

CITATION: *Inquest into the death of Mohammed Hassan Ayubi, Muzafar Ali Sefarali, Mohammed Amen Zamen, Awar Nadar, Baquer Husani* [2010] NTMC 014

TITLE OF COURT: Coroner's Court

JURISDICTION: Darwin

FILE NO(s): D0061/2009 D0118/2009  
D0062/2009 D0119/2009  
D0063/2009

DELIVERED ON: 17 March 2010

DELIVERED AT: Darwin

HEARING DATE(s): 25 January 2010 to 19 February 2010  
(inclusive)

FINDING OF: Mr Greg Cavanagh

**CATCHWORDS:**

Detention of persons by Australian Defence Force members, violent & unexpected death of asylum seekers, apprehension of illegal entry boat, explosion on boat, rescue of multiple survivors.

**REPRESENTATION:**

*Counsel:*

Assisting:	Stephen Walsh QC
Instructing Solicitor:	Elisabeth Armitage
Commonwealth	Peter Hanks QC
Dept. of Defence:	Richard Niall
Crew and some passengers of SIEV 36:	Ian Reid

Judgment category classification: A  
Judgement ID number: [2010] NTMC 014  
Number of paragraphs: 125  
Number of pages: 45

IN THE CORONERS COURT  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. D0061/2009  
D0062/2009  
D0063/2009  
D0118/2009  
D0119/2009

In the matter of an Inquest into the death of

**MOHAMMED HASSAN AYUBI  
MUZAFAR ALI SEFARALI  
MOHAMMED AMEN ZAMEN  
AWAR NADAR and  
BAQUER HUSANI  
ON 16 APRIL 2009  
AT ASHMORE REEF – TERRITORY OF  
ASHMORE AND CARTIER ISLANDS**

**FINDINGS**

17 March 2010

Mr Greg Cavanagh:

**INTRODUCTION**

1. Mohammed Hassan Ayubi, Muzafar Ali Sefarali, Mohammed Amen Zamen, Awar Nader, and Baquer Husani died on the 16<sup>th</sup> of April 2009 after an explosion on an Indonesian fishing vessel known as Suspected Illegal Entry Vessel (SIEV) 36.
2. The inquest into the deaths was held both pursuant to powers under the *Coroners Act* NT and a Deed of Agreement between Northern Territory of Australia and the Commonwealth of Australia of 19 September 2005 in accordance with s 11A of the *Ashmore and Cartier Islands Acceptance Act* 1933 whereby it was agreed that the Northern Territory would provide coronial services for deaths occurring on or around Ashmore and Cartier Islands.

3. The inquest into these deaths was required pursuant to s.26 of the *Coroners Act* because the deaths occurred whilst the deceased were being held in custody. Australian Defence Forces had detained SIEV 36 in Australian waters adjacent to Ashmore and Cartier Islands pursuant to the *Migration Act* Cth.

4. Pursuant to section 34 of the *Coroners Act*, I am required to make the following findings:

“(1) A coroner investigating –

(a) a death shall, if possible, find –

(i) the identity of the deceased person;

(ii) the time and place of death;

(iii) the cause of death;

(iv) the particulars needed to register the death under the Births, Deaths and Marriages Registration Act;

(v) any relevant circumstances concerning the death.”

5. Section 34(2) of the Act operates to extend my function as follows:

“A Coroner may comment on a matter, including public health or safety or the administration of justice, connected with the death or disaster being investigated.”

6. Additionally, I may make recommendations pursuant to section 35(1), (2) & (3):

“(1) A coroner may report to the Attorney-General on a death or disaster investigated by the coroner.

(2) A coroner may make recommendations to the Attorney-General on a matter, including public health or safety or the administration of justice connected with a death or disaster investigated by the coroner.

(3) A coroner shall report to the Commissioner of Police and Director of Public Prosecutions appointed under the Director of Public Prosecutions Act if the coroner believes that a crime may have been committed in connection with a death or disaster investigated by the coroner.”

7. Thus, apart from formalities with respect to the deceased, I am required in this Inquest to make findings on matters including:
  - The cause of the explosion on SIEV 36;
  - What, if any, action might have prevented the explosion;
  - What, if any, action might have prevented the deaths of the deceased.
8. The inquest was a public inquest and took place in Darwin from Monday the 25<sup>th</sup> of January 2010 until 18<sup>th</sup> of February 2010. Mr Stephen Walsh QC and Ms Elisabeth Armitage were my counsel assisting and I gave leave to Mr Peter Hanks QC, and with him, Mr Richard Niall to appear for the Commonwealth and Mr Ian Reid to appear on behalf of other interested persons, namely two crew of SIEV 36, Beny and Tahir and three passengers, Arman Ali Brahimi, Ghulam Mohammadi and Sabzali Salman.
9. 34 witnesses were called to give evidence during the inquest. In addition to their oral evidence, I received into evidence their recorded statements and reports where provided. I also received statements from numerous other persons and other documents including autopsy reports, hospital records, records of the Australian Defence Forces, reports by the Northern Territory Police who conducted the coronial investigation, which proved to be of considerable assistance to me, and a report of an internal inquiry by the Australian Defence Forces (“ADF”).
10. I wish to commend the rather unglamorous but important work of Superintendent Tony Fuller and his DVI team (ie. “Disaster Victim Identification”). Their detailed and professional efforts resulted in the

identification of the deceased persons in somewhat difficult circumstances to say the least.

11. By way of overview only and having regard to all of the evidence I have concluded that the explosion was caused when a passenger or passengers deliberately ignited petrol which had collected in the bilge area below the deck of SIEV 36. Unleaded petrol in a container housed in a hatch near the bow of the boat had been deliberately spilt into the bilge. The ignition of the petrol resulted in almost instantaneous ignition of petrol vapour emanating from the spill.
12. Prior to this, a group of passengers mistakenly believed they were to be returned to Indonesia. They planned to set fire to SIEV 36 to cripple it and ensure that they could not be returned. Notwithstanding that all passengers now deny knowledge of most of what occurred, I conclude that at least passengers Brahim, Ghulam Mohammadi and Salman were involved in a plan to set fire to the vessel.
13. Next I conclude that the explosion could have been avoided if members of a naval boarding party had properly searched SIEV 36 and secured the unleaded petrol. There is no dispute that there was unleaded petrol in the hatch at that bow of the boat. The hatch had not been searched. The passengers knew of the unleaded petrol. Alternatively, if lighters and matches had been confiscated either when the boarding party went on to SIEV 36 or even later when a replacement steaming party boarded at about 6:15am the following morning, again the explosion may have been avoided. Alternatively, if there had not been a Warning Notice served which suggested return to Indonesia, and if it had been made clear to the Afghani passengers that they were being taken to Australia and not returning to Indonesia, again the explosion probably would not have occurred. The Warning Notice concluded: "You should now consider immediately returning to Indonesia with your passengers and not enter Australian Territory". This notice was interpreted by one of the passengers and communicated to others.

14. As to whether lives could have been saved after the explosion, I have concluded that action taken by navy personnel was appropriate and more passengers might have died but for the action they took. Indeed, later in these findings, I refer specifically to the bravery of three members of the ADF. Those who drowned were most likely thrown into the water by the force of the explosion. Even if life vests had been more accessible, there would have been no time to make use of them. One passenger drowned near Leading Seaman Keogh who was standing on the starboard side of the vessel. He tried to help. He was forbidden without direction from entering the water by Standing Orders. It would have been foolhardy to do so. He may have died as well. As it was he assisted in saving other lives.
15. Whilst there was a priority to save ADF members in the water first, and whilst that in fact occurred, I conclude that no criticism can be made in the circumstances of this case. It was not known whether ADF members in the water were injured or not. Corporal Jager would have drowned but for the efforts to rescue her.
16. The fact that the ADF members were recovered and then assisted in the timely rescue and treatment of passengers probably saved many lives.

### **Formal Findings**

17. Pursuant to s.34 of the *Coroners Act*, I find, as a result of the evidence adduced at the public inquest the following:-

#### Mohammed Hassan Ayubi

- (i) The deceased Mohammed Hassan Ayubi was a person born in Afghanistan and was 45 years of age at the date of his death.
- (ii) The time and place of death of the deceased was shortly after 7:45am on the 16th of April 2009 at a point within three nautical miles of Ashmore Reef in the Territory of Ashmore and Cartier Islands.
- (iii) The cause of death was drowning.

- (iv) Particulars required to register the death are:
- a. The deceased was a male.
  - b. The deceased was Mohammed Hassan Ayubi.
  - c. The deceased was born in Afghanistan.
  - d. The death was reported to the Coroner.
  - e. The cause of death was drowning.
  - f. The forensic pathologist was Dr Terence John Sinton and he viewed the body after death.
  - g. The name of the deceased's mother is not known.
  - h. The name of the deceased's father is not known.
  - i. The deceased was temporarily within the Territory of Ashmore and Cartier Islands.
  - j. The employment of the deceased is unknown.
  - k. The deceased was 45 years of age.

Muzafar Ali Sefarali

- (i) The deceased Muzafar Ali Sefarali was also born in Afghanistan and was aged 45 years at the date of his death.
- (ii) The time and place of death of the deceased was shortly after 7:45am on the 16th of April 2009 at a point within three nautical miles of Ashmore Reef in the Territory of Ashmore and Cartier Islands.
- (iii) The cause of death was drowning.
- (iv) Particulars required to register the death are:
  - a. The deceased was a male.

- b. The deceased was Muzafar Ali Sefarali.
- c. The deceased was born in Afghanistan.
- d. The death was reported to the Coroner.
- e. The cause of death was drowning.
- f. The forensic pathologist was Dr Terence John Sinton and he viewed the body after death.
- g. The name of the deceased's mother is not known.
- h. The name of the deceased's father is not known.
- i. The deceased was temporarily within the Territory of Ashmore and Cartier Islands.
- j. The employment of the deceased is unknown.
- k. The deceased was 45 years of age.

Mohammed Amen Zamen

- (i) The deceased Mohammed Amen Zamen was born in Afghanistan and was aged 38 years at the date of his death.
- (ii) The time and place of death of the deceased was shortly after 7:45am on the 16th of April 2009 at a point within three nautical miles of Ashmore Reef in the Territory of Ashmore and Cartier Islands.
- (iii) The cause of death was drowning.
- (iv) Particulars required to register the death are:
  - a. The deceased was a male.
  - b. The deceased was Mohammed Amen Zamen.
  - c. The deceased was born in Afghanistan.



- d. The death was reported to the Coroner.
- e. The cause of death was drowning.
- f. The forensic pathologist was Dr Terence John Sinton and he viewed the body after death.
- g. The name of the deceased's mother is not known.
- h. The name of the deceased's father is Zamen.
- i. The deceased was temporarily within the Territory of Ashmore and Cartier Islands.
- j. The employment of the deceased was unknown.
- k. The deceased was 38 years of age.

Awar Nader

- (i) The deceased Awar Nader was also born in Afghanistan and was aged 50 years at the date of his death.
- (ii) The time and place of death of the deceased was shortly after 7:45am on the 16th of April 2009 at a point within three nautical miles of Ashmore Reef in the Territory of Ashmore and Cartier Islands.
- (iii) The cause of death is likely to be drowning although it is possible that injuries sustained in the explosion on SIEV 36 contributed.
- (iv) Particulars required to register the death are:
  - a. The deceased was a male.
  - b. The deceased was Awar Nader.
  - c. The deceased was born in Afghanistan.
  - d. The death was reported to the Coroner.

- e. The cause of death was either drowning or injuries sustained on SIEV 36.
- f. The body was not recovered.
- g. The name of the deceased's mother is not known.
- h. The name of the deceased's father is not known.
- i. The deceased was temporarily within the Territory of Ashmore and Cartier Islands.
- j. The employment of the deceased was unknown.
- k. The deceased was 50 years of age.

Baquer Husani

- (i) The deceased Baquer Husani was also born in Afghanistan and was aged 26 years at the date of his death.
- (ii) The time and place of death of the deceased was shortly after 7:45am on the 16th of April 2009 at a point within three nautical miles of Ashmore Reef in the Territory of Ashmore and Cartier Islands.
- (iii) The cause of death is likely to be drowning although it is possible that injuries sustained in the explosion on SIEV 36 contributed.
- (iv) Particulars required to register the death are:
  - a. The deceased was a male.
  - b. The deceased was Baquer Husani.
  - c. The deceased was born in Afghanistan.
  - d. The death was reported to the Coroner.
  - e. The cause of death was either drowning or injuries sustained on SIEV 36.

- f. The body was not recovered.
- g. The name of the deceased's mother is Bakhtawar.
- h. The name of the deceased's father is Ali Hasan.
- i. The deceased was temporarily within the Territory of Ashmore and Cartier Islands.
- j. The employment of the deceased was unknown.
- k. The deceased was 26 years of age.

### **RELEVANT CIRCUMSTANCES SURROUNDING THE DEATH**

18. At the time of their deaths, the deceased were passengers on SIEV 36. A group of 47 asylum seekers and two Indonesian crew departed Indonesia in the middle of the night on either 10<sup>th</sup> or 11<sup>th</sup> of April 2009. Their destination was Australia. On the morning of 15<sup>th</sup> of April 2009, SIEV 36 arrived in the vicinity of Ashmore Island. At that time, the passengers were somewhat dehydrated, exhausted and seasick but none were suffering from any serious illnesses. One of the crew, Beny, had an infected tooth. A passenger, Talash, had previously had an appendectomy. Otherwise, all were healthy and apparently fit notwithstanding their trip.
19. At the same time as these events were unfolding, Border Protection Command Canberra had approved deployment of HMAS Albany and HMAS Childers to the vicinity of Ashmore Island. It was intended that HMAS Tobruk would also deploy to the area to convey any intercepted asylum seekers to Christmas Island. HMAS Tobruk was delayed due to repairs being completed in Darwin. Accordingly, when SIEV 36 was intercepted there was to be up to a 50 hour delay before the passengers and crew could be transferred to HMAS Tobruk, and thereafter transported to Christmas Island.
20. HMAS Albany was crewed by a team of naval personnel known as Assail Two. HMAS Childers was crewed by a team known as Ardent Four. HMAS

Albany and Childers are Armidale Class Patrol Boats. They can carry a crew of 29 persons. HMAS Albany was carrying a crew of 21.

### **The boarding and search**

21. Naval officers on HMAS Albany first sighted SIEV 36 at about 9:49am on 15<sup>th</sup> of April 2009. At that time it was heading towards Ashmore Reef on a collision course as it was the intention of the crew to beach the vessel<sup>1</sup>. A six member boarding party was prepared to transfer to SIEV 36. The boarding party consisted of a Command team, a Security team and an Engineering / Sweep team as follows:

- Command: Boarding Officer Chief Petty Officer McCallum and Seaman Pierce who was McCallum's "*scribe*"<sup>2</sup>;
- Security: Bosun's Mate Hetherington who was second-in-charge and in charge of security and Seaman Bosun's Mate Lordan;
- Engineering / Sweep: Able Seaman Gallant, a marine technician, who was responsible for checking and securing the engineering of SIEV 36 and conducting a search of the vessel, the passengers and their bags. Seaman Saville was to inspect the hull and was to assist in securing the engineering spaces and with the searches.

22. For convenience sake I will refer to these and other ADF witnesses by their surnames.



Photo of SIEV 36 shortly after it was boarded by HMAS Albany

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<sup>1</sup> Beny TR 1046

23. Normally SIEVs are boarded by an eight person boarding crew<sup>3</sup>. The engineering and sweep responsibilities are separated, with two members being allocated to engineering and two members filling a dedicated sweep and search function<sup>4</sup>. However, McCallum said Assail Two “sailed with personnel deficient in the crew” and “we could not put an eight man navy team together for this operation”<sup>5</sup>. Commanding Officer Learoyd conceded that he sailed with “a deficiency in personnel” though not readiness<sup>6</sup>. Learoyd had 21 on board HMAS Albany instead of the preferred staffing of 23. Faunt described such staffing levels as being a “bad day”<sup>7</sup> in the sense that it was not a normal occurrence. Therefore a boarding party of six only was transferred. This meant that the engineering and sweep functions had to be completed by two instead of the usual four persons. Although Standing Orders permitted boarding parties of less than 8 members, the training officer, Lee, said training and policy was based on an eight man minimum for SIEV boardings<sup>8</sup>.
24. Upon boarding, all crew and passengers were mustered onto the front deck forward of the coach-house or cabin on the vessel. Saville and Gallant did a quick check of the engineering area. Both thought that the only fuel on board was diesel and kerosene. They were not aware that a small bilge pump which was relatively new, was powered by unleaded petrol (ULP)<sup>9</sup>.
25. Nor were they aware that there was ULP in two white plastic jerry cans near the bow of the vessel. One jerry can was partially used and contained about

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<sup>2</sup> Pierce TR 477

<sup>3</sup> McCallum TR 332, 337

<sup>4</sup> McCallum TR 332

<sup>5</sup> McCallum TR 337

<sup>6</sup> Learoyd TR 655

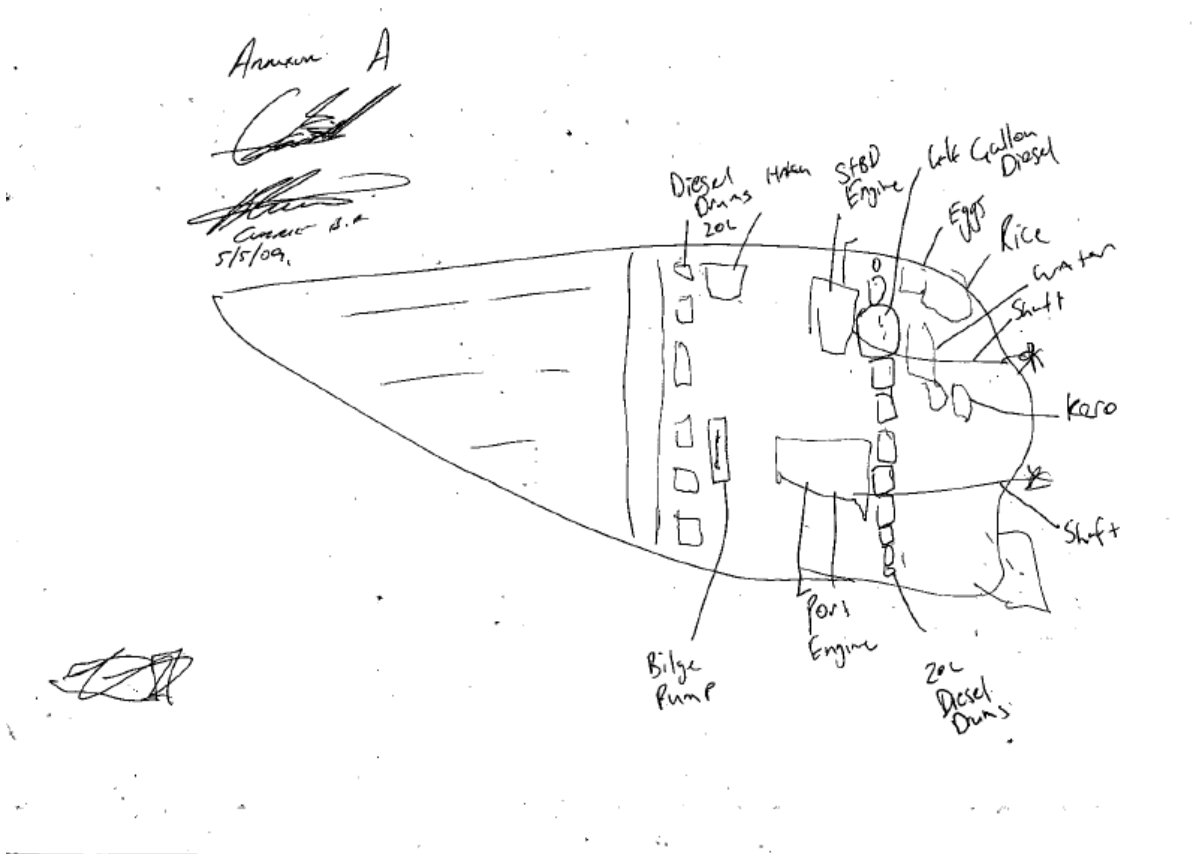
<sup>7</sup> Faunt TR 69

<sup>8</sup> Lee TR 523, 541

<sup>9</sup> Saville TR 454, 463; Gallant TR 421, 427

10 litres of ULP, the other had not been used and contained possibly 20 or 30 litres of ULP<sup>10</sup>.

26. As the hand drawn diagram graphically demonstrates<sup>11</sup>, they did not search the bilge area between the engine room and the bow. They did not search hatch areas near the bow. Neither the diagrams nor their written inventories identify the existence of ULP.



27. They could see into the bilge area forward of the engine room. There were some passenger bags in that area which were subsequently removed and placed above the coach-house. Gallant saw a manhole which would allow crew or passengers to gain access to the engine room from that forward bilge area<sup>12</sup>. He did not see an unlit kerosene lantern in the bilge area but Saville did<sup>13</sup>. Saville did not see the manhole allowing access to the engine room.

<sup>10</sup> Pierce TR 489; Beny TR 1051

<sup>11</sup> Saville, Statutory Declaration 5 May 2009, Annex A

<sup>12</sup> Gallant TR 421

<sup>13</sup> Saville TR 461

There is no doubt that the forward bilge area and hatches, should have been searched. Learoyd<sup>14</sup>, and Lee<sup>15</sup> said so and common sense dictated it. There was plenty of time to do so on the first day of the holding pattern. Therefore lack of boarding party numbers was not the sole reason for this obvious failure.

28. Unbeknown to either Gallant or Saville, but observed by McCallum, one of the crew obtained one of the jerry cans of unleaded petrol from the bow area in order to refuel the bilge pump<sup>16</sup>. Thus McCallum knew that there was unsecured unleaded petrol on board; as did Pierce who observed the refuelling of the pump<sup>17</sup>. In spite of this knowledge, McCallum did not order a search of the forward hold to ensure all the ULP was located and secured. Accordingly, the existence of a second jerry can of unleaded petrol was not apparently ascertained by the ADF. A search of the forward bilge area was simply not ordered<sup>18</sup> in circumstances where it should have been. Whatever else can be said, the search of SIEV 36 was clearly deficient.
29. I mention in passing that Pierce, who was otherwise a reliable witness, was mistaken when he said that there were a number of containers on deck immediately in front of the cabin<sup>19</sup>.

### **Securing unleaded petrol**

30. Clearly the unleaded petrol should have been located, identified and secured with other fuel in the engine area or secured elsewhere. Faunt who was in a relief steaming party sent to SIEV 36 shortly prior to the explosion, reasonable assumed that all fuel would have been secured<sup>20</sup>. Clearly it was

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<sup>14</sup> Learoyd TR 663, 664, 667, 668

<sup>15</sup> Lee TR 532

<sup>16</sup> McCallum TR 344

<sup>17</sup> Pierce TR 487, 491

<sup>18</sup> Saville TR 461

<sup>19</sup> Pierce TR 487

<sup>20</sup> Faunt TR 79, 110

not. Learoyd<sup>21</sup> and Lee<sup>22</sup> both agreed that the unleaded petrol should have been found and secured.

31. Many passengers who were asked, knew that there was unleaded petrol on board stored in the bow of the vessel<sup>23</sup> and some knew that it was more volatile than diesel fuel<sup>24</sup>.
32. I can therefore conclude that the unleaded petrol should have been secured in the engine area, or if it was too hot, in some other secured area, or removed from SIEV 36 altogether. Beny said:

“I was afraid to put this container near the engine because the engine has been running....and it’s hot..”<sup>25</sup>.

### **Lighters**

33. After the engineering spaces had been secured, all passengers were searched. The normal practice was to remove passports, mobile phones and any sharp implements. Some thought that cigarette lighters and matches should be removed<sup>26</sup>. Others thought not. The crew and passengers were compliant and therefore they should not be stopped from smoking cigarettes<sup>27</sup>. Learoyd said lighters and matches would normally be put under some sort of control<sup>28</sup>. Westcott conceded the simple solution was to allow passengers to smoke but with the ADF having control of lighters<sup>29</sup>.

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<sup>21</sup> Learoyd TR 663

<sup>22</sup> Lee TR 532, 533

<sup>23</sup> See for example Brahim, Statutory Declaration 23 April 2009 p15-17

<sup>24</sup> See for example Brahim TR 963

<sup>25</sup> Beny Statutory Declaration dated 7 June 2009 p28

<sup>26</sup> Westcott TR 620; Faunt TR 79

<sup>27</sup> Lee TR 526, 546; Saville TR 459

<sup>28</sup> Learoyd TR 657, 658

<sup>29</sup> Westcott TR 620



34. Bendeich clearly recognised the danger of unsecured lighters and raised his concern, albeit perhaps obliquely, with other members of the steaming party. When he boarded at midnight he said he saw:

“what I thought was a glow, like someone had started a lighter, because I remember talking to the naval personnel who were on board the boat and I asked them....were they searched....It wasn't clear whether they had been searched. But I had the impression they'd gone through the motions of searching them”<sup>30</sup>.

35. In his evidence to me he went on to say:

“I did think through the consequences. I was looking and trying to get aware of my surroundings and ....with my past employment history with working as a correctional officer, it was something of a habit that when you are dealing with people who are in custody that you take away all means that they can either harm people or they can cause problems”<sup>31</sup>.

36. Counsel for the Commonwealth sought to qualify the evidence of Corporal Bendeich concerning the dangers associated with the passengers and crew having access to lighters. Those qualifications do not affect the commonsense and value of Bendeich's evidence on this question. As events unfolded, Bendeich's apprehensions about passenger access to lighters were well founded. Maintaining compliance is one thing, it is another thing altogether to permit uncontrolled access to lighters on a small wooden boat especially when ULP is also on board.

37. Obviously, it may be difficult to ensure removal of all possible ignition sources and Saville likened some SIEVs to a “Bic lighter factory”<sup>32</sup>. The danger posed by ignition sources is reduced if all fuel stocks are secured. However, given the possibility that fuel could be deliberately secreted, and that other inflammables could be used to start a fire such as refuse, I conclude that matches and lighters should have been confiscated.

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<sup>30</sup> Bendeich TR 252, 271

<sup>31</sup> Bendeich TR 253

<sup>32</sup> Saville TR 460

## **The interpreter and passenger rapport**

38. It was important at an early stage of the boarding of SIEV 36 to establish rapport with an interpreter to assist with communication with passengers. A person who could assist with interpreting came forward, Homayoun Mohammad (aka Saba), and he became known as “H”<sup>33</sup>. It is not certain precisely what Homayoun was told about the destiny of the passengers and crew. They may have been told that they were to be taken to Christmas Island which was the intention or to Australia. They may have been told that a larger ship was going to come later to collect them and that the navy were waiting for instructions<sup>34</sup>. It is likely that they were not told that they were going to remain in Australia notwithstanding that McCallum said this in answers to Counsel for the Commonwealth<sup>35</sup>. The suggestion that this information was passed by McCallum to the passengers is not recorded elsewhere in any documentation and was heard for the first time in this Inquest<sup>36</sup>. Homayoun does not recall passing on any such information<sup>37</sup>. I do however note in fairness to the ADF that whatever attempts the ADF may have made to communicate with the passengers, may have failed simply because they had no way of assessing the understanding, quality or accuracy of the interpretation provided by Homayoun. It is also clear, that whatever they were told on the 15<sup>th</sup> April 2009, the passengers and crew remained compliant.
39. However, the issue as to what had been communicated and who could deliver the message became important the following morning when Faunt was confronted with non-compliant passengers who thought they were going to be taken back to Indonesia.

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<sup>33</sup> Homayoun TR 938

<sup>34</sup> Learoyd, Statutory Declaration 24 July 2009 p14

<sup>35</sup> McCallum TR 387

<sup>36</sup> See for example McCallum Statutory Declaration dated 17 April 2009 p39; Learoyd Statutory Declarations dated 18 April 2009 p6 and 24 July 2009 p222-234 and all documentation provided by Learoyd including HMAS Albany Signals, Ships Log and Ships Narrative

<sup>37</sup> Homayoun TR 955, 956

## Warning Notice

40. Upon boarding the vessel it was important to identify the Master of the vessel. There were two crew. Neither spoke much if any English, however Tahir was treated as the Master because he had a better understanding of directions from the Boarding Party members. In accordance with practice he was given two notices. One a Detention Notice under the *Migration Act*, and the other a Warning Notice which included the words –

“The Government of Australia is determined to stop illegal migration to its Territory.”

and

“You should now consider immediately returning to Indonesia with your passengers and not enter Australian Territory”.

41. McCallum said both notices were given to the Master notwithstanding that a photograph was taken of him holding the Detention Notice only<sup>38</sup>. The SIEV Report, Albany Ship’s Log and Signals all record that the Warning Notice was issued<sup>39</sup>. Policy manuals referred to both notices<sup>40</sup>.

B. GIVEN TO CREW AND ASIA MODJESA 4/09  
WHETHER NOTICE REGARDING INCREASED PEOPLE SMUGGLING PENALTIES HAS BEEN READ/ISSUED TO MASTER/CREW (IF YES, INCLUDE DETAILS OF TO WHOM AND NAME OF AUTHORISED OFFICER ISSUING NOTICE)

Extract EX 4, SIEV Report completed by McCallum referring to the Warning Notice

42. However, both Learoyd<sup>41</sup> and Lee<sup>42</sup> said that only the Detention Notice should have been given to the Master. The Warning Notice was incorrectly issued because SIEV 36 was already in Australian Territorial waters. Further, it suggested that the vessel should return to Indonesia, which was

<sup>38</sup> McCallum TR 339, 341

<sup>39</sup> Signal 151058Z 17/4/09 MSGID/SIEVREP/001/ApPR//; Ships Log 15 April 09 Time 10:42; SIEV Report EX 4

<sup>40</sup> Boarding Officers Handy Billy; Annex D to COMD JOPC OPOD 03/06 para 27; SIEV Report EX 4

<sup>41</sup> Learoyd TR 660

<sup>42</sup> Lee TR 458

inconsistent with both the fact of their detention under the *Migration Act* and the decision to take the passengers and crew to Christmas Island.

43. The interpretation of the Warning Notice and its communication to the passengers played a significant part in causing the passengers to incorrectly think that they were being returned to Indonesia. It was the catalyst for the unrest. Very shortly after the Warning Notice was read, the vessel's engine was sabotaged and subsequently petrol was spilt into the bilge and ignited.
44. I conclude that the Warning Notice was incorrectly issued and its interpretation to the passengers<sup>43</sup> contributed significantly to their fears that they were to be returned to Indonesia. It was apparently these fears that sparked a plan to burn the vessel to prevent its return to Indonesia. A fire would also necessitate rescue of the passengers by the ADF and their transfer to an Australian vessel. Importantly, I note that Standing Orders have changed and the Warning Notice is no longer to be issued<sup>44</sup>.

#### **Life vests (or PFDs - personal flotation devices)**

45. Although ultimately sufficient life-vests were transferred to SIEV 36 for all passengers and crew, in total 49, these were secured in the top of the coach-house in a tied doona bag. The passengers were not shown how to use the life vests. New procedures now require that a demonstration be given as to their use<sup>45</sup>. They do not require immediate issue of the vests and there are sound reasons for this, however the vests are now to be more readily available<sup>46</sup>.

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<sup>43</sup> Salman TR 864, 865, 876

<sup>44</sup> Part EX 33, Appendix 5 to Annex C to CHQJTF OPORD 01/10 Jan 10 para 19.

<sup>45</sup> Westcott TR 627

<sup>46</sup> EX 32 Captain Rixon Affidavit dated 26 January 2010 p22

## **Conclusion on boarding 15 April 2009**

46. In conclusion therefore, in my view the boarding and management of SIEV 36 on 15 April 2009 was deficient in the following respects:

- The Boarding Party comprised 6 persons rather than the preferred minimum of 8 persons. This may have contributed to the inadequate search of passengers and the vessel;
- The forward bilge area and hatches were not searched;
- The fact that the bilge pump was fuelled by unleaded petrol was not ascertained. Had it been, the source of the ULP may have been discovered;
- Unleaded petrol was not secured even though Standing Orders required inflammable liquids to be secured<sup>47</sup>;
- A kerosene lantern in the forward bilge area was not secured;
- The passengers were not informed in a clear way that they were not going to be returned to Indonesia;
- Lighters and matches were not confiscated;
- An inappropriate Warning Notice was served on the Master which became available to the passengers.

## **The handover from HMAS Albany to HMAS Childers**

47. After the boarding of SIEV 36, it remained under the control of the Commanding Officer of HMAS Albany throughout the day. It is clear throughout that time that all passengers and crew were treated well by the ADF. Medical attention was provided where required. Overnight, there were relief steaming parties. At about midnight, two Transit Security Element (TSE) personnel (who had previously transferred from HMAS

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<sup>47</sup> ABR 1920 Annex A to Chapter 6 para 7; ACPBSO Version 1.3 (Interim) para 6.60

Childers to HMAS Albany to boost numbers), comprised part of the steaming party. They were Corporal Jager and Corporal Bendeich. They remained on the vessel until the explosion. Little of any consequence occurred overnight.

48. It had been agreed between Commanding Officer Westcott of HMAS Childers and Commanding Officer Learoyd of HMAS Albany that HMAS Childers was to return from patrol duties the following morning to relieve HMAS Albany from steaming party duties. There was a misunderstanding as to the exact time. Westcott<sup>48</sup> thought it was 6:00am. Learoyd thought it was 6:30am<sup>49</sup>. HMAS Childers did return at about 6:00am. A steaming party was then sent to SIEV 36 from HMAS Childers. That party consisted of Chief Petty Officer Faunt, Petty Officer Dawe and Petty Officer Karmiste. They boarded at about 6:15am.
49. At that time it was still dark and most of the passengers were sleeping. Darkness no doubt made it more difficult for the new steaming party to fully appreciate the layout and configuration of SIEV 36. It made it more difficult to see into the engineering spaces, torches had to be used and sleeping passengers woken and moved. It may have contributed to the difficulty Faunt had in positively identifying “H” and the crew members. Darkness may have suggested an element of stealth to the passengers and contributed to their fears. Westcott<sup>50</sup> frankly acknowledged:

“If there was one thing I could possibly change about that day, it may be the handover time...when I arrived on the bridge before 6 in the morning and discovered total darkness (I) had a conversation with myself and my Executive Officer about why are we doing this now, we could delay....With hindsight I believe handovers of this nature would benefit from doing it in daylight, with people awake, aware of what’s going on”.

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<sup>48</sup> Westcott TR 618

<sup>49</sup> Learoyd TR 676

<sup>50</sup> Westcott TR 639

50. During the handover McCallum, the HMAS Albany Boarding Officer, was not on board the SIEV. He was then on HMAS Albany resting. He was not apparently woken for the handover and the confusion as to the time of the handover may have contributed to this oversight. He did however speak to Faunt by radio. This was an inadequate response and once he was woken, McCallum should have returned to the vessel for the handover. McCallum agreed in evidence that his failure to be at the handover was one of the things that he was most embarrassed about<sup>51</sup>.
51. There were a number of failings at the handover from HMAS Albany to HMAS Childers. The fact that McCallum was not present may have contributed to the lack of information that apparently was passed. There had also apparently not been a focus in training or in written policy on the type of information that should be provided during a handover. That lack of focus may also have contributed to the difficulties experienced by Faunt. Whatever the reason or combination of reasons, the handover was inadequate:
- Faunt was not told at the handover that there was unleaded petrol onboard the vessel<sup>52</sup>. Westcott said that he should have been told that<sup>53</sup>. It was a vital piece of information that should have been communicated. It is likely that only McCallum held the relevant knowledge.
  - Faunt also assumed that lighters and matches had been confiscated but clearly that had not occurred<sup>54</sup>. Westcott said that if he had been the Boarding Officer he would have made the same assumption<sup>55</sup>. Faunt should have been told the passengers and crew had retained their lighters and matches and the reason for the decision.

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<sup>51</sup> McCallum TR 374; see also Lee TR 545

<sup>52</sup> Faunt TR 79

<sup>53</sup> Westcott TR 623

<sup>54</sup> Faunt TR 79

<sup>55</sup> Westcott TR 620, 621

- Faunt was entitled, as a relief steaming party, to rely on the search conducted by McCallum<sup>56</sup> however, he was not informed that the whole vessel had not been searched. Westcott expected that whole vessel had been searched<sup>57</sup> as indeed did Learoyd<sup>58</sup>. Faunt was entitled to assume that it had been.
- Faunt was apparently introduced to the interpreter, but he thought that “H” was the Master of the vessel<sup>59</sup>. The failure to properly identify to Faunt significant persons on board SIEV 36, such as the interpreter and the crew, was yet another failing in the handover process.
- Given that there was to be a holding pattern, and given the fact that the new steaming party came at night, it was important that rapport was re-established with the passengers and that they understood that their circumstances had not changed. That did not occur but would have been “eminently sensible”<sup>60</sup>.

52. Although Faunt said that lighters and matches should have been confiscated, he did not decide to do that himself when the relief steaming party boarded at about 6:15am. Had he done so, there was sufficient time to remove lighters and give the passengers reassurance as to the reason why. However, this is probably an observation tainted by hindsight. Removal of lighters may have been another “change in circumstances” that could have contributed to passenger fears.

53. At about 7:02am on the 16<sup>th</sup> of April 2009, the tow from HMAS Albany was slipped. The Indonesian crew were woken up, the bilge was pumped and the crew were then directed to start one engine of the vessel to allow SIEV 36 to

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<sup>56</sup> Learoyd Statutory Declaration 18 April 2009 p46

<sup>57</sup> Westcott TR 624

<sup>58</sup> Learoyd TR 663, 667

<sup>59</sup> Faunt TR 81, 82

<sup>60</sup> Westcott TR 621



travel at about four knots to get some air across the bow to keep the passengers cool<sup>61</sup>.

### **Warning Notice interpreted**

54. At some time between 7:02am and 7:20am, I find that the Warning Notice was interpreted to the passengers. In particular I rely on the evidence of Rezvani contained in his statutory declaration. He said:

“two letters were handed over to Aman or Homayoun....the interpreter went through the letter, read it for us and say to us “In this letter they have advised us that the Australian Government will not accept you and you should return back to the place where you have come by this boat”<sup>62</sup>.

55. I also rely on the evidence of Ahmadi contained in his statutory declaration when he said:

“maybe other people were unhappy, possibly is because of the paper that was handed to the captain that we are return, that we have to go back...But I saw this paper in the hands of Humayoun...the same person who was doing the translating...”<sup>63</sup>

56. In spite of his denials<sup>64</sup> it is likely that the Warning Notice was interpreted by Homayoun and not some other passenger. The Warning Notice was either mistakenly handed to him as “the Master”<sup>65</sup> or was left on the shelf in front of the steering wheel of the vessel<sup>66</sup>. Homayoun told passengers effectively what was said at the end of the notice namely:

“You should now consider immediately returning to Indonesia with your passengers and not enter Australian Territory”.

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<sup>61</sup> Faunt TR 80

<sup>62</sup> Rezvani Statutory Declaration dated 1 May 2009 p40 – 41;

<sup>63</sup> Ahmadi Statutory Declaration 22 May 2009 p23 – 25, 62; see also Salman Statutory Declaration 29 April 2009 p87 – 88

<sup>64</sup> Homayoun TR 947

<sup>65</sup> Jager TR 154; Faunt TR 85, 86; Bendeich TR 255 (“H” can be seen wearing a green scarf in the Albany video footage from 15 April 2009).

<sup>66</sup> Tahir TR 1033

57. The passengers on hearing this, and possibly because they were following a new patrol boat with a new steaming party and nothing having been said to reassure them, became restless. They feared that they were to be returned to Indonesia<sup>67</sup>. They became noisy and agitated and, as observed by Westcott, ultimately control of them and the vessel was lost<sup>68</sup>.
58. By 7:20am, the passengers were saying “No Indonesia, no Indonesia”<sup>69</sup>. They were crowding towards the cabin area and were making cut throat gestures. It was clear that they mistakenly believed they were being sent back to Indonesia.

### **Sabotage**

59. At 7:22am the starboard engine seized and the vessel stopped. Dawe went down to inspect the engine. He saw the crew member with long hair, Tahir, standing next to the engine with a rag in one hand and the filler cap in the other hand. He was wiping away what was likely to be salt off the top of the engine<sup>70</sup>. Both Tahir and Beny deny any knowledge of the sabotage of the engine<sup>71</sup>. However both were in the cabin of the vessel and salt was kept in a cooking area near where Beny was sitting<sup>72</sup>. It seems highly unlikely that anyone else would have accessed the engine area, lifted planks and then sabotaged the engine without them knowing. None of the passengers or indeed ADF saw anyone other than Beny or Tahir in the engine spaces. And yet they assert lack of knowledge of the sabotage. Whilst in general Beny and Tahir’s evidence appeared straight forward and acceptable, they were not telling the truth about their knowledge of the sabotage to the engine.

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<sup>67</sup> Salman TR 867, 865, 876

<sup>68</sup> Westcott Statutory Declaration dated 17 April 2009 p26

<sup>69</sup> Jager TR 163; Karmiste TR 237

<sup>70</sup> Dawe TR 207, 208, 210

<sup>71</sup> Tahir TR 1035; Beny TR 1056

<sup>72</sup> Beny TR 1056

60. Ultimately I am left to conclude that either Beny or Tahir sabotaged the engine.
61. Dawe reported the sabotage to Faunt who was standing on the top of the cabin.

### **Childers EOD (electronic optical device) footage**

62. The agitation of the passengers continued. They refused to obey directions to move away from the front of the cabin. This refusal was deliberate and in marked contrast to their compliant behaviour the previous day. It is apparent on the Childers video footage.
63. A video recording of the events from this time onwards clearly depicts what happened. The camera was on HMAS Childers and had been activated within minutes of Faunt calling high threat<sup>73</sup>. That video shows that about 12 minutes before the explosion, namely about 7:33am, the passenger Brahim was squatting at the bow of the boat immediately in front of the hatch where the unleaded petrol was stored. There was still one container of petrol in that hatch. The other had been taken by one of the crew members to the cabin and it remained somewhere in the cabin or in the engine compartment thereafter. That container was recovered and Beny said a photo of it attached to his statutory declaration was **the** container, when he gave his oral evidence<sup>74</sup>.
64. As observed however, the second container remained in the hatch near the bow<sup>75</sup>. At that time Brahim (a non-smoker) had a lighter in his hand and he was flicking the lighter<sup>76</sup>. He must have been aware that petrol had been spilt because at about that time Faunt said there was a strong smell of petrol

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<sup>73</sup> Burnett TR 289

<sup>74</sup> Beny TR 1060

<sup>75</sup> Beny TR 1051

<sup>76</sup> Faunt TR 87

to the extent that the fumes caused his eyes to sting<sup>77</sup> and ULP could be smelt 60 metres away by Westcott on HMAS Childers<sup>78</sup>. Some passengers could also smell petrol even though most denied this when called to give evidence<sup>79</sup>.

### **Afghani witnesses**

65. Faunt saw Brahimi at the bow of the boat and directed two of the steaming party to take the lighter away. Before Dawe and Bendeich moved, the passenger Salman who was standing with the group in front of the cabin, made a sharp pointing gesture with his right arm and hand. In response to this gesture, which appeared to be accompanied by words being said, another passenger can clearly be seen on the video moving toward Brahimi and speaking to him. Shortly after that, Dawe and Bendeich tackled Brahimi who was resisting handing over the lighter. Salman denies his involvement. In his evidence before me he said, incredulously in my opinion:

“Yeah I moved my hand...But I’m a human being, you move your hand you know...I was not giving any directions to anyone, not speaking to anyone”, and “I had no knowledge of the man with the lighter”<sup>80</sup>. I do not accept those denials.

66. In the same vein, Brahimi denies that a person spoke to him or that he was resisting handing over the lighter<sup>81</sup>. The evidence of Brahimi is startling. In his statements to the police, he said that he knew that there was more than one container of unleaded petrol. He knew where the petrol was stored. He knew that petrol could be dangerous. He knew that passengers had become agitated<sup>82</sup>. In his oral evidence, he feigned little knowledge that anything

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<sup>77</sup> Faunt TR 89

<sup>78</sup> Westcott TR 629

<sup>79</sup> See for example Hajiyen TR 842; “R” TR 764

<sup>80</sup> Salman TR 868

<sup>81</sup> Brahimi TR 976

<sup>82</sup> Salman Statutory Declaration dated 12 June 2009 p5-11, 13 ; Statutory Declaration dated 23 April 2009 p15, 16, 61, 78

was happening. He lied about not resisting attempts to take the lighter from him. Rather he said:

“But I was happy because I needed to urinate. And I was concentrating on myself and I was happy that the attention was away”<sup>83</sup>.

67. He said someone had indicated to him that there was an empty bottle which he could use to urinate. He denied that the hatch was open. He said he noticed a lighter on the ground and he picked it up and tested it to see if it worked. He thought the navy man (Faunt) wanted the lighter so he raised his hand and said “I’ve got a lighter”. At one time he suggested he was offering it to light Chief Faunt a cigarette<sup>84</sup>. Notwithstanding that, he says he knew that the lighter did not work. These assertions might be laughable were it not for the seriousness of what occurred.
68. He denied that Salman was gesturing towards him and he denied that the other passenger spoke to him. He denied seeing the activities of G. Mohammadi. He denies any knowledge of how the fire started.



Childers EOD screen capture showing passenger speaking to Brahimi

69. Having regard to the video evidence, and what he had said previously in his written statements, I must conclude that his denials are not to be believed. He has lied.

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<sup>83</sup> Brahimi TR 974



Childers EOD footage screen capture of Dawe and Bendeich wrestling lighter off Brahimi

70. When asked if Brahimi was resisting, Dawe told me “Absolutely”<sup>85</sup>. Bendeich who took the lighter from Brahimi said he had to prise the lighter from his hand<sup>86</sup>. Brahimi not only resisted but can be seen trying to throw the lighter to other passengers.
71. Brahimi also denied that the floorboards over the hatch where the petrol was stored were open at that time<sup>87</sup>. Bendeich however said they were open. He replaced them after he had taken the lighter. The video shows them to be open. Again Brahimi has not told me the truth. I accept the following evidence of Bendeich<sup>88</sup>:

“Did you hear him (Faunt) say something about lighters?---Yes. He said, “Put the lighter away”. He was saying, “Put the lighter away”.

Did you respond to that?---Yes. We were told by the board-O, myself and Petty Officer Dawe, to proceed to the front of the boat because there was a man up there who had a lighter and we were to take that lighter off him.

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<sup>84</sup> Brahimi TR 976

<sup>85</sup> Dawe TR 214

<sup>86</sup> Bendeich TR 261

<sup>87</sup> Brahimi TR 984

<sup>88</sup> Bendeich TR 261, 262, 263

And what did you do?---Myself and Petty Officer Dawe proceeded up to the front of the boat. There were – due to the fact that there was quite a few people in the deck area we did have to sort of side saddle motion along the hull, solid hull area. Once we got up to this – this gentleman it seemed as if the others had sort of left a big space around him. I heard Petty Officer Dawe ask him, requesting him to hand the lighter over and this gentleman didn't respond and so Petty Officer Dawe went to get the lighter out of his hand and then he attempted to switch the lighter in his hands and also attempted to try and throw the lighter or what we've assumed he was trying to throw the lighter or pass the lighter away to the other – other people on board. Petty Officer Dawe had to grab his arm to try and get it before he switched the lighter over and because the person was sitting down, Petty Officer Dawe was leaning over the actual – the person at the front starting pulling away. Petty Officer Dawe fell towards him and that was when I grabbed the person's other arm and I actually took the lighter out of his hands. **I had to prise it out of his fingers.**”

“Now, when you had completed that process of taking the lighter, did you see a hatch area or something just in front of where that person is depicted at the bow?---Yes, I did.

Tell his Honour what you saw?---I saw a – a place where the deck boards were actually removed. I noticed that they were numbered, because I remember making a remark to Petty Officer Dawe to that effect, that they were numbered, and it was like as if it was like etched into the actual boards themselves. I noticed that there was a lot of what appeared to be plastic bags, water bottles, paper scrunched up in that area there.

And did you do anything about the planks?---Yes, I put the planks back across.

And why did you do that?---I did that because we had to remain up there in that area and where we were standing was roughly where our feet would have been on those planks and that I also did it to ensure that, just in case the gentleman had anything else on him, that he couldn't get access to that area.

Thank you. Did you at any time, whilst you were on that boat and more particularly at the time you were looking at that hatch, see a 20 or 30 litre white plastic jerry can with the fluid in it?---I don't think it was white. Pretty sure it would be – pretty sure it was. There was a container there. It had something in it, but it wasn't really white. It was more like a light bluish colour to me, to me.

Was it as big as 20 or 30 litres?---I honestly can't recall, no.”

72. I cannot be certain as to what Brahimmi was attempting to do with the lighter. He did not smoke<sup>89</sup>. The question is why did he have the lighter in his hand? Why was he flicking the lighter? It might have been a threat or it may have been that he intended to light a fire at the forward hatch area. He was in a very good position to gain access to the unleaded petrol, spill the petrol and then start a fire. In all events if he had intended to do so, he was stopped by the intervention of Dawe and Bendeich.
73. Other passengers were asked about this “lighter” incident. Most if not all of those who were a on the front deck would have been in a position to see this incident. However, all the witnesses called denied knowledge of it<sup>90</sup>. In so far as those depicted on the video were in a position to see and were in fact looking in the direction of the incident, I do not accept their denials of knowledge. They are lying.
74. Not all the passengers were called to give oral evidence in the Inquest. However all provided statutory declarations and these were tendered as part of Exhibits 1 and 2 in the hearing. Many of those who were not called also lied. For example, a passenger “J” (a person under 18 years of age) can be clearly seen on the video sitting portside near the mast, he is wearing a yellow scarf. In his statutory declaration he said that he placed a wet towel on his head and covered his face with the towel for between 5 – 20 minutes before the explosion<sup>91</sup>. The video clearly shows that he is not telling the truth. Another passenger, Karimi, can be seen sitting near the mast on the starboard side of the vessel wearing a white shirt. When asked in his statutory declaration what happened after breakfast and before the explosion he said “I don’t remember”<sup>92</sup>. Passenger Nazari can be seen on the video sitting near the mast, on the starboard side, wearing a red t-shirt with dark

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<sup>89</sup> Brahimmi TR 977

<sup>90</sup> See for example, Salman TR 875; Hajiyen TR 844; Rezvani TR 826; G. Mohammadi 1015; Homayoun TR 950; Rezai TR 931; Ahmadi TR 912

<sup>91</sup> “J” Statutory Declaration dated 7 May 2009 p45, 46

<sup>92</sup> Karimi Statutory Declaration dated 22 may 2009 p45



sleeves. In his statutory declaration his account of the events leading up to the explosion is simply as follows<sup>93</sup>:

Q: What happened then?

A: Went and sat in the front of the boat. Approximately I sat for a minute from there and there and all of a sudden I heard the explosion. I was in the middle of the flame myself. That's what happened. That's all the story about myself."



Childers EOD screen capture approximately 10 minutes before the explosion

Passenger circled is Nazari, to his right is Karimi, and portside left of mast is "J"

75. Insofar as each of these witnesses denies knowledge of events taking place on the front deck in the lead up to the explosion, I can only conclude that they have not told the truth.
76. Mohammad Anwar Mohammadi denied any knowledge of the pouring or the smell of petrol even though he was nominated by passenger "R" (a child whose name has been suppressed) as the person who said on the morning of the explosion "They had spilled petrol to burn the ship"<sup>94</sup>. In fact Anwar Mohammadi denied knowledge of any unrest at all and claimed "everyone was happy"<sup>95</sup> though he can be clearly seen on the video, portside of the

<sup>93</sup> Nazari Statutory Declaration dated 12 June 2009 p6

<sup>94</sup> Anwar Mohammadi TR 809, 810

<sup>95</sup> Anwar Mohammadi TR 801

cabin and close to the group who were resisting the directions of the ADF to move forward. He has not told the truth.

77. Ibrahim Rezvani who was wearing Afghani clothes on the morning of the explosion, denied being the person in Afghani dress who “R” said had screamed “I want to burn the ship...I will burn this ship”<sup>96</sup> . He also denied hearing passengers screaming and any of the events that had thus far occurred. He said “where I was sitting it was really normal”<sup>97</sup>. Again he has not told me the truth.
78. It is quite apparent when one compares the evidence of the Afghani witnesses to that which is depicted on the video, none of them are telling the truth. All of them are denying knowledge of events about which they must have some knowledge. Because they have all told similar lies I can only conclude that they have all to some extent colluded with each other and decided as a group to lie to this Inquest.
79. After Chief Faunt had called high threat at 7.29am, he considered that he was on a “floating bomb”<sup>98</sup>. He called for reinforcements and four officers were sent over from HMAS Childers. They arrived within minutes of the explosion. Just before their arrival, the video clearly shows Ghulam Mohammadi shuffling along the deck in front of the cabin on his buttocks. At that time he was wearing a white singlet. Because of his denials it is difficult to know precisely what he was intending. As G. Mohammadi did this, other passengers can be seen in the video closing in around him blocking him from view of arriving reinforcements. Chief Faunt then heard “Mr White Singlet” (G. Mohammadi) screaming at the interpreter “H”. Chief Faunt said<sup>99</sup>:

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<sup>96</sup> Rezvani TR 827

<sup>97</sup> Rezvani TR 826

<sup>98</sup> Faunt TR 89

<sup>99</sup> Faunt TR 99, 100

“When he started arguing with H, he had his fingers around the hatch and he was jumping up there and pushing that hatch forward to make an opening”.

“Mr White Singlet just kept screaming at him and then jumping up and pushing that deck plate in a forward position... and made a gap”.

80. Ghulam Mohammadi also lied to me. He denied any knowledge of the events depicted on the video. He denied shouting or kicking up deck plates or threatening to burn the boat. I accept the evidence of Chief Faunt.
81. There is no doubt that the commotion created by G. Mohammadi and possibly also because the reinforcements were about to board, Dawe and Bendeich moved away from the bow of the boat and towards the cabin.
82. That left Brahimy alone at the bow of the boat. Near the mast was another small group of passengers. Apart from a few people sitting on the sides, there was then a gap, until the main group of passengers crowded in front of the cabin.
83. The video shows that after the two navy officers moved towards the cabin, passengers sitting along the sides of the front deck turned to look in the direction of Brahimy and the group near the mast. It is not known what they were looking at but it may well have been the action of a person starting a fire. Moments later, the explosion occurred. The fire came from the front half of the front deck and shortly after the explosion a fire can be seen burning in that area.



Childers EOD screen capture moments before the explosion showing passengers looking towards the bow.

## **The explosion**

84. There is little dispute about the actual explosion itself and the events immediately prior to it from those at the bar table. I heard evidence and received a report<sup>100</sup> from an explosion and fire expert, John Kelleher. I accept his report and opinions that:

- The explosion which occurred on board SIEV 36 was a fuel-vapour air explosion,
- The mixture involved was a petrol vapour air mixture. Neither diesel nor kerosene being sufficiently volatile to have caused the explosion,
- The relatively rapid development of the petrol odour is not consistent with a leak (of petrol),
- The spill of petrol can be calculated to have involved most of the petrol on the vessel,
- A substantial proportion if not all of the petrol in the container in the forward hold was vaporised prior to the explosion,
- An explosive vapour-air mixture is not something that can be overlooked, ie. the smell would have been, and was, obvious.
- The point of ignition was in the forward hold, forward of the middle of the vessel and probably below deck level, and
- The petrol air- mixture was ignited by a person (or persons) using a lighter or match.

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<sup>100</sup> Kelleher Report dated 8 September 2009, contained in EX 1 and EX 2.

- I agree with Kelleher when he concluded that “Alternative explanations require complex combinations of unlikely incidents, and are improbable”<sup>101</sup>.



Childers EOD footage screen capture showing fire moving from bow to cabin

85. It is accepted that there was petrol in the forward hatch. Video shows the force of the explosion moving from the bow area back towards the cabin. Accordingly, it is most likely that the ignition point was in the vicinity of Brahim and the smaller group of persons close to him. It is likely that when persons seen on the video turned to look in the direction of Brahim, someone was in the process of trying to start a fire.
86. I accept that whoever started the fire did not expect that an explosion would occur. What was intended was that a fire be started so that the boat would be crippled and they would be taken off the vessel and taken to Australia.
87. Ironically, that person may not have realised that the engine had been sabotaged which would have had the same effect. He may not have set fire to the boat if he had known that fact.
88. It may also be possible that it was the intention to light the fire much earlier, namely, when Brahim was at the bow flicking the lighter. Because the lighter was taken away, there was a delay. That delay allowed the petrol

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<sup>101</sup> Kelleher Report dated 8 September 2009 p14

to flow throughout the bilge and provided time for extended vaporisation below deck creating an ideal but no doubt unexpected level of explosive mixture.

89. When the explosion occurred, many of the passengers and navy personnel were thrown into the water. Again the video depicts what occurred. Keogh can be seen on the starboard side of the boat trying to direct passengers to leave the boat. He was very brave as were many others that day. He was unable to save one of the passengers who drowned in front of him. Standing Orders required that he remain on the boat and not enter the water unless directed to do so. He tried to help and took hold of the seat of the wheel house which he intended to throw to the drowning man but it melted in his hand<sup>102</sup>. Thereafter he remained on the burning vessel until he was extracted despite the obvious danger of further explosions and him being injured himself.

### **The rescue**

90. The navy personnel in the water were rescued first. On the whole of the evidence that appears to be so<sup>103</sup>. Standing Orders at the time said “Although focus may change, the safe return of the boarding party is the foremost priority”<sup>104</sup>. Standing Orders then direct how the boarding party once recovered is to ensure preparation for the rescue of passengers. Notwithstanding the explanation given by Lee<sup>105</sup>, the thrust of the policy was towards rescue of ADF members first. That is what occurred. Those who gave evidence did not all consider that to be a policy but rather something that they would do anyway<sup>106</sup>. Saville on the other hand said he thought that

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<sup>102</sup> Keogh TR 279

<sup>103</sup> See for example Dawe TR 226; Medbury TR 305; Saville TR 465

<sup>104</sup> Appendix K to Chapter 6 to ACPBSO Version 1.3 (Interim) para 9, 23

<sup>105</sup> Lee TR 607

<sup>106</sup> Burnett TR 289, 290; Westcott TR 633

the priority was to rescue ADF members first<sup>107</sup>. I do not consider there to be anything wrong in that policy save, as conceded by Lee, that there should be some flexibility to accommodate commonsense<sup>108</sup>.

91. In the process of the rescue, Corporal Jager was endangered because her life vest did not inflate and she believed she was drowning<sup>109</sup>. Medbury and Boorman who were crewing the RHIB that was portside of the SIEV at the time of the explosion, rescued her. In the process of doing so, they had great difficulty. She was clearly struggling, they were finding it difficult to get her onboard. Shortly before they succeeded, a passenger was hanging on to her and preventing the rescue. Medbury either kicked the RHIB or kicked towards the passenger. Corporal Jager says that the passenger was kicked in the head. However, she conceded it happened in a split second and she could be mistaken. Medbury agreed that he was kicking toward the passenger to stop him from preventing Jager's rescue<sup>110</sup>. I do not need to make any specific findings about this incident. The incident must be seen in the context of what was happening. There had been a violent explosion, people were screaming in the water, Corporal Jager was struggling and would have drowned but for prompt action, the passenger concerned was in fact rescued anyway.
92. After high alert had been sounded, HMAS Albany returned to the scene. Albany's two RHIB's were launched and assisted with the rescue of ADF and passengers. The rescue was efficient, effective and in my opinion saved lives. There were many heroic acts that morning in the process of saving the passengers and crew of SIEV 36 and also in their treatment thereafter. For example, Corporal Jager, notwithstanding what she had been through, attended to the needs of severely injured people with the Medical Officer Darby with seemingly inexhaustible energy and precision. Many passengers

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<sup>107</sup> Saville TR 466

<sup>108</sup> Lee TR 607

<sup>109</sup> Jager TR 188

<sup>110</sup> Boorman TR 318 – 320; Medbury TR 301 – 304; Jager Tr 168, 169, 189

were saved because of their efforts. It can be said that but for the combined efforts of the Australian Defence Force, Border Protection Command, Australian Maritime Safety Authority (Rescue Co-ordination Centre), Off Shore Gas Installation Front Puffin, Truscott and medical teams from around Australia, many more lives would have certainly been lost.

93. I have already commented on the great efforts, professionalism and bravery of the ADF members collectively in rescuing survivors from the SIEV 36. In my view, the individual efforts of ADF members Jager, Keogh and Faunt are worthy of specific mention; 1) I have already mentioned Jager in the previous paragraph; after being on the boat for some time during the night, she was blown off the back of the boat into the water by the explosion, she was in a state of shock and her life vest did not inflate, she was close to drowning with other survivors attempting to swim over her in order to be rescued, she was terrified. Yet, despite this trauma, after her rescue with her specialist medical training, she attended to the survivors for the next 10 hours, 2) I have already mentioned the efforts of Keogh in paragraph 89 thereof, 3) Faunt had only been on the SEIV 36 for a short time on the morning of the explosion, he realised the dangers of an explosion, he called “high alert”, he attempted to appropriately deal with the developing situation, he was standing on top of the roof of the boat’s coach house, the explosion blew him from the roof into the air and into the water, despite the shock and confusion engendered by this trauma, after rescue he remained on duty for several hours supervising the men under this command in relation to the rescue.





## **Findings**

94. I now turn to my findings. In reaching my conclusions I have been assisted by the thorough investigation conducted by NT Police. I have also been assisted by the frank and honest evidence of all ADF personnel who gave evidence to this Inquest. It is clear that all have endeavoured to co-operate to the best of their ability and they are to be commended.

### **The cause of the explosion.**

95. I find that the cause of the explosion was the ignition of petrol vapour, by a passenger or passengers, using a lighter or match. The vapour had accumulated under the deck of SIEV 36 during a period of about 20 minutes from 7:25am to 7:45am on the 16<sup>th</sup> of April 2009.

96. I find notwithstanding the denials made by all surviving passengers on SIEV 36, that most of them knew of a plan to disable the boat and to start a fire.

97. I find that either Beny or Tahir sabotaged the engine by pouring salt into it.

98. I find that Brahim, Ghulam Mohammadi and Salman were part of a plan to cripple the boat, and there may well have been others with similar plans.

99. Brahim was either threatening to or was trying to start a fire before the lighter in his hand was confiscated.

100. Mohammadi was either attempting to start a fire or cause a diversion shortly before the explosion.

101. I find that it is likely that a person in the vicinity of Brahim or Brahim himself ignited the petrol vapour.

102. I find that the point of ignition was close to the bow of the boat and that petrol had been poured from the hatch in front of Brahim into the bilge.

103. Finally, I am of the belief that crimes may have been committed in connection with the explosion. In my view, the Criminal Code of the NT is

applicable by virtue of the *Ashmore and Cartier Acceptance Act 1933* (Commonwealth). Accordingly, I propose to refer these findings to the NT Commissioner of police and the NT Director of Public Prosecutions. I note that I only have to have a belief about a crime being committed and that the question of whether or not there is a sufficient basis for further investigation and prosecution is a matter for them.

### **Could the explosion have been avoided?**

104. I find that when SIEV 36 was boarded, the forward bilge area and the forward hatches were not searched by the boarding party.
105. At that time there was at least one container of unleaded petrol of about 20-30 litres stored in the front hatch immediately forward of the mast, and adjacent to where Brahimi was subsequently squatting.
106. The petrol was used to power a generator and a petrol bilge pump. Those responsible for the search did not realise the pump was powered by petrol. They thought it was a diesel pump. The fact that it was a petrol bilge pump ought to have been ascertained. If that had been known, it might have caused further inquiry as to the location of the unleaded petrol.
107. I find that the unleaded petrol was not located and secured and it should have been.
108. An inappropriate Warning Notice was served on the Master. Although it may have been mandated, clearly it was inappropriate in the circumstances. The concluding words “You should now consider immediately returning to Indonesia with your passengers and not enter Australian Territory” was inappropriate. The vessel was already detained in Australian waters. The inference that the boat might be returned to Indonesia was incorrect.
109. This notice was read by Homayon and it sparked the events that led to the explosion.
110. I also find that lighters and matches should have been confiscated. The Commanding Officers, Chief Faunt, and Chief Lee, all thought that lighters

and matches should have been confiscated. McCallum did not do so because he thought that because the crew and passengers were compliant, it would be better to let them smoke. However, passengers' smoking could equally be accommodated if ADF controlled the lighters.

111. I find that passengers should have been reassured of their destination on the morning of 16<sup>th</sup> April 2009.

### **Could the deaths have been otherwise avoided?**

112. As to the topic of wearing life vests, I find that in the circumstances of this case, it was not reasonable to require passengers to wear life vests.

113. Whilst it is good practice to show them how to operate a life vest, in the present case there was insufficient time to access the life vests even if they had been more readily available. They had been stored in a tied doona bag on top of the cabin and could not be accessed easily.

114. I note that navy procedures have accommodated the question of safety vests<sup>111</sup>.

115. Next I find that there is nothing about the rescue process which should be criticised in the circumstances of this case.

116. A priority of recovering ADF personnel first is sensible.

117. The current revised policy does not seem to leave any room for discretion. It states:

“On declaration of mass SOLAS, the BP will be recovered and once on board the BO is to ensure the following preparations...”<sup>112</sup>

118. Whilst there was some ambiguity in the earlier policy it did leave some discretion. It might be better to provide a note which explains that in some circumstances a passenger or passengers should be rescued first.

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<sup>111</sup> EX 32, Rixon Affidavit dated 26 January 2010, Recommendation 40

<sup>112</sup> Part EX 33, ABR 1920 Chap 7 Annex N para. 12

**Other issues relevant to public health or safety and their care and supervision and treatment of persons held in custody.**

119. The Navy Manuals recognise that there is a duty of care to their personnel and passengers and crew of vessels such as SIEV 36. The evidence before me demonstrated that left as it was at that time, there were a number of questions which arise as to whether Standing Procedures should be modified and specific training directed to the safety and care of such persons.
120. The Australian Defence Force has conducted an Inquiry Officer's Report which has been incorporated into the evidence at this Inquest. That Report analysed the practices and procedures contained in Australian Book of Reference 1920, RAN Manual of Military Training and Armidale Class Patrol Boats Standing Orders and other documents. The Report referred to the need for a complete revision of ABR 1920 and the Standing Orders. It acknowledged that a number of areas relating to the transit security element were unclear and confusing. A number of crew that had been allocated to HMAS Childers had not completed appropriate training courses. There were anomalies in operational orders and instructions relating to boarding operations.
121. The Report reached Findings and made numerous recommendations. There were 58 recommendations and included:
- Review of manuals;
  - Development of separate standing risk profiles for SIEV and FFV boardings reflecting lessons learned from SIEV 36;
  - The need to explain any change to operating patterns or circumstances to passengers with reassurance, eg as occurred in the case of SIEV 36 where Commanding Officer Westcott frankly admitted that it was probably a mistake in hindsight to have a new steaming party inserted in darkness and that there was a need for the reestablishment of rapport with the passengers;
  - A recommendation that matches and cigarette lighters be confiscated;

- That all inflammable fuel to be secured and removed if necessary.
122. Captain Rixon of the Australian Navy gave evidence and his statement was tendered. I am be satisfied as a result of his evidence that where appropriate, the recommendations have been acted upon or are to be acted upon. I am satisfied that with the action taken and pursued at training and operational level, an incident such as occurred on SIEV 36 is unlikely to occur again.
123. I am also satisfied that communication of information between Customs and Royal Australian Navy of incidents occurring involving SIEV will occur in accordance with the protocol previously established. There was evidence that an incident involving SIEV 34 on the 3<sup>rd</sup> of April 2009 was not communicated to Navy Commanders as quickly as it should have been. That was due to an oversight. I am satisfied that it will not recur.
124. Whilst there was an issue raised as to whether the decision to have a holding pattern for 48 to 50 hours whilst HMAS Tobruk was being repaired should have been made, it was not practical for the passengers in this case to be taken aboard the two patrol boats and taken to Christmas Island. The patrol boats are not ideal for the carriage of passengers. But in any event other SIEVs were expected at the time.
125. Finally, in my view, the timely and proactive response by the ADF as a institution to these deaths is commendable, as is the co-operation shown with the coronial process.

Dated this 17th day of March 2010.

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GREG CAVANAGH  
TERRITORY CORONER