UNDER	**THE INQUIRIES ACT 2013**
IN THE MATTER OF	**A GOVERNMENT INQUIRY INTO OPERATION BURNHAM AND RELATED MATTERS**

Date of Minute: 17 July 2020

MINUTE No 25 OF INQUIRY

---

[1] This Minute provides a brief record of a matter that arose before the public hearings in September/October 2019 into the allegations made in *Hit & Run* that the New Zealand Defence Force (NZDF) had covered up the possibility of civilian casualties in Operation Burnham.

[2] In its Minute No 19 dated 18 July 2019 the Inquiry announced that it would hold a public hearing into the "cover-up" allegations. As was obvious from that Minute, an investigation carried out by an International Security Assistance Force (ISAF) Incident Assessment Team (IAT) shortly after Operation Burnham was important to several of the issues identified. ISAF was a North Atlantic Treaty Organisation (NATO)-led coalition, the records of which are now in NATO's control.

[3] As became clear during the public hearings, NZDF had initially prepared relevant witnesses on the basis that the classified report of the investigation, the Incident Assessment Team Executive Summary (the IAT executive summary), would be publicly available in some form, or at least that there would be some mechanism to enable it to be addressed in a meaningful way at the public hearings.[1] The IAT executive summary was an important feature of Brigadier Parsons' evidence. He was permitted by an ISAF officer to read one paragraph from it shortly after Operation Burnham and misinterpreted it. His misinterpretation

---

[1] See remarks of NZDF's counsel, Mr Radich QC, in Transcript of Proceedings, Public Hearing Module 4 (17 September 2019) at 289.

became the basis for NZDF's inaccurate narrative, to both ministers and the public, about the possibility of civilian casualties on Operation Burnham in subsequent years.

[4] In the circumstances, NZDF's assumption that the IAT executive summary would be accessible in some way at the hearings was reasonable:

(a) The IAT executive summary contained the results of a preliminary investigation into the actions of NZDF forces on Operation Burnham in August 2010 (some of whom were interviewed at the time), as well as the actions of United States air assets. It was factual in nature and did not expose intelligence-gathering capabilities, sensitive information or other matters obviously needing protection from disclosure.

(b) ISAF had issued two public statements in August 2010 about the conclusions reached by the IAT, which identified the possibility that civilian casualties had been caused when rounds from coalition helicopters fell short and struck two buildings. It also announced a further investigation, the results of which it said would be available on completion.

(c) NZDF had held a copy of the IAT executive summary since 2011.

(d) NZDF and ministers made numerous public statements over a number of years purporting to describe the conclusions reached by the IAT in the IAT executive summary.

(e) The IAT executive summary dealt with an operation which had, by the time of the public hearings, been the subject of extensive publicity already—including as a result of the public release in June 2019 by the United States Government of the further investigation arising out of the IAT's investigation, namely the AR 15-6 report. That report contains much detail from United States personnel about

the conduct of Operation Burnham, including significant references to the IAT executive summary (although the IAT executive summary was not disclosed with the AR 15-6 report).

[5] In the event, however, the IAT executive summary was not made publicly available for the hearings, nor was any mechanism agreed by which it could be referred to so as to make the public hearings more meaningful. This caused some awkwardness in the way the hearings were conducted. We outline briefly the background to this for the record.

[6] NZDF had previously sought consent from NATO in April 2017 to declassify the IAT executive summary so that it could be publicly released, but NATO declined its request in early 2018. In mid-August 2019, NZDF and the Ministry of Foreign Affairs and Trade asked NATO to declassify the IAT executive summary so that it could be publicly released in some form for use at the public hearings to begin on 19 September 2019. Despite several indications that an answer would be forthcoming in early September 2019, that did not eventuate.

[7] Consequently, on 11 September 2019, the Inquiry held an urgent private hearing on the Crown's application for an order under s 70 of the Evidence Act 2006 for the non-disclosure of the IAT executive summary. The Inquiry has the powers of a Judge under s 70 of the Evidence Act through s 27(1) of the Inquiries Act 2013.

[8] Sections 70(1) and (2) of the Evidence Act provide:

Discretion as to matters of State

(1) A Judge may direct that a communication or information that relates to matters of State must not be disclosed in a proceeding if the Judge considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information.

(2) A communication or information that relates to matters of State includes a communication or information—

(a) in respect of which the reason advanced in support of an application for a direction under this section is one of those

set out in sections 6 and 7 of the Official Information Act 1982; or

(b) that is official information as defined in section 2(1) of the Official Information Act 1982 and in respect of which the reason advanced in support of the application for a direction under this section is one of those set out in section 9(2)(b) to (k) of that Act; …

[9] To the extent relevant, s 6 of the Official Information Act 1982 provides:

Conclusive reasons for withholding official information

Good reason for withholding official information exists, for the purpose of section 5, if the making available of that information would be likely—

(a) to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or

(b) to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by—

(i) the Government of any other country or any agency of such a Government; or

(ii) any international organisation.

[10] The Crown argued that disclosure of the IAT executive summary without NATO's consent would seriously prejudice both:

(a) the international relations of the New Zealand Government with NATO and the United States Government; and

(b) the entrusting of information to the New Zealand Government on the basis of confidence by NATO and the United States.

[11] The Crown relied on the control principle;[2] an agreement between NATO and New Zealand that provides that NATO-originated material held by New Zealand will not be disclosed to a third party without the consent of NATO; and the

[2] The Crown referred to the description of the principle given by Lord Judge LCJ in *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, [2011] QB 218 at [44]. Lord Judge made it clear, however, that the control principle is not absolute and that the courts have the power to "disapply" it: see in particular at [46]. See further at [13] and fn 5 below.

fact that this was the latest of a number of requests to overseas partners for information to be made available.

[12] The Crown filed affidavit evidence in support of its submissions. This affidavit evidence is classified but its effect was that New Zealand had no ability to release information provided in confidence by an overseas partner without the consent of the overseas partner. Particular emphasis was placed on the importance of the control principle. Any decision about the release of the IAT executive summary would be made by NATO in a way that reflected that it engaged significant United States interests.

[13] The Inquiry took the view that an overseas partner does not have what is, in effect, a power of veto under s 70. The fact that an overseas partner has not consented to release is, of course, highly relevant to the evaluation to be made under s 70. But it cannot foreclose or pre-determine the exercise of the statutory power.[3] That power must be exercised in accordance with the statutory test, which requires a weighing of competing public interests—it cannot be "trumped" by the Executive's assessment of the position.[4] Equally, an obligation undertaken by the Executive in a treaty, while relevant to the exercise of the statutory power, cannot deprive a court of a jurisdiction accorded to it by statute. As we understand it, the courts in the United Kingdom and the United States take a similar view.[5]

[14] The Inquiry proposed to order that a significantly redacted version of the IAT executive summary be made available only to counsel and core participants for the purpose of the Inquiry's public hearings. The redacted document could be used by counsel and witnesses in the hearings, and referred to in the Inquiry's final report, but would not be publicly available. Given that NZDF and its counsel already had access to the full IAT executive summary, the only additional disclosure would have been to the two non-Crown core participants (Messrs Hager and

---

[3] See the observations of Glazebrook J in an analogous context in *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 (CA) at [74].

[4] The Executive has mechanisms to accord greater protection to particular documents in some circumstances: see s 27(3) of the Crown Proceedings Act 1950 and s 31 of the Official Information Act. Neither appear relevant in the present context.

[5] See, for example, the discussion in *Mohamed*, above fn 2, per Lord Judge LCJ at [44]–[46], Lord Neuberger MR at [131]–[133] and at [160]–[161] and Sir Anthony Gray P(QBD) at [287]–[291].

Stephenson) and their legal advisers, who would have received only the heavily redacted version of the IAT executive summary. In light of the importance of the paragraph from the IAT executive summary to the "cover-up" allegations, the Inquiry considered that this reflected a reasonable weighing of the competing interests referred to in s 70.

[15] This proposal was put to the Crown for comment. At that point, the Inquiry received a classified affidavit from the Minister of Foreign Affairs. Its effect was to say that the release of the redacted version of the IAT executive summary at that stage (that is, without partner consent) would breach New Zealand's obligations to protect partners' classified information and would cause grave and significant harm to New Zealand's relationships with its partners and in maintaining their trust and confidence.

[16] Obviously, the assessment of the Minister of Foreign Affairs is entitled to great weight in the present context, for the reasons explained in the judgments in *Mohamed*.[6] Faced with his affidavit, the Inquiry decided that it would not make the proposed order. The result was that the whole IAT executive summary remained classified during the hearings.

[17] On 28 November 2019, Crown Counsel advised that NATO had approved the release of a redacted version of the IAT executive summary to core participants on a confidential basis. Regrettably, the particular hearings for which the redacted executive summary would have been useful had already taken place.[7] What this indicated, however, was that the IAT executive summary could be redacted so as to protect any classified or sensitive material. This suggested that the principal objection to the Inquiry's proposed release arose from the operation of the control principle rather than the need for protection of sensitive information.[8]

[18] In March 2020 NATO gave permission for the Inquiry to make a slightly redacted version of the relevant paragraph from the IAT executive summary

---

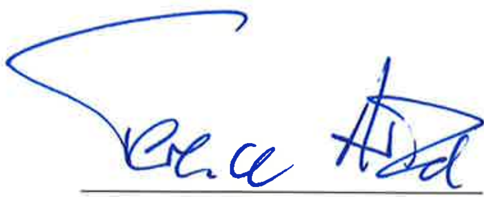
[6] Above fn 2.

[7] Given that the hearings had been completed, the Inquiry did not provide the redacted version to non-Crown core participants but instead sought a broader public release to facilitate the writing of its final report.

[8] As appears to have been the case in *Mohamed*: see Lord Judge LCJ at [53].

publicly available, and that paragraph has been quoted and discussed in the Inquiry's report. This will greatly facilitate public understanding if the report is publicly released. The Inquiry is grateful to NATO for its consent to this.

[19] Given that this Minute refers to matters which are addressed in detail in the Inquiry's final report, and to some extent foreshadows findings in the final report, we direct under s 15(1) of the Inquiries Act 2013 that this Minute be kept confidential and not published on the Inquiry's website until the Inquiry's report is made publicly available or until Friday 21 August 2020, whichever comes first. This order is made to protect the integrity of the Inquiry's processes.



Sir Terence Arnold QC

Sir Geoffrey Palmer QC

Core Participants:
Mr Radich QC for New Zealand Defence Force
Mr Nilsson for Mr Stephenson
Mr Hager
Also:
Messrs Martin and Auld for Crown Agencies