

Al-Sweady Public Inquiry

REPRESENTATIONS ON BEHALF OF THE MINISTRY OF DEFENCE FOR FIRST DIRECTIONS HEARING PURSUANT TO INQUIRY'S INVITATIONS DATED 11th May 2010

- 1 By letters dated 11th May 2010 the Inquiry invited representations from the Ministry of Defence ("MoD") in relation to:
 - A. the nature and extent of any undertakings which should be sought by the Inquiry Chairman in relation to the subsequent use of any evidence, documents and / or information which are to be given to the Inquiry by any person;
 - B. the procedure to be adopted in relation to applications for anonymity by witnesses and the appropriate legal tests to be applied.

A. Undertakings regarding the use of evidence and / or the use of information

- 2 The Chairman's intended approach is set out in the Inquiry's letter of 11th May 2010. Representations were invited in the form of 10 questions. The MoD's response to each of the 10 questions is as follows.

Question 1: Do you agree that the Chairman should seek such an undertaking?

- 3 The MoD agrees with the Chairman's proposal to seek such an undertaking.

Question 2: If so, why?

- 4 The MoD considers the proposal to seek such an undertaking to be appropriate because its terms are sufficiently broad to provide protection for witnesses against self-

incrimination without being so broad as unnecessarily to fetter the Crown's prosecutorial discretion.

- 5 If given, the undertaking would maximise the possibility of obtaining from witnesses a full and candid account of the events which have occurred. This in turn would assist the Inquiry to fulfil its Terms of Reference. In addition, the wording of the undertaking which it is proposed to seek is similar to undertakings provided in previous public inquiries.

Question 3: If not, why not?

- 6 Not applicable, having regard to the answer given to Question 2 above.

Question 4: Do you suggest that an undertaking of a different kind ought to be sought from the Attorney General (and, if so, what form of words do you suggest and why)?

- 7 No, for the reasons given in answer to Question 2 above.

Question 5: In particular, do you suggest that the undertaking set out above should be extended to prevent the use of the evidence etc of a witness in the investigation of an offence as well as in evidence in any future proceedings (and, if so, why)?

- 8 The MoD does not suggest that the undertaking should be extended in this way.

Question 6: Do you agree that it is sufficient to seek such an undertaking from the Attorney General, and not also from the Director of Public Prosecutions?

- 9 The MoD agrees that it is sufficient to seek the relevant undertaking from the Attorney General, and not also from the Director of Public Prosecutions. The Director is appointed by the Attorney and is under his superintendence (see, respectively, sections 2(1) and 3(1) of the Prosecution of Offences Act 1985).

- 10 In the Baha Mousa Inquiry, the submission was advanced that an undertaking should be sought from the Director because the Attorney's role may change in the future so as to remove or restrict the Attorney's power to consent to prosecutions so that (it was submitted) the Director might take proceedings even though the proceedings were covered by an undertaking given by the Attorney. The MoD responded that it would be inconceivable that the Director would bring proceedings if that were in conflict with an undertaking from the Attorney.
- 11 In the Baha Mousa Inquiry, the Chairman did not rule that it was necessary to seek an undertaking from the Director, but nonetheless did seek such an undertaking "*in an excess of caution*".
- 12 The MoD maintains that an approach to the Director is unnecessary (just as it would not be necessary to approach every individual Crown Prosecutor whether or not an approach were made to the Director). It is acknowledged that there may well be changes to the Attorney's role in relation to consenting to prosecutions¹ but:
- (i) The nature and ambit of any required undertakings should be assessed on the basis of the current state of the law and current constitutional arrangements – not on the basis of possible future changes (the precise nature of which are impossible to predict). Just as the Attorney's role might change so too might the Director's;
 - (ii) The reason for approaching the Attorney is not primarily that the Attorney has a role in relation to consenting to prosecutions: the Attorney's consent is only required for certain particular prosecutions, and there are many potential prosecutions that would arise out of Inquiry proceedings that would not require the Attorney's consent. The reason for approaching the Attorney is because of the Attorney's role as guardian of the public interest, a role which is more entrenched;
 - (iii) An undertaking given by the Attorney would continue to have public law effect, even if the Attorney's role subsequently changed: it is a factor that any person would be required to take into account when exercising

¹ The last Attorney recently suggested as much in a lecture on the Role of the Attorney General given to the Administrative Law Bar Association on 19th January 2010. It has long been recognised that there is no coherent structure to the consent provisions and that they are ripe for reform – see eg the Law Commission report "Consents to Prosecution" (LC255).

prosecutorial discretion (including when considering the impact of the public interest test under the Code for Crown Prosecutors) and, if necessary, would be a factor which a Court would take into account if required to rule on the fairness of any particular prosecution.

- 13 If, however, the Chairman considers it appropriate to depart from his intended approach in this respect then the MoD would not object.

Question 7: Should an undertaking be sought from the Ministry of Defence in relation to the subsequent use of evidence, documents and / or information given by any person to the Inquiry?

- 14 The MoD considers that it would not be appropriate to seek an undertaking in respect of administrative action.

Question 8: If so, in what form, why and from whom?

- 15 Not applicable, having regard to the answer given to Question 7 above.

Question 9: If not, why not?

- 16 The law provides for no general right, analogous to the privilege against self-incrimination, for a witness to decline to answer a question the answer to which might tend to expose him or others to administrative action by his employer. In this regard, any undertaking sought from the MoD in relation to administrative action falls into a different category from the undertaking to be sought from the Attorney which provides protection against self-incrimination.

- 17 There is no compelling reason to believe that the absence of an undertaking from the MoD would hamper the Inquiry from eliciting relevant evidence. The appropriate tools with which to ensure that witnesses speak frankly are the power of compulsion, the giving of evidence on oath and rigorous questioning. It would be undesirable for the MoD to be deprived of the opportunity to undertake any administrative or disciplinary action in respect of individuals shown to have committed breaches of

discipline. Potentially, the consequence would be that the MoD would not be able to take any steps to restrict a serviceman's access to lethal weaponry even if that person had admitted gross breaches of discipline. There is the theoretical possibility that any such undertaking might turn out to conflict with obligations owed by the MoD, including under article 2 ECHR.

- 18 In the Baha Mousa Inquiry, undertakings were sought by the Chairman and given by the MoD in the following terms (see, the letter from Sir Bill Jeffrey dated 19th December 2008 and identical undertakings given on behalf of the Navy, the Army and the Royal Air Force):

If written or oral evidence given to the Inquiry by a witness who is a former or current MoD civil servant may tend to indicate that:

- (1) the same witness previously failed to disclose misconduct by himself or some other person, or
- (2) the same witness gave false information on a previous occasion in relation to such misconduct,

then I undertake that the MoD will not use the evidence of that witness to the Inquiry in any disciplinary proceedings against that witness where the nature of the misconduct alleged is the failure to give a full, proper or truthful account on that previous occasion.

The position in the Baha Mousa Inquiry is distinct from the position in the present Inquiry. In the Baha Mousa Inquiry, court martial proceedings had already taken place and been completed, so disciplinary procedures had run their course. That is not so in the context of the Al-Sweady Inquiry. While the MoD maintains its position that the allegations which have led to the present Inquiry disclose no wrongdoing on the part of service personnel, it is acknowledged that the premise upon which the Inquiry has been instituted is that the investigative obligations owed under articles 2 and 3 ECHR may not yet have been fully discharged.

- 19 The MoD therefore respectfully submits that it should not be deprived of the opportunity of bringing administrative action in the event that is considered appropriate.

Question 10: Do you suggest that any other undertaking should be sought (and, if so, in what form, why and from whom)?

- 20 The MoD does not consider it necessary for additional undertakings to be sought.

B. Anonymity applications

- 21 The MoD acknowledges that this issue most directly concerns individual witnesses, and that therefore the Treasury Solicitor and Public Interest Lawyers (as representing the interests of individual witnesses) will have a more direct role in making representations. The MoD practice is to make applications for anonymity only where such applications are justified on public interest grounds under section 19 of the Inquiries Act 2005. Nonetheless, the MoD tentatively offers some representations in order to assist the Inquiry and because the MoD does have an indirect and vicarious interest.
- 22 The Chairman has identified a six stage process which will be undertaken in circumstances where an application is to be made by a witness for anonymity.
- 23 The MoD considers that the process identified is sound and appropriate. The mechanics are entirely a matter for the Inquiry and the other agencies involved. The threat assessments (step 3) can, of course, only be fully completed after all information relevant to the threat assessments (steps 2 and 4) has been provided. Accordingly, it is respectfully suggested that an alternative approach might be for step 3 to follow step 4. That said, it is acknowledged that there is nothing objectionable in step 3 being initiated (but not completed) before step 4, and that there may be some slight overall time saving in this approach (cf paragraph 24(ii) below).
- 24 However, the MoD fears that the timescale proposed for Steps 2 and 4 of the process might be too restrictive, having regard to:
- (i) the number of witnesses on behalf of whom applications for anonymity are likely to be made and therefore the length of time required to consider and establish whether each witness wishes an application for anonymity to be made (particularly given that relatively few legal teams are representing a relatively large number of witnesses). The risk in providing insufficient time is that an overly precautionary approach may be taken resulting in applications for anonymity which would not have been advanced if greater time and space had been permitted to make a decision;

- (ii) the fact that a number of witnesses are based outside the United Kingdom or, in the case of some service personnel, have left the forces, so that it is likely to be more time consuming to take full instructions particularly in relation to ‘Step 4’ of the process.

25 Although of course the MoD would endeavour to indicate its position in accordance with Steps 2 and 4 as soon as possible and well within any stipulated time limit, it makes the tentative suggestion that the timescales both in Steps 2 and 4 be doubled so as to allow 28 days to indicate which witnesses are required and 56 days for the preparation of the documents specified in step 4.

26 The four issues of law upon which the Inquiry has invited submissions are addressed in turn below. These submissions proceed on the basis that the core legal basis for the grant of anonymity is section 19 of the Inquiries Act 2005, which, so far as material, provides as follows:

19 Restrictions on public access etc

- (1) Restrictions may, in accordance with this section, be imposed on—
 - (a) attendance at an inquiry, or at any particular part of an inquiry;
 - (b) disclosure or publication of any evidence or documents given, produced or provided to an inquiry.
- (2) Restrictions may be imposed in either or both of the following ways—
 - (a) by being specified in a notice (a “restriction notice”) given by the Minister to the chairman at any time before the end of the inquiry;
 - (b) by being specified in an order (a “restriction order”) made by the chairman during the course of the inquiry.
- (3) A restriction notice or restriction order must specify only such restrictions—
 - (a) as are required by any statutory provision, enforceable Community obligation or rule of law, or
 - (b) as the Minister or chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4).
- (4) Those matters are—
 - (a) the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;
 - (b) any risk of harm or damage that could be avoided or reduced by any such restriction;
 - (c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;
 - (d) the extent to which not imposing any particular restriction would be likely—
 - (i) to cause delay or to impair the efficiency or effectiveness of the inquiry, or
 - (ii) otherwise to result in additional cost (whether to public funds or to witnesses or others).
- (5) In subsection (4)(b) “harm or damage” includes in particular—
 - (a) death or injury;
 - (b) damage to national security or international relations;
 - (c) damage to the economic interests of the United Kingdom or of any part of the United Kingdom;
 - (d) damage caused by disclosure of commercially sensitive information.

Issue 1: What is the legal test to be applied, and what considerations are relevant, in relation to any application that relies on Articles 2 and 3 of the ECHR?

27 The legal test to be applied under Article 2 ECHR when setting down the approach to be followed in respect of anonymity applications (in the Robert Hamill Inquiry), was encapsulated by Lord Carswell in *Re Officer L* [2007] 1 WLR 2135, at paragraphs 19 to 21. The principles there set out may be summarised as follows:

- (i) Article 2 covers not only the negative obligation not to take the life of another, but it also imposes upon contracting states a so-called ‘positive obligation’ to take certain steps towards the prevention of loss of life at the hands of others than the state: *Osman v United Kingdom* (1998) 29 EHRR 245 at paragraph 115 - 116;
- (ii) The positive obligation arises only where the risk is ‘real and immediate’. That is, ‘a real risk is one that is objectively verified and an immediate risk is one that is present and continuing’: *Re W’s Application* [2004] NIQB 67, *per Weatherup J*;
- (iii) The threshold required to engage the positive obligation is high. The standard is constant and the fear must be objectively well-founded;
- (iv) The case law pursuant to Article 2 reflects the principle of proportionality. That is, the degree of stringency imposed as to the level of precaution required to avoid a breach of Article 2 reflects the need to strike a fair balance between the general rights of the community and the personal rights of the individual.

28 The legal test to be applied under Article 3 of the Convention is whether there exists a ‘real and immediate threat’ of violence contrary to Article 3 to an identified individual.

29 Article 3 carries the negative obligation not to torture or to subject an individual to inhuman or degrading treatment. It also imposes upon a contracting state a positive obligation to take reasonable and effective measures to prevent an individual from being subjected to such treatment contrary to Article 3, of which the authorities of that state are, or ought to be, aware.

30 As with Article 2, the legal principles which inform the application of Article 3 in the present context are as follows:

- (i) In order for the threat to be ‘real and immediate’ so as to engage Article 3, it must be ‘objectively verified’ and ‘present and continuing’: *Re W’s Application, supra*;
- (ii) The threshold required to engage the positive obligation is high. The standard is constant and the fear must be objectively well-founded;
- (iii) The principle of proportionality is reflected in the Court’s application of Article 3, in that the degree of stringency imposed as to the level of precaution required to avoid a breach of Article 3 reflects the need to strike a fair balance between the general rights of the community and the personal rights of the individual.

Issue 2: What is the legal test to be applied, and what considerations are relevant, in relation to any application that asserts that there is a risk of death or injury but where articles 2 or 3 of the ECHR are not relied on (‘the so-called ‘common law test’)?

31 The test was authoritatively established by the House of Lords in *Re Officer L* [2007] 1 WLR 2135. In circumstances where the so-called common law duty of fairness is relied upon in support of an application for anonymity (and Articles 2 or 3 are not relied upon or the threshold required to engage those Articles has not been reached), the relevant test in broad terms is whether, on conducting a balancing exercise pursuant to the common law duty of fairness, anonymity should be granted. The Inquiry panel must reach a decision whether to grant anonymity ‘after weighing the various competing interests.’ The Panel is not required to find compelling justification before refusing the application for anonymity (*A and Others Application (Nelson Witnesses)* [2009] NICA 6 *per* Kerr LCJ at paragraph 38).

32 The common law duty of fairness goes further than do Articles 2 and 3 in providing protection to witnesses in appropriate cases. It is capable of entailing consideration of concerns other than the risk to life, but it includes such concerns. Such concerns must

be considered with the most anxious scrutiny (*Re Officer L per Lord Carswell* at paragraph 22).

33 It is possible to envisage a range of matters which could make for unfairness in relation to witnesses (*Re Officer L per Lord Carswell* at paragraph 22). Among the considerations to which the Inquiry panel is entitled to have regard are the following:

- (i) Considerations relevant to Article 2 may be taken into account, if the facts require it (*Officer L per Lord Carswell* at paragraph 29);
- (ii) the witness's subjective fears, even if not well founded (*Re Officer L per Lord Carswell* at paragraph 22);
- (iii) whether the evidence supplied to the Inquiry is controversial, that is, whether it is likely to attract the interest of those elements thought to pose a risk to the witness (*A and Others per Kerr LCJ* at paragraph 40);
- (iv) whether the fears entertained by the witness are genuinely and reasonably held (*A and Others per Kerr LCJ* at paragraph 41);
- (v) the erosion of public confidence in the public inquiry which might ensue as a consequence of permitting a witness, (or a category of witnesses) to remain anonymous (*A and Others per Kerr LCJ* at paragraph 41).

Issue 3: What is the legal test to be applied, and what considerations are relevant, in relation to any application that relies on Article 8 of the ECHR?

34 Article 8 of the Convention provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

35 The legal test to be applied to any application that relies on Article 8 of the Convention is one of proportionality. The proportionality exercise involves weighing any interference with the witness's Article 8 rights by revealing his identity against the relevant countervailing public interest considerations. In this context, it will also be necessary to consider the rights of individuals and the press under Article 10 of the Convention: *Re S (A Child)* [2005] 1 AC 593.

Issue 4: What is the legal test to be applied, and what considerations are relevant, in relation to so-called 'public interest' applications for protective measures?

36 The considerations relevant to a so-called public interest application for protective measures are, pursuant to section 19 of the Inquiries Act 2005, as follows:

- (a) the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;
- (b) any risk of harm or damage that could be avoided or reduced by any such restriction;
- (c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given to the inquiry;
- (d) the extent to which not imposing any particular restrictions would be likely –
 - (i) to cause delay or to impair the efficiency or effectiveness of the inquiry, or
 - (ii) otherwise to result in additional cost (whether to public funds or to witnesses or others).

37 The relevant public interest ground that is relied upon may vary from application to application. Those representing individuals will, of course, be directly concerned with their safety (as will be the MoD, in a vicarious capacity, in respect of service personnel). In general, the MoD will only make an application for anonymity in circumstances where such an application is justified on public interest grounds. For example, the MoD has a distinct and direct interest in protecting national security (see section 19(5)(b) of the Inquiries Act 2005). Protective measures would be justified on public interest grounds where disclosure of the witness's identity or appearance would cause real harm to national security. This consideration is likely to be engaged, for example, in the cases of soldiers who serve in special units or who are engaged in other sensitive work, such as the gathering or exploitation of intelligence.

28th May 2010

JEREMY JOHNSON
5 Essex Court
Temple

MELANIE CUMBERLAND
6 King's Bench Walk
Temple