THE AL-SWEADY PUBLIC INQUIRY

SUBMISSIONS ON UNDERTAKINGS ON BEHALF OF MOD WITNESSES REPRESENTED BY THE TREASURY SOLICITOR

1. By way of a letter dated 11th May 2010 the Solicitor to the Inquiry invited summary responses to 10 questions concerning the nature and extent of undertakings in relation to the subsequent use of evidence, documents and/or information given by any person to the Inquiry. The Treasury Solicitor provided summary responses to those questions on 26th May 2010.

2. These submissions address the three issues in respect of which the Chairman has directed that oral submissions be made at the forthcoming directions hearing:

   (i) Should the Chairman seek an undertaking from the Attorney General in the form set out at Annex A to the ruling of Sir William Gage, dated 6th January 2009, in the Baha Mousa Inquiry (BMI)?

   (ii) Should the Chairman seek undertakings from the MOD in the form set out at Annexes C – F to the ruling of Sir William Gage in the BMI?

   (iii) What are the legal principles that the Chairman should apply in deciding whether to seek an undertaking from a relevant person?

3. Each is addressed in turn.

Undertaking from the Attorney General - Criminal Prosecution

4. Any witness called to give evidence to the Inquiry has the right to refuse to answer questions or produce documents which may tend to incriminate him.

5. That "basic liberty of the subject" (*Rank Film Distributors v Video Information Centre* [1982] AC 380, at 442C) is expressly preserved by s.22 of the Inquiries Act 2005.

6. The scope of the privilege against self-incrimination extends to evidence which may inform the case which the prosecution may wish to establish and/or evidence which the prosecution may rely upon in deciding whether to prosecute.

7. This proposition was clearly established by Lord Wilberforce in *Rank Film Distributors, supra*. It was argued on behalf of the Appellants in that case that the Respondents' concerns that compliance with an *Anton Piller* order would expose them to the risk of criminal prosecution could be adequately addressed by an undertaking by the Appellants not to use the information obtained in criminal proceedings. In rejecting that submission Lord Wilberforce said this, at 443D:

   "Moreover, whatever direct use may or may not be made of information given, or material disclosed, under the compulsory process of the court, it must not be overlooked that, quite apart from that, its provision or disclosure may set in train a process which may lead to incrimination or may lead to the discovery or real evidence of an incriminating character. In the present case, this cannot be discounted as unlikely: it is not only a possible but probably the intended result. The party from whom the disclosure is asked is entitled, on established law, to be protected from these consequences."

8. In *Istel Ltd v Tully* [1993] 1 AC 45, Lord Lowry observed, at 68G, that the proper definition of the privilege against self-incrimination was: "*the privilege against exposing oneself to the reasonable risk of prosecution*." There is nothing in that definition which confines the scope of the privilege to evidence subsequently used against the witness in criminal proceedings. A witness may equally expose himself him to the risk of

prosecution by giving evidence which is subsequently used to inform a decision as to whether to prosecute and/or give rise to further inquiries which reveal further evidence upon which a prosecution is subsequently based.

9. In *Istel*, Lord Lowry considered the determining factor to be the provision of a letter by the CPS, which demonstrated that it felt "*inhibited for all practical purposes from making use of material disclosed in consequence of the court order*" (at 69C). That was sufficient to dispose of the "*potentially troublesome question whether the authorities might have decided to follow up clues revealed by the primary disclosures on the part of the defendant*."

10. The effect of the undertaking provided by the CPS in *Istel*, which was deemed sufficient to protect the Respondents from self-incrimination, extended to a prohibition on the use of any disclosed material for "*all practical purposes*" including the following up of "*clues*" contained within that material.

11. Both *Rank Film Distributors* and *Istel* were cited to the Court of Appeal in *Den Norske Bank v Antonatos* [1999] QB 271. In a judgment with which the two other members of the Court agreed, Waller LJ said (at 289A):

"Thus, it is not simply the risk of prosecution. A witness is entitled to claim the privilege in relation to any piece of information or evidence on which the prosecution might wish to rely in establishing guilt. And, as it seems to me, it also applies to any piece of information or evidence on which the prosecution would wish to rely in making its decision whether to prosecute or not."

12. Finally, in *Saunders v United Kingdom* (1996) EHRR 313, the ECtHR made clear that the privilege against self-incrimination, which was said to form part of the concept of fairness enshrined in Article 6, extended beyond evidence that was directly incriminating:

"…However, the Government have emphasised, before the Court, that nothing said by the applicant in the course of the interviews was self-incriminating and that he had merely given exculpatory answers or answers which, if true, would serve to confirm his defence. In their submission only statements which are self-incriminating could fall within the privilege against self incrimination.

The Court does not accept the Government's premise on this point since some of the applicant's answers were in fact of an incriminating nature in the sense that they contained admissions to knowledge of information which tended to incriminate him (see paragraph 31 above). In any event, bearing in mind the concept of fairness in Article 6, the right not to incriminate oneself cannot reasonably be confined to statements of admission or wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or mere information on questions of fact – may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. Where the credibility of an accused must be assessed by a jury the use of such testimony may be especially harmful. It follows that what is of the essence in this context is the use to which evidence obtained under compulsion is put in the course of a criminal trial."

13. It is apparent from this analysis that a witness will be able to invoke the privilege against self-incrimination not just in respect of evidence which might be regarded as directly incriminating but also in respect of evidence which might subsequently be used to his detriment in the course of subsequent criminal proceedings. It follows that unless the prohibition on the use of such evidence by the prosecuting authority is absolute, as envisaged for example in *Istel*, the scope of the witness's right not to answer questions or produce documents will be very wide indeed.

14. It is submitted that the effect of the analysis set out above is to demonstrate that the scope of the draft undertaking set out in the letter from the Solicitor to the Inquiry dated 11th May 2010 is not wide enough to protect witnesses to the Inquiry against self-incrimination. In particular, it does not extend: (1) to protecting the witness against the use of evidence given to the Inquiry by the prosecuting authority in deciding whether or not to bring a prosecution; and (2) to protecting the witness against prosecution based on evidence obtained during an investigation commenced as a result of evidence provided by the witness to the Inquiry.

15. It follows that unless the scope of the undertaking is extended so as to cover the use of evidence in these two respects there will be a real risk that a witness's willingness to co-operate with the important work of the Inquiry will be tempered by the justifiable concern that by giving evidence he will expose himself to a risk of prosecution.

16. If it is accepted that the legal analysis set out above is correct and that the scope of the privilege extends to the use of the evidence in decisions as to whether to prosecute and/or in determining what further inquiries should be made then, it is submitted, an undertaking in the form set out at Annex A to the BMI ruling should be sought. It would plainly be appropriate that the scope of the undertaking matched the scope of the privilege.

17. If, however, there is doubt as to whether the privilege extends to the use of evidence in these two respects, an undertaking in the terms set out an Annex A should still be sought, for two reasons.

18. First, the primary aim of the Inquiry is to ensure that it conducts a full and thorough investigation. It is not required, by its Terms of Reference or otherwise, to take account of the interests of the Law Officers in preserving their ability to prosecute witnesses who give evidence to the Inquiry.

19. Second, there is no coherent distinction to be drawn between a witness who made a frankly incriminating statement during the course of his evidence which would ordinarily result in prosecution, and a witness who gave superficially non-incriminating evidence which turned out, following further investigation, to be incriminating such as to lead to a prosecution.

20. The Treasury Solicitor would wish to advise those witnesses whom it represents to give full and frank evidence to the Inquiry. It is submitted that it is in the interests of neither the witness nor the Inquiry for a witness to have to consider whether a full and frank answer might expose him to a risk of prosecution. The undertaking obtained by Sir William Gage in the BMI has been effective in the context of that inquiry and this has been reflected in the quality of the evidence he has received.

<u>Undertaking from the MOD - Administrative Action</u>

21. The privilege against self-incrimination does not extend to administrative action. The basis of our submission that limited undertakings be sought in respect of administrative action is not that the witnesses would have a right to decline to answer such questions, but that by obtaining undertakings of this nature the extent of the co-operation provided to the Inquiry by military witnesses is likely to be increased, and the quality of their evidence improved.

22. The undertakings obtained by Sir William Gage in BMI were limited in scope. They extended only to administrative action in respect of evidence which might tend to indicate that: (1) the same witness previously failed to disclose misconduct by himself or some other person; and (2) the same witness gave false information on a previous occasion in relation to such misconduct.

23. The effect of such undertakings would not extend to preventing the MOD from taking administrative action against civil service and/or military

witnesses whose evidence revealed misconduct of any other sort. The submission made on behalf of the MOD (at §17) to the effect that evidence might emerge during the Inquiry that indicated an individual was not suitable to be entrusted with lethal weapons is noted. The scope of the undertakings sought would not prevent appropriate action being taken in such circumstances.

24. As the Chairman noted in his Opening Statement: "*Unlike some previous inquiries there has been to date no fact finding exercises such as a trial in which the allegations outlined in the proceedings in the Administrative Court have been explored in detail so as to enable any findings of fact to be made as a result of such a trial.*" In addition, the investigation that was conducted into the material events was found to be flawed and/or inadequate in a number of respects, hence the need for this Inquiry.

25. In those circumstances, it would be unfair to expose witnesses to administrative action, which may result in the loss of their careers and livelihoods, were they to provide information to the Inquiry which their employer considers should have been provided earlier, or which is considered to be materially different to a previous account. If the witnesses concerned had provided previous accounts in the course of a careful and thorough investigation during which they had been given access to all the relevant documentation and received appropriate advice, or if they had given evidence on oath in previous proceedings, then any discrepancies between those accounts and their evidence to the Inquiry might give rise to disciplinary concerns. But that is plainly not the case in the context of this Inquiry.

26. Furthermore, the absence of undertakings in the terms sought would act as a significant disincentive in those cases where the full and frank account that a witness would otherwise wish to give to the Inquiry is different to an account given during the course of a previous investigation. The understandable inclination of a witness in this position will be to "stick to his story" lest he get himself or his colleagues into serious trouble.

24. The purpose of the Inquiry is to conduct a full and thorough investigation into a series of events which have yet to be properly investigated. The Chairman has recognised that he cannot rely on previous investigations as having established the relevant facts. It is submitted that failing to seek protection for witnesses against administrative action on the basis that the account given to the Inquiry is different from accounts given previously would not be compatible with that objective.

25. In their letter of 2nd June 2010 Public Interest Lawyers (PIL) observe, in answer to question 9, that a witness does not have the right to refuse to provide evidence on the basis that in so doing he might expose himself to administrative action, and that the familiar mechanisms of the oath, cross examination, and the Inquiry's statutory powers of compulsion will be available in seeking to ensure that a full and truthful account is given. These observations are quite correct, but they address a different issue. It is not envisaged that a witness would refuse to provide evidence on the grounds that do so would expose him to administrative action. The far more likely scenario is that a witness would feel inhibited from giving a truthful account that was different to, or more complete than, one he had given before.

26. Nor would seeking undertakings of a similar nature to those obtained in the BMI inhibit the MOD in taking appropriate action against those whom, on the evidence given to the Inquiry, serious misconduct is suspected. If, to take the example given by PIL, a witness were found to have committed "acts amounting to murder and torture" the undertakings would not protect him from administrative action.

27. It is submitted on behalf of the MOD (at §19) that the situation in the BMI was different because court-martial proceedings in respect of 7 of the key individuals had already run their course. Whilst that is true, it has no bearing on whether limited undertakings of the type obtained in

the BMI should be sought in this Inquiry. The court-martial proceedings relevant to the BMI concerned the substantive allegations of physical ill-treatment, not the failure or otherwise of witnesses to give full and consistent accounts of their actions. In the absence of the undertakings obtained it would have been open to the MOD to take administrative action against any witness, including the CM7, who gave an account to the Inquiry that was different to an account he had given before. Sir William Gage decided that this amounted to a sufficient disincentive to full and frank co-operation such that undertakings should be sought. It is submitted that the same analysis is applicable to this Inquiry.

28. Finally, it is suggested by PIL that the limited nature of the public and private investigations conducted into the events material to this Inquiry, compared with those conducted in advance of the BMI, means that the "*disincentive to resile from a previously publicly stated position*" is not as great in this Inquiry as it was in BMI. On that basis, it is submitted, there is no need for undertakings even of the limited nature obtained in the BMI.

29. There are two reasons why that submission is misconceived. First, the "disincentive" to provide a different, or more complete, account is derived not from the thoroughness or otherwise of the previous investigations but from the fear of being punished for not having given a full and honest account earlier. In this respect there is no material difference between this Inquiry and the BMI. Second, it is precisely because the previous investigations in this Inquiry were limited that it would be unfair to punish witnesses for failing to provide full and thorough accounts during the course of those limited investigations.

Legal Principles

30. The legal principles, insofar as they are relevant to the two specific issues identified by the Chairman have been set out above. In summary, it is submitted that the key principles are:

(i) The scope of the privilege against self-incrimination extends to evidence which may be used to inform a decision as to whether or not to prosecute.

(ii) The scope of the privilege also extends to evidence which may subsequently be used to inform further inquiries leading to a decision to prosecute.

(iii) A witness would be entitled, pursuant to s.22 of the 2005 Act, to refuse to provide evidence falling into either of the two categories identified above in the absence of an undertaking which prevented the use of that evidence.

(iv) The privilege against self-incrimination does not extend to administrative action by the MOD against civil service or military witnesses.

(v) The issue in respect of administrative action is not whether the witness has a right to refuse to provide evidence but whether the possibility of punishment will inhibit him from giving a full and frank account.

(vi) The Inquiry's primary obligation, as set out in its Terms of Reference, is to investigate the allegations made by the claimants in the judicial review proceedings. When determining whether an undertaking should be sought the most important consideration should be whether or not it is likely to assist the Inquiry in the effective completion of that task.

NEIL GARNHAM QC

NEIL SHELDON

10th June 2010

LIST OF AUTHORITIES

1. *Rank Film Distributors v Video Information Centre* [1982] AC 380

2. *Istel Ltd v Tully* [1993] 1 AC 45

3. *Saunders v United Kingdom* (1996) EHRR 313

4. *Den Norske Bank v Antonatos* [1999] QB 271