

Disclosure; Human rights; Judicial review.

[P.L. 2010, Jan, 186](#)

R. (on the application of Al-Sweady) v Secretary of State for Defence: judicial review - where cases turned on "hard-edged" findings of fact

Cross-examination; Disclosure; Human rights; Judicial review.

[Arch. News 2009, 9, 3](#)

Disclosure

Disclosure; Inhuman or degrading treatment or punishment; Iraq; Right to liberty and security; Right to life.

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[N.L.J. 2009, 159\(7390\), 1467-1468](#)

Books

Cross on Local Government Law

Chapter: Chapter 10 - Judicial Control of Local Authorities, Legal Proceedings by and Against Local Authorities and the Human Rights Act 1998

Documents: [10-100 The claim for judicial review](#)

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Chapter: Chapter 16 - CPR Pt 54 Claims for Judicial Review

Documents: [Section 4. - The Procedural Stages](#)

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Documents: [Rule 54.16 Evidence](#)

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Documents: [Section 1-The Convention rights](#)

Insight

[Judicial review: procedure](#)

Neutral Citation Number: [2009] EWHC 2387 (Admin)

Case No: CO/9282/2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 October 2009

Before:

LORD JUSTICE SCOTT BAKER
MR JUSTICE SILBER
MR JUSTICE SWEENEY

Between:

**The Queen (on the application of Al-Sweady
and Others)**

Claimants

- and -

The Secretary of State for the Defence

Defendant

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

Mr R Singh QC, Mr M Fordham QC, Mr D Squires and Miss S Fatima for the Claimants
Mr C Lewis QC, Mr S Wordsworth, Miss J Clement and Mr R Wastell for the Defendant

Hearing dates: 22 April 2009, 27 April to 1 May 2009, 5 to 19 May 2009, 21 to 22 May 2009, 6
July 2009, 10 July 2009 and 3 August 2009

Judgment
As Approved by the Court

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Lord Justice Scott Baker:

This is the judgment of the court to which each member of the court has made a substantial contribution.

I Introduction

1. Although this judicial review application has been stayed, it is appropriate and necessary to explain how and why we dealt with many of the novel problems raised on and during the application, especially as they are likely to arise in other actual and potential cases; such cases would concern not only strongly disputed claims against the Secretary of State for Defence (“the Secretary of State”) of ill-treatment by British troops in Iraq, but also other cases in which there are disputed allegations that human rights have been infringed. Hopefully, our explanation of the lessons learnt from the present case will assist in resolving these cases, and avoid the costs and court time wasted in these proceedings.
2. This case raised the hotly-contested issue of whether members of the British army (for whom the Secretary of State is responsible) killed or ill-treated Iraqis, whom they had taken prisoners on 14 May 2004. The claimants contended that the right of those prisoners under Articles 2, 3 and 5 of the European Convention on Human Rights and Fundamental Freedoms (“the ECHR”) had been infringed. There was an underlying factual question as to whether (as the Secretary of State contended to be the position) the nephew of the first claimant Hamid Al-Sweady (“Mr Al-Sweady”) died on the battlefield or (as the first claimant contended to be the position) his nephew was murdered by British soldiers after he had been taken to their base at Camp Abu Naji (“CAN”). This question raised a fundamental issue of jurisdiction under Article 1 of the ECHR because if the Secretary of State was correct and Mr Al-Sweady died on the battlefield, then the ECHR could not be invoked. The second to sixth claimants were among nine Iraqis, who were interned before eventually being handed over to the Iraqi Authorities in September 2004. The dispute between the parties in relation to those claims centred on whether the rights of the detained claimants under Articles 3 and 5 of the ECHR had been infringed. These factual disputes and the failure of the Secretary of State to give proper disclosure promptly meant that the hearing of the judicial review application lasted for 20 days in April and May 2009 and ten live witnesses were heard before the Secretary of State finally accepted, in a letter sent just before the start of the adjourned hearing of the proceedings in July 2009, that he could not give the reassurance that all material documents had been disclosed. The claimants then obtained the relief they sought.
3. The claim related to events on 14 May 2004, which was when Iraqi insurgents ambushed vehicles belonging to the Argyll and Southern Highlanders near to a permanent vehicle checkpoint known as Danny Boy, which was some five kilometres north east of Majar al-Kabir on route 6 in Iraq. A fierce battle followed which involved not only the Argylls but also soldiers from the Princess of Wales Royal Regiment. It resulted in many Iraqis being killed and two British soldiers being wounded. Although the battle was diffuse in nature, it was broadly divisible into two areas, one of which was north of Danny Boy and the other being south of Danny Boy. Ordinarily all enemy dead would have been left on the battlefield. Unusually, after the incidents close to Danny Boy an order was given to the British soldiers to identify the dead to see if there was among them the main suspect who had been involved in

the murder of six British soldiers in 2003. The Secretary of State's case was that this order was implemented by the British soldiers taking the bodies of twenty dead Iraqis back to CAN for identification. The bodies of the other dead Iraqis were not recovered. In addition to the twenty dead, nine Iraqis were, so the Secretary of State contended, taken prisoner and they were also taken to CAN.

4. It was the claimants' case that not all of the twenty died on the battlefield as at least one of them was murdered by British soldiers after he had been returned alive to CAN, while other Iraqis first were tortured or ill-treated contrary to Article 3 of the ECHR after their arrival at CAN and second were unlawfully detained contrary to their rights under Article 5 of the ECHR. On 15 May 2004, the bodies of the twenty Iraqis were handed back to the local Iraqi authorities.
5. The first claimant claimed that his nephew, Mr Al-Sweady, was killed at CAN either on 14 May 2004 after he had been detained, or on 15 May 2004 (before his body was returned), with the consequence that Article 2 of the ECHR was engaged. The Secretary of State says that Mr Al-Sweady was killed on the battlefield and so Article 2 of the ECHR was not engaged. We have explained that the other five claimants were among nine men who were taken prisoner. They claimed to have been ill-treated contrary to Article 3 of the ECHR.
6. There were also claims of breaches of Article 5 of the ECHR both in relation to the original detention of these five claimants and also in relation to their continued detention until they were handed over to the Iraqi criminal justice system in September 2004. The Secretary of State claimed that they were held throughout for imperative reasons of security under international law with the consequence that the provisions of Article 5 of the ECHR were qualified or displaced. Finally, there was a further claim that the decision of the Secretary of State to transfer these five claimants to the Iraqi authorities was a further breach of Article 3 of the ECHR because there were substantial grounds for believing that they would be subjected to Article 3 ill-treatment by the Iraqi authorities and we shall refer to this as "*the Soering Claim*".
7. The main relief sought by the claimants was for the court to order an adequate and independent investigation into the alleged violations of their rights under Articles 2 and 3 of the ECHR, while the Secretary of State contended, first, that there had been no violations of any of the claimants' rights under the ECHR and second, that in any event there had been a proper investigation by the Royal Military Police ("RMP") or alternatively that the hearing of the application constituted such an investigation. We stress that this meant an important issue was the quality of the original investigation, and it was therefore obvious that this would have to be the subject of further scrutiny.
8. The court was therefore faced with complicated legal and factual issues relating to Articles 1, 2, 3 and 5 of the ECHR. There were numerous interlocutory hearings before the substantive hearing began on 22 April 2009. This was due to the fact that this claim was unusual for a judicial review application in two fundamental respects; first because it was necessary for a number of witnesses to attend for cross-examination and second because of the disclosure of the vast number of documents and witness statements that were either relevant or potentially relevant to resolving the legal and factual issues raised by this judicial review application. Indeed, the disclosure obligations of the Secretary of State proved a constant and repeated source of friction and difficulty both before and during the hearing. We shall have to return

to set out some of the more disturbing aspects of the difficulties caused by the Secretary of State's attitude to disclosure in a little detail in paragraphs 30 onwards in the hope of avoiding similar problems in future. We were also so concerned about the lamentable approach of the RMP to disclosure that we invited the Treasury Solicitor and the Provost Marshal (who is in charge of the RMP), to come to court on 15 May 2009 to assist in ensuring that proper disclosure would take place. They duly attended and we were grateful for their help, but we will return in paragraph 29 onwards to explain the subsequent problems with the disclosure, which ought to have been given, but which unfortunately was not given, by the Secretary of State.

9. Nevertheless, mainly because of the Secretary of State's failure to disclose many relevant documents prior to its commencement, the hearing could not be finished in the estimated 15 days or indeed in the remaining five days leading up to Whitsun break. Indeed, throughout this period, further and substantial disclosure was constantly being given by the Secretary of State as the RMP found further documents and the claimants' legal team then required time to consider them. We stress that these documents should have been disclosed before the hearing but surprisingly no adequate reason has been given for the Secretary of State's failure to do so. Thus it came about that the hearing was adjourned on 22 May 2009, immediately before the Whitsun vacation for a week's further hearing, which was then fixed for the week commencing on 6 July 2009.
10. During the period leading up to this adjourned hearing, the claimants' solicitors correctly continued to press for further disclosure to which they were entitled, and indeed some disclosure was then given. Again we do not know why this disclosure could not have been given, and why it was not given, earlier.
11. Eventually, just before the adjourned hearing, the Treasury Solicitor wrote to the court on the evening of Friday 3 July 2009 a letter which we will quote from in paragraph 43 below stating that in the light the discovery of yet further e-mails and documents, the Secretary of State could not reassure the court that all material documents had been disclosed and that he was, in effect, conceding the claimants' claim for an inquiry under Articles 2 and 3, notwithstanding his continuing position that there had been no violation of either of those Articles.
12. It seemed to the court that as a matter of logic if the disclosure deficiency was such as to prevent the court dealing fairly with the claims under Articles 2 and 3 of the ECHR, the same reasoning applied equally to the claims under Article 5 of the ECHR and to the Soering claims.
13. Accordingly the court, on 6 July 2009 decided to stay not only the Article 2 and 3 claims as sought by the Secretary of State, but also both the Article 5 and the Soering claims. In the result, the whole of the cost of these proceedings have been wasted by the inadequate disclosure process conducted on behalf of the Secretary of State. Mr Rabinder Singh QC for the claimants duly sought an order for the costs of the whole of the proceedings on an indemnity basis. This was neither consented to nor opposed by Mr. Clive Lewis QC counsel for the Secretary of State but the court concluded that such an order was, in the circumstances, inevitable. As we will explain, we are forced to the conclusion that the approach of the Secretary of State to disclosure in this case was lamentable and indeed this led to an interim order of costs being made against

him and in favour of the claimants with these interim costs assessed at £1,000,000 against an itemised bill in excess of £2,000,000.

14. Apart from the question of disclosure, there is another matter that has caused the court very considerable concern in this case. The members of the court were obliged to spend a considerable amount of time reviewing documents containing redactions for which Public Interest Immunity ("PII") was claimed. The claim was supported by a PII certificate signed by the present Secretary of State in his previous role as Minister of State for the Armed Forces and it was dated 25 March 2009. On Thursday 2 July 2009, without any prior warning and much to its surprise, the court was provided with a supplemental certificate pointing out that the previous certificate was signed on a partly false basis because a good deal of the information referred to in the PII certificate was already in the public domain. We have dealt separately in a judgment handed down on 10 July 2009 ([2009] EWHC 1687 Admin) ("the PII judgment") with PII issues and the potentially very serious damage caused by the failure of the Ministry of Defence in this case to the integrity of the PII process.

II The Practical Problems of Resolving Factual Disputes

15. This application raised some unusual procedural problems as it started off as a judicial review application to review decisions of the Secretary of State in relation to the aftermath of the Danny Boy Incident. There were, however, five main factual disputes between the parties on issues and the determination of these disputes was bound to be of crucial importance in determining which party would be successful.
16. First, as we have already explained in paragraph 2, the success of the claim that Mr Al-Sweady's Article 2 rights had been infringed depended on proof that he was killed in CAN and not on the battlefield. There was also a second factual dispute as to whether the detained claimants were ill-treated in CAN in a way so that their Article 3 rights were infringed. A third factual dispute was whether the continued detention of the second to sixth claimants could be justified because if it could not, their Article 5 rights might have been infringed. Next, there was a factual dispute on the Soering claim. We had to decide how to deal with these matters. Finally there was a dispute as to whether there had already been a proper investigation of the Article 2 and of the Article 3 claims.
17. The difficulty confronting us was that, as is well known, the usual procedure in judicial review cases is first for there to be no oral evidence and second, in so far as there are factual disputes between the parties, the court is ordinarily obliged to resolve them in favour of the defendant (see, for example, *R v Board of Visitors of Hull Prison ex parte St Germain (No2)* [1979] 1 WLR 1401, 1410 H per Geoffrey Lane LJ (as he then was)).
18. If that approach had been adopted in this case, the Secretary of State would have succeeded and it would also have had the more far-reaching consequence that a defendant would always succeed if sued for an infringement of human rights which was disputed. So a different approach was needed because these "hard-edged" questions of fact represented an important exception to the rule precluding the court substituting its own view in judicial review cases. It is noteworthy that Lord Mustill has distinguished between "a broad judgment whose outcome could be overruled only on grounds of irrationality" and "a hard-edged question [where t]here is no room for

legitimate disagreement” (*R v Monopolies & Mergers Commission ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23, 32 D-F).

19. In our view, it was necessary to allow cross-examination of makers of witness statements on those “*hard-edged*” questions of fact. We envisage that such cross-examination might occur with increasing regularity in cases where there are crucial factual disputes between the parties relating to jurisdiction of the ECHR and the engagement of its Articles.
20. We consider that this conclusion is consistent with the approach adopted by Dyson LJ when giving the judgment of the Court of Appeal in *R (N) v M and others* [2003] 1 WLR 562 at 574, when he explained that cross-examination in judicial review cases should be ordered only if it is necessary to enable the court to determine factual issues for itself. A similar conclusion was arrived at by the Court of Appeal in *R (Wilkinson) v Broadmoor Special Hospital Authority* [2002] 1 WLR 419 especially at page 442 per Hale LJ (see also Fordham in *Judicial Review Handbook* ((5th edition) paragraph 16.1).
21. Indeed, it was agreed by counsel that there had to be cross-examination of some of the makers of witness statements in this case so that when on 17 October 2008 this case was fixed for hearing, the claimants were given permission to cross-examine five named members of the armed forces, who had made witness statements. Indeed, ultimately ten witnesses were cross-examined by Mr Singh, while the Secretary of State did not avail himself of the opportunity to cross-examine the makers of the witness statements adduced by the Claimants.
22. An important consequence of the orders for cross-examination was that disclosure was needed to enable effective and proper cross-examination to take place. This constituted an important exception to the conventional approach in judicial review cases, which is that “*on an application for judicial review there is usually no [disclosure] because [disclosure] should be unnecessary because it is the obligation of the [defendant] public body in its evidence to make fresh disclosure to the court of the decision-making process*” (per Lord Woolf MR in *R v Secretary of State for the Home Department ex parte Fayed* [1998] 1 WLR 763, 775 C). This obligation is a very important one because of the special position of the public authority and indeed it has been said that there is “*a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanation of all the facts relevant to the issue the court must decide*” (per Laws LJ in *R (Quark Fishing Limited) v Secretary of State for Foreign & Commonwealth Affairs* [2002] EWCA Civ 1409 [50]). Sadly, the Secretary of State consistently and repeatedly failed to comply with this obligation.
23. In practice, orders for disclosure in judicial review cases have usually been unnecessary, not only because the defendant normally complies with this well-recognised duty to make disclosure, but also because judicial review applications typically raise issues of law with the facts either not being in dispute or only being relevant to explain the context in which the issue of law arises. The position is different in many human right cases brought under the ECHR because in Lord Bingham’s words, such cases :-

“tend to be very fact-specific and any judgment on the proportionality of a public authority’s interference with a protected Convention right is likely to call for a careful and accurate evaluation of the facts. But even in these cases, disclosure should not be automatic. The test will be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and accurately” (Tweed v Parades Commission for Northern Ireland ([2007] 1 AC 650, 654 [3])).

24. In this case, it was common ground that in order to resolve many of the factual issues, disclosure was necessary of all reports of and other documents relating to, first, the incidents which led to the death of Mr Al-Sweady in order to determine whether he died in CAN so that Article 2 would be engaged; second, the treatment of the second to sixth claimants whilst in the custody of the Secretary of State so that the Article 3 and 5 claims could be determined; and third whether there had been a proper investigations of these matters.
25. The duty of disclosure on the Secretary of State in a case such as the present one is heightened by the fact that the allegations raised in this case concerned some of the most important and basic rights under the ECHR. For example, Article 2, which protects the right to life, *“must rank among the highest priorities of modern democratic state governed by the rule of law. Any violation or potential violation must be treated with great seriousness”* (per Lord Bingham in *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 [5]).
26. Similarly, Article 3 of the ECHR, which prevents citizens being subjected to *“torture or inhuman or degrading treatment or punishment”*, is also an Article without any exception or reservation. Compliance with it is of vital importance to any civilised state, as is the right to liberty, which is preserved by Article 5. In essence, the claims made in this action related to the most basic human rights and therefore it must be incumbent on this court to consider with great care and to apply intense scrutiny to any claim that any of these three basic human rights have been infringed. This means that the duty of disclosure on the part of the defendant to a claim for an infringement of these rights is even more acute.
27. For there to have been effective cross-examination, it was vital for full disclosure to occur as otherwise the evidence of those witnesses could not be effectively challenged and appraised with the consequence that the truth would not have been discovered. Put in another way, where the court is involved in fact-finding on issues as crucial to the outcome of this case as they were in the present case, the approach to disclosure should be similar to that in an ordinary Queen’s Bench action.
28. We concluded that it is vital that when it becomes clear that the outcome of a judicial review application might depend on the determination of a factual dispute, urgent consideration should be given to ordering disclosure and cross-examination. Rule 12.1 of the Practice Direction to CPR Part 54 provides that *“Disclosure is not required unless the court orders otherwise”*.

29. In our view, the parties and the Court should always scrutinise with care the stance of parties to judicial review applications (and in particular those concerning human rights claims) to ascertain if there is any critical factual issue which requires orders for cross-examination of the makers of witness statements or disclosure as being (in the words of Lord Bingham in the *Tweed* case which we have quoted in paragraph 23 above) “*necessary in order to resolve the matter fairly and accurately*”. Courts should not be reluctant to make such orders in suitable cases, which are especially likely to arise in claims based on the ECHR. As we shall explain, sadly the Secretary of State has consistently failed to comply with these obligations in the present case.

III Disclosure of the Secretary of State

(i) Introduction

30. Both before and during the hearing of this judicial review application, the claimants’ solicitors were compelled to make numerous applications for disclosure of relevant documents. It was only when such applications were made that the Secretary of State actually gave some disclosure which the court was then wrongly assured was adequate. Rather than give every instance when this problem arose, we will merely focus on two important areas where we have concluded that there have been serious breaches committed by the Secretary of State’s advisers of the duty to make proper disclosure in this case. The first deals with electronic communications between the Military Facilities in Iraq and United Kingdom command centres relating both to the death of Mr Al-Sweady and also to the treatment of the detained defendants while the second relates to disclosure of material concerning the investigations carried out by the RMP, and in particular by Colonel Dudley Giles, who was the Secretary of State’s principal witness in this case on the issue of the investigation of the claims.

(ii) Electronic Communications between the Military Facilities in Iraq and United Kingdom Command Centres relating to the death of Mr Al-Sweady and the treatment of the detained claimants.

31. The history of this has been carefully set out in the sixth witness statement of the claimants’ solicitor Mr Phil Shiner made on 1 July 2009. It is convenient to start the chronology on 16 October 2008 when the claimants’ solicitors asked the Treasury Solicitor’s representatives when they intended to disclose the communication logs between, on the one hand, the camps and other military facilities in Iraq and, on the other hand, the Headquarters and other United Kingdom-based Command Centres relating to the incidents, which formed the subject-matter of the present claims.
32. After a follow-up letter from the claimants’ solicitors, the Treasury Solicitor’s representatives explained in a letter dated 24 October 2008 that “*in accordance with our duty of candour we have disclosed all communication logs of which we are aware and that are material to the issues in this case*”. On 27 October 2008, the claimants’ solicitors stated that it was for the Secretary of State’s legal advisers to demand disclosure of relevant information and to deal with such material so that “*representatives of its legal team can assure the Court by a sworn statement that each and every one of the above that falls to be disclosed to the Court and the claimants in accordance with a legally correct approach to candour in effect has been*”.

33. After a warning letter, the claimants' solicitors duly issued an application for disclosure of, among other material, relevant communications between Iraqi military facilities and the United Kingdom-based command headquarters.
34. On 8 December 2008, the Treasury Solicitor responded that their client *"has made a reasonable search, in accordance with well-established principles, for relevant communication logs and is not aware of the existence of any further logs beyond those which have already been disclosed to you"*.
35. This aspect of the claimants' application was the subject of submissions at a hearing held on 18 December 2008 and the matter was ultimately resolved by an undertaking given by the Secretary of State that a witness statement from the Treasury Solicitor or from the Secretary of State's legal advisor would be forthcoming explaining, first, that a proper search for relevant material had been made and second, that the search had included the communications to which we have just referred.
36. A witness statement was then duly made by Mr Adam Chapman, who is the Team Leader at the Public Law Team at the Treasury Solicitors, in which it was said that *"no further documents were recovered that were considered by [the Ministry of Defence] legal advisors/[Treasury Solicitors] to be relevant to the claimants' claims"*. The claimants' solicitors have explained correctly in our view that they could not go behind that statement although they had reservations about its accuracy bearing in mind that not a single electronic communication, for example by email, had been retrieved and disclosed in relation to the incidents which concerned either the death of Mr Al-Sweady or the detention of the detained claimants.
37. There were then, as we have explained in paragraph 8 above, a series of serious problems with disclosure during the hearings, which culminated with the court requiring the Provost Marshal (Army) (who is in charge of the RMP) and the Treasury Solicitor himself to appear at a hearing on 15 May 2009. Indeed, when the Treasury Solicitor came to court to give evidence, his attention was drawn to the fact that many contemporaneous documents between Iraq and Headquarters command centres in the United Kingdom had not been disclosed although some contemporaneous reports between the theatre and Permanent Joint Headquarters and some contemporaneous logs had been disclosed.
38. On 19 May 2009, the Treasury Solicitor wrote a letter to the court explaining that they had conducted searches of material in the military computer system and in the theatres of war. It was not suggested that the searches were qualified by any requirement of proportionality. By paragraph 1 of the Order which we made on 22 May 2009, the claimants were entitled to make a request listing any further documents which they believed may not have been disclosed from the defendant.
39. A letter was duly sent by the claimants' solicitors to the Treasury Solicitor asking, yet again, for disclosure of these communications and logs between the theatre of war and the United Kingdom and requiring the Secretary of State's lawyers to search for material on the Permanent Joint Headquarters computer. No satisfactory response was received to this request.
40. A report was produced by the Treasury Solicitor on the issue of disclosure, as he had indicated when he gave his oral evidence on 15 May 2009, but there still was no

proper disclosure on the communication issue. In consequence, the claimants' solicitors wrote a further detailed letter on 23 June 2009 in which they requested disclosure of the electronic communications and the logs.

41. On 25 June 2009, the Treasury Solicitor responded and then for the first time made the point that it did not deny that the electronic communication sought by the claimants were still in existence. Much to our surprise in the light of the Secretary of State's previous stance, it was then asserted for the first time that:-

“the sheer volume of the material... together with the technical difficulties in framing meaningful search parameters, means that it would be impractical and disproportionate to conduct broad-based searches of the exchange servers themselves, and that to do so would be disproportionate”.

42. No reason has been put forward to explain why this response had not been made at any time since the original request which had been made more than eight months earlier on 16 October 2008. We conclude that the Secretary of State's agents had simply failed for no good reason during that lengthy period to carry out these critically important and obviously highly relevant searches and this failure in our view constitutes a serious breach of their duty to give proper disclosure. It must not be forgotten that Salmon J explained in *Woods v Martins Bank* [1959] 1 QB 55 at page 60 that “it cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court, to go through the documents disclosed by their client to make sure, as far as possible, that no relevant documents have been omitted from their client's [list]”. This duty requires a solicitor to take steps to ensure that their client knows what documents have to be disclosed.

43. The next development was, as we have explained, that on the evening of Friday 3 July 2009, the solicitors for the Secretary of State wrote to the Court in the light of the adjourned hearing fixed for Monday 7 July 2009 explaining that:-

“In the light of the discovery on Tuesday 30 June 2009 of the emails of 19, 20 and 24 May 2004, and the memorandum to the Armed Forces Minister and annexes of 21 May 2004, it is clear that the searches conducted to date cannot be said to have been effective and can no longer be regarded as reasonable and proportionate. The Secretary of State further recognises that he cannot provide the reassurance that the Court will seek that all material documents have been disclosed within the timescale of the present hearing. In those circumstances, the Secretary of State recognises that, realistically, the Court cannot be sure that it is in possession of all the material that it needs. He recognises that the Court may consider that it cannot appropriately make the rulings on the issues of the alleged deaths at Camp Abu Naji and the allegations of ill-treatment at Camp Abu Naji and the Divisional Temporary Detention Facility at Shaibah.”

44. In consequence, various inquiries were ordered and the Secretary of State was ordered to pay the costs of the claimants on an indemnity basis. It is deeply regrettable that so

much public money and so much court time has been wasted as a consequence of the persistent and repeated failure by the Secretary of State to comply with his duties of disclosure. It is a matter of great surprise and deep disappointment to the court that the Secretary of State still could not be satisfied more than 18 months after this claim was brought that he could give proper disclosure in a case such as the present one with the result that he was obliged to concede defeat and to pay indemnity costs.

(iii) Colonel Dudley Giles

45. The investigations into the allegations in this case were conducted on behalf of the Secretary of State by the RMP, which forms part of the British Army and the Ministry of Defence, but which is independent for the purposes of investigation. The first RMP investigation took place in 2004 and 2005 while the second one was carried out from 2007 to 2009. These investigations were important not merely for ascertaining what happened to Mr Al-Sweady and the detained claimants but also in ascertaining if the Secretary of State had complied with any duty of his to carry out a full investigation.
46. As we have explained, Colonel Dudley Giles was the principal witness for the Secretary of State in these proceedings on the issue of the nature and the adequacy of the investigations into the alleged breaches of Articles 2 and 3 of the ECHR. He joined the RMP in 1969 and was a front-line investigator for some 14 or 15 years. In 2004 and 2005, he was working closely with the then Deputy Provost Marshal (Investigations) of the RMP and in August 2007 he was himself promoted to that position, which is equivalent to the post of an Assistant Chief Constable (Crime) in domestic police forces. From mid-November 2007 onwards, Colonel Giles took personal charge of the RMP's disclosure in relation to these proceedings.
47. In his role as the principal witness for the Secretary of State on the adequacy and the nature of the investigations, Colonel Giles made eight witness statements, which were dated 6 December 2007, 2 April 2008, 3 May 2008, 23 July 2008, 15 October 2008, 12 January 2009, 30 January 2009 and 26 March 2009. In these statements, he sought, amongst other things, to argue the factual case for the Secretary of State including asserting the thoroughness and proficiency of the first RMP investigation, which was, of course, an important issue in the case. Colonel Giles gave evidence at some length on these matters on 5 and 7 May 2009.
48. As the person who took personal charge of the RMP disclosure in this judicial review application from mid-November 2007 onwards, Colonel Giles was responsible for ensuring that all relevant RMP materials were properly collated. It is clear that he also played the leading role in deciding what was then revealed to the Secretary of State, who then (with the Treasury Solicitor and Counsel) made decisions as to what should be disclosed to the claimants.
49. By 6 May 2009 (which was three weeks into the hearing), the late disclosure of the RMP materials had reached such a state that, as we have explained in paragraph 8 above, we required the Provost Marshal (Army) himself to make a statement and to give evidence, explaining the disclosure process to date and the late disclosure of materials, as well as giving an assurance that all relevant documents and materials had now been disclosed to the Secretary of State. In the result, there was disclosure of yet further substantial quantities of hitherto undisclosed material. No adequate reason

was put forward to explain why this had not occurred earlier, although this material was obviously disclosable.

50. We were also disturbed by Colonel Giles' written and oral evidence. By way of example, in his long witness statement of 23 July 2008, he asserted that only nine live detainees were taken to CAN on 14 May 2004; this became a significant plank in the Secretary of State's case in responding to the claim that Mr Al-Sweady had died at CAN and not on the battlefield. Yet Colonel Giles failed to deal with a number of important documents, which were consistent with the contention that more than nine live detainees had been taken to CAN. One such document was an 'Analytic Review' dated 14 May 2008 by the analyst attached to the then ongoing second RMP investigation. This indicated that the total number of possible live detainees was between ten and twelve. When questioned as to why this document was not referred to in his statement or disclosed at that stage, Colonel Giles asserted that this was to avoid any prejudice to any further prosecution. When this assertion was examined, it became obvious that it was wholly without foundation. The fact that the 'Analytic Review' was eventually produced and that the other documents were eventually disclosed, does not detract from our deep concern about Colonel Giles' approach to disclosure and also to the objectivity of his evidence.
51. In the result, Colonel Giles must shoulder a considerable proportion of the responsibility for the lamentable disclosure failures by the RMP in this case. We will return in paragraph 65 to give some guidance about how the court should deal with the outstanding cases of allegations of breaches of the ECHR made by Iraqis concerning the behaviour of British troops.
52. In addition, Colonel Giles was overall a most unsatisfactory witness. By way of illustration, as we have already indicated, the thoroughness and proficiency of the RMP investigation in 2004/5 was an important issue in the case - albeit against the background that it was carried out in an ongoing theatre of conflict. In his witness statement of 23 July 2008 Colonel Giles stated, amongst other things, that:-
- i) *"The Danny Boy incident was initially investigated under the protocols of the Shooting Policy ... but when it became clear that allegations of murder, mistreatment and mutilation were being made the matter was correctly referred to the SIB. There was, however, a consequent delay of six days before the police investigation was initiated".* (Paragraph 20); and
 - ii) *"In conclusion, I am satisfied that the SIB conducted a thorough and proficient investigation into the allegations made in 2004...."* (Paragraph 125).
53. As to the assertion that there was a delay of six days before the investigation into the allegations of murder, mistreatment and mutilation was initiated – there was overwhelming evidence that this was wrong. Indeed, during the present proceedings, the Secretary of State accepted that it was. The evidence from contemporaneous documents clearly showed that the investigation into the allegations of murder on 14 or 15 May 2004 was blocked until 20 June 2004, thereby resulting in a crucial loss of vital time and investigative opportunity – itself reflecting adversely on the thoroughness and proficiency of the investigation. This was something that Colonel Giles either did know or should have known to be the case.

54. In our view, the RMP investigation in 2004/5 was not thorough and proficient. By way of illustration, after making full allowance for the very difficult circumstances in which it had to be carried out, the investigation relating to the allegation of murder and torture was deficient because first it did not start until some five weeks after the events; second it had no Major Incident Room support; third it failed to identify or interview all the relevant personnel at CAN who were involved in dealing with the detainees; fourth it failed to seize all contemporaneous records, and fifth it failed to interview the detainees as to what had happened at CAN on the night of 14 to 15 May 2004.
55. These and other shortcomings were, or should have been, known and indeed obvious to Colonel Giles – not only because he is an experienced investigator as we have explained in paragraph 46 above, but also because many of the defects in the 2004/5 investigation were referred to in a Review by the Greater Manchester Police which Colonel Giles had himself commissioned in the autumn of 2008. Yet very surprisingly and regrettably, he said nothing in any written statement to correct the position nor (despite being given the opportunity) did he do so when he went into the witness box. Indeed it was only when he was cross-examined that he was driven to accept some of the shortcomings, although seeking to discredit, or to minimise, much of the Greater Manchester Police Review, despite the obvious validity of the great majority of its criticisms. Our confidence in Colonel Giles was further undermined by the fact that he had not disclosed until he gave evidence the contents of a preliminary version of the report, which was also very critical of his investigation. No good reason was put forward to justify this.
56. Indeed, as to one of the most fundamental shortcomings, namely the failure to interview the nine detainees as to what had happened at CAN on the night of 14/15 May, it was only at the very end of his evidence, under questioning by the Court, that he finally and very belatedly accepted that this failure alone and in itself meant that his assertion that there had been a thorough and proficient investigation was a rather optimistic way in which to have cast his statement. We were each of the opinion that Colonel Giles was an unsatisfactory witness and his evidence was seriously flawed.
57. Another problem which undermined our confidence in Colonel Giles was that in the period between the completion of his evidence in early May 2009 and the resumed hearing on 6 July 2009, the Secretary of State made substantial further disclosure to the claimants in compliance with the orders that we had made. Indeed 14 ring-binder files of documents were disclosed on about 22 June 2009. Those documents (which had not been disclosed previously) should have been disclosed well in advance of the hearing and no adequate reason has been given as to why it was not, and why it could not have been, disclosed earlier.
58. On 6 July 2009 at the resumed hearing, in light of that disclosure, Mr Singh sought the recall of Colonel Giles for further cross-examination on the basis that Colonel Giles had not told the truth to the Court during the course of his earlier evidence. Mr Lewis argued that, if there was to be any such cross-examination, then Colonel Giles should have the benefit of independent legal advice before it took place and that (in any event) the Court already had all that it needed to know for the purpose of giving any judgment. The Court should not, he submitted, rush to judgment, conduct a witch hunt or make life difficult for the new investigation.

59. In the result, we concluded that we already had adequate material upon which to reach a judgment on the reliability of Colonel Giles and that it was not necessary for him to be further cross-examined. Despite an invitation from us, neither party then sought to persuade us to the contrary. Having refused further cross-examination on 6 July 2009, it would not be right for us to reach any conclusions as to the underlying reasons for Colonel Giles' serious shortcomings. However, whatever the underlying reasons, it is incumbent on us to record that we are all firmly of the view that he lacked the necessary objectivity, proficiency and reliability which should be the hallmarks of any witness put forward especially by a Secretary of State in judicial review proceedings or relied on by the Secretary of State to make proper disclosure.
60. Accordingly, if Colonel Giles continues to be put forward as a principal or even a significant witness in judicial review proceeding or if he is in any way responsible for disclosure, it is our view that any Court seized of those proceedings should approach his evidence with the greatest caution.

IV The Nature of the Investigation ordered

61. As we have explained, in July 2009 the Secretary of State accepted that a full investigation would take place into the claimants' complaints concerning the interference with the Article 2 rights of Mr Al-Sweady and the Article 3 rights of the detained claimants. On 10 July 2009, we ordered that:-

"A stay be granted until further order of the Court in relation to the Claimants' claims for breach of Articles 2, 3 and 5 of the European Convention on Human Rights ("ECHR") subject to there being an investigation into the Claimants' allegations of murder at Camp Abu Naji on 14th and 15th May 2004 and into the Claimants' claims of ill-treatment at Camp Abu Naji on 14th and 15th May 2004 and at the Divisional Temporary Detention Facility at Shaibah between 15th May 2004 and 23rd September 2004 made in these proceedings. The Defendant intends that the investigation shall satisfy the requirements of Articles 2 and 3 of the ECHR."

62. It was for the Secretary of State to determine how the investigation should be carried out and his wish is that it should be conducted by the Metropolitan Police. The matter was duly adjourned to ascertain if they were able to do this. A further hearing took place on 3 August 2009 at which the court was informed that the negotiations with the officials of the Metropolitan Police had reached a stage when they required a longer period before deciding if they would carry out the investigation. We considered that we should continue to ensure that an investigation is carried out in satisfaction of the Secretary of State's obligations, and so we adjourned this matter until 2 October 2009. By a letter dated 25 September 2009, Assistant Commissioner Cressida Dick of the Metropolitan Police informed the court that *"following the scoping exercise the [Metropolitan Police Service] has come to the conclusion that it cannot usefully, and therefore should not, undertake an investigation into the matters alleged"*. We therefore propose to consider further at the adjourned hearing fixed for 2 October 2009 how we should ensure that the Secretary of State complies with his obligations to ensure that a proper investigation is carried out.

V The Lessons Learnt from this Case

63. We can divide this topic into two parts which deal first with case management matters and second with the obligations on the Secretary of State in a case such as the present case.
64. As to the case management issues, we consider that the parties have a clear obligation in any judicial review case to consider at all times whether there is a crucial issue in the case in the form of a hard-edged issue, of the kind described by Lord Mustill in the passage which we set out in paragraph 18 above, because this will be relevant in determining whether the court should make orders for cross-examination and disclosure. If the parties cannot reach agreement, an application should be made for the appropriate orders for disclosure and cross-examination in accordance with the principles, which we have set out above.
65. Turning to the duty of the Secretary of State in a case such as the present, we stress that:-
- (i) he has clear obligations to ensure that any PII certificate is accurate as we explained in the PII judgment to which we referred in paragraph 14 above;
 - (ii) the Treasury Solicitor should ensure that those involved in similar cases in the future are fully aware of their duty to ensure that proper disclosure is given where there is to be cross-examination or indeed any case where the court makes findings of fact;
 - (iii) he should ensure that, unlike what happened in the present case, there is in force an adequate document retrieval system as otherwise much public money and court time will be wasted as in the present case; and
 - (iv) he must give anxious and urgent consideration to implementing the matters mentioned by the Provost Marshal in his witness statement prepared for the hearing on 15 May 2009 which included (i) *“a review of current case file management with a view to improving accountability of material collated during an investigation”*, (ii) *“the agreement and signing of an internal protocol on disclosure between the RMP, SPA, the Ministry of Defence legal team and the Operations Directorate at [that Ministry]”*; and (iii) *“a bid for additional resources to expand the RMP SIB investigative capacity to include the provision of HOLMES”*. We regard each of these reforms to be of great pressing significance.

VI Other cases

66. We are aware that there are a number of other claims which have been brought against the Secretary of State by a number of Iraqis, who contend that their rights under Articles 3 and 5 of the ECHR have been infringed. In addition, we have been led to believe that other similar claims were about to be made. The Secretary of State will no doubt wish to review his position in these claims to ensure that his advisers are able to give adequate and prompt disclosure. Any litigation which leads to the conclusion that there has to be a further investigation in order to comply with the

Human Rights Act 1998 is not only going to be very costly but imposes a considerable burden on the use of court time.

67. We cannot part with this case without paying tribute to the claimants' legal advisers who although greatly outnumbered by the Secretary of State's legal team have persisted with their requests for disclosure skilfully and with commendable determination.