Al-Sweady Public Inquiry

MINISTRY OF DEFENCE'S SKELETON ARGUMENT FOR FIRST DIRECTIONS HEARING PURSUANT TO INQUIRY'S INVITATIONS DATED 4TH JUNE 2010

---

1. By a letter dated 4th June 2010, the Inquiry invited Core Participants to submit skeleton arguments in relation to:

   (i) the appropriateness of seeking undertakings, and

   (ii) the approach to be adopted in relation to anonymity applications,

   with a view to the Inquiry hearing oral submissions on these issues at the directions hearing on 21st and (if necessary) 28th June 2010. This Skeleton Argument is submitted in response to that invitation.

Undertakings

2. The specific matters upon which the Inquiry has invited further representations in respect of undertakings are:

   Issue 1: *Whether the Chairman should seek an undertaking from the Attorney General in the form sought by Sir William Gage in the Baha Mousa Inquiry and set out in Annex A to his Ruling of 6.1.09 (as suggested by TSol). The Chairman would be grateful for assistance in relation to the following points, in particular:*

   (i) Does the privilege against self-incrimination extend to evidence which may inform towards the case which the prosecution may wish to establish and material upon which the prosecution may wish to rely in deciding whether to prosecute?

(ii) *What are the relevant considerations in relation to this Inquiry in relation to whether such an undertaking should be sought?*

Issue 2: *Whether the Chairman should seek an undertaking from the MoD in the form sought by Sir William Gage in the Baha Mousa Inquiry and set out in Annexes C-F to his Ruling of 6.1. 09 (as suggested by TSol). The Chairman would be grateful for assistance in relation to the identification of the relevant considerations that he ought to take into account in deciding whether to seek such an undertaking.*

Issue 3: *Generally, what are the legal principles that the Chairman should apply in deciding whether to seek an undertaking from a relevant person?*

3. Each issue upon which further representations are invited is addressed below.

Issue 1: The extended undertaking given by the Attorney General in the Baha Mousa Inquiry

4. For ease of reference, the extended undertaking sought and provided by the Attorney General to Sir William Gage in the Baha Mousa Inquiry was as follows:

> '*Where any such evidence is provided to the Inquiry by a person, it is further undertaken that, as against that person, no criminal proceedings shall be brought (or continued) in reliance upon evidence which is itself the product of an investigation commenced as a result of the provision by that person of such evidence.*'

5. The MoD maintains (as indicated in its Representations dated 25th May 2010) that it has not been demonstrated that an undertaking in an extended form is necessary. However, the MoD does not advance a positive case as to whether such an undertaking should be sought and it does not formally object to the grant of such an undertaking if the Chairman considers that this would be appropriate.

6. The MoD considers that the question posed by the Inquiry Chairman (that is, '*Does the privilege against self-incrimination extend to evidence which may inform towards the case which the prosecution may wish to establish and material upon which the prosecution may wish to rely in deciding whether to prosecute?*') should as a matter of law, be answered in the affirmative. The legal principles upon which this view is founded are set out in the following paragraphs.

7. The privilege against self-incrimination was given statutory force in relation to civil proceedings by virtue of the Civil Evidence Act 1968. Section 14, so far as relevant, provides as follows:

> '*14 Privilege against incrimination of self or spouse or civil partner*
>
> *(1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty –*
>
> *(a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and (…)*'

8. The principles contained in section 14 of the Civil Evidence Act 1968 are incorporated into the inquiry process by virtue of section 22 of the Inquiries Act 2005 ('the 2005 Act'). Section 22 of the 2005 Act provides that a person may not be required to produce or give evidence to the inquiry under section 21 of the 2005 Act where he would not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom or if such a requirement would be incompatible with a community obligation.

9. The wording of section 14 of the Civil Evidence Act 1968 is declaratory of the position at common law. The position at common law was succinctly summarised by Goddard LJ in *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253 CA at 257:

'the rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for.'

10. The scope of the privilege against self-incrimination, as formulated under the common law and section 14 of the Civil Evidence Act 1968 is sufficiently broad to encompass evidence which may inform towards the case which the prosecution may wish to establish and material upon which the prosecution may wish to rely in deciding whether to prosecute, as the following authorities demonstrate.

11. In *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 Lord Wilberforce stated at 443:

    '*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 discover of 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 disclosure is asked is entitled, on established law, to be protected from these consequences.'*

12. Similarly, in *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310, Staughton LJ considered a number of earlier authorities, including *Rank Film*, and stated (at 324):

    '*The substance of the test is thus that there must be grounds to apprehend danger to the witness, and those grounds must be reasonable and not fanciful.'*

    Beldam LJ observed (at 332) in relation to section 14 of the Civil Evidence Act 1968 that:

    '*It is significant that Parliament referred to a 'tendency to expose' and to proceedings and not merely to conviction. Thus, in my judgment, it is sufficient to support a claim to privilege against self-incrimination that the answers sought might lead to a line of inquiry*

which would or might form a significant step in the chain of evidence required for a prosecution. I find support for this view in the judgments in the Westinghouse case [1978] AC 547 and in Rank Film Distributors Ltd v Video Information Centre [1982] AC 380.'

13. Finally, in *Den Norske Bank ASA v Antonatos* [1999] QB 271, Waller LJ summarised the principles governing what is meant by 'self-incrimination', at 289:

    '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.'

14. The MoD respectfully makes the following observations as to the relevant considerations in relation to this Inquiry in relation to whether such an undertaking should be sought:

    (i) the default position is that no such undertaking would be sought or granted;

    (ii) neither the Inquiries Act 2005 nor the Inquiry Rules 2006 make any provision for the seeking or granting of an undertaking. Parliament did not intend that witnesses in inquiry proceedings would, generally, have the benefit of an immunity from prosecution or an undertaking in the terms suggested. Otherwise it would have made provision for this;

    (iii) the Code for Crown Prosecutors requires not just that there is sufficient evidence to merit a prosecution but also that a prosecution is in the public interest before proceedings are instituted. So the Crown would not bring a prosecution if it were not in the public interest, even if no undertaking were in place;

    (iv) so the <u>effective</u> impact of an undertaking on prosecutorial policy would be to preclude the institution of proceedings where a prosecution would be in the public interest;

(v) this represents a serious erosion of the public interest;

(vi) accordingly, an undertaking should only be granted if the erosion of the public interest by the grant of an undertaking is outweighed by countervailing factors;

(vii) an Inquiry Chairman should not seek an undertaking unless he considers that it is appropriate that an undertaking should be granted (always recognising that the final decision will be for the Attorney). So an undertaking should only be sought by an Inquiry Chairman if it is assessed that an undertaking ought to be granted – in other words that the assessment of the Inquiry Chairman is that the erosion of the public interest by the grant of the proposed undertaking would be outweighed by countervailing factors;

(viii) the assessment will be acutely fact sensitive but it would ordinarily require a demonstrable case that the evidence that would become available to a public inquiry will be deficient if an undertaking is not granted to such an extent that an undertaking is justified. This might arise, for example, if identified witnesses indicate that they will claim a privilege against self-incrimination and the evidence to be given by those witnesses could not be obtained from other sources;

(ix) an analogy might be drawn with the circumstances in which witnesses in criminal proceedings are offered immunity from prosecution (or offered a restricted use undertaking pursuant to section 72 of the Serious Organised Crime and Police Act 2005). The criteria to be considered in determining whether it is appropriate to grant immunity in such circumstances were set out by the then Attorney General in a written answer to the House of Commons on 9 November 1981 (which is annexed to this skeleton argument). They are that:

(a) Whether, in the interests of justice, it is of more value to have a suspected person as a witness for the Crown rather than as a possible defendant;

(b) Whether, in the interests of public safety and security, the obtaining of information about the extent and nature of criminal activities is of greater importance than the possible conviction of an individual;

(c) Whether it is **very unlikely** that any information could be obtained without an offer of immunity and whether it is also **very unlikely** that any prosecution could be launched against the person to whom the immunity is offered.

[emphasis added]

In summary, therefore, the question (in the first instance for the Inquiry Chairman but then for the Attorney) is whether the damage to the public interest in fettering the Crown's prosecutorial discretion is outweighed by the gain to the public interest that would accrue from the increase in quality of the evidence available to the Inquiry as a result of the provision of undertakings.

Issue 2: Administrative Undertakings

15. The MoD does not consider that undertakings in the terms indicated at Annexes E to F would be necessary or appropriate in the instant Inquiry. On this aspect, the MoD relies upon the submissions advanced at paragraphs 17 to 20 of its Representations dated 25th May 2010. The circumstances in which the Al-Sweady Inquiry will be conducted are distinct in material respects from the position in the Baha Mousa Inquiry (and, an additional factor present in the Baha Mousa Inquiry which weighed in favour of obtaining wider undertakings was the fear that soldiers were protecting each other by refusing to provide information). Notwithstanding those submissions, the MoD respectfully considers that whether or not to seek these additional undertakings is entirely a matter for the Inquiry Chairman.

Issue 3: Generally, what are the legal principles that the Chairman should apply in deciding whether to seek an undertaking from a relevant person?

16. The MoD considers that the principles to be applied in deciding whether to seek an undertaking from a relevant person are those set out at paragraph 14 above (with appropriate modifications for the context).

Anonymity Applications

17. The specific matters upon which the Inquiry has invited further representations in respect of applications for anonymity are:

> *'Issue 1: Are the submissions set out in paragraphs 13 to 14 of TSol's skeleton argument correct?*
>
> *Issue 2: Is it part of the common law test that, once it has been found that an applicant's subjective fears are based on reasonable grounds, there must be a compelling justification for naming the applicant (i.e. was In re A and others [2009] NICA 6 wrongly decided)?'*

18. As noted in its Representations dated 25th May 2010, the MoD recognises that the principles and procedure governing applications for anonymity most directly concern the Treasury Solicitor and Public Interest Lawyers. Nonetheless, in response to the Inquiry's invitation, the MoD offers succinct observations as to the applicable legal principles.

Issue 1: Paragraphs 13 and 14 of the skeleton argument submitted on behalf of the Treasury Solicitor

19. The MoD respectfully submits that the test proposed by the Treasury Solicitor at paragraphs 13 and 14 of their skeleton argument is not correct in its entirety. The MoD submits that it is erroneous to import into the test for an anonymity application under Article 2 or 3 of the European Convention on Human Rights ('the Convention') a requirement of *'reasonable grounds'* as opposed to *'real risk'*. This is because:

(i) No authority has been cited to support the modification of the conventional approach to the threshold test in Articles 2 and 3 which has been authoritatively stated on a number of occasions;

(ii) The interrelationship between an anonymity application based on Article 2 of the Convention and the common law test for anonymity was analysed extensively by Lord Carswell in *Re Officer L* [2007] 1 WLR 2135. Nowhere in that decision was it suggested that it would be appropriate to import into the Article 2 analysis the (clearly more generous) threshold test applicable in the common law context;

(iii) On the contrary, Lord Carswell in *Re Officer L* at paragraph 20 adopted, in relation to the positive obligation, the summary given by Weatherup J in *In re W's Application* [2004] NIQB 67 at paragraph 17 that:

> '*a real risk is one that is objectively verified and an immediate risk is one that is present and continuing'*.

Lord Carswell added (also at paragraph 20) that:

> '*the criterion is and should be one that is not readily satisfied: in other words, the threshold is high.'*

(iv) The Strasbourg Court jurisprudence as to the test to be applied under Articles 2 and 3 is well established. No separate or modified test is applied in relation to anonymity applications and there is no principled reason for doing so. There is no basis for importing into the statutory test under Articles 2 and 3 principles that are applicable to common law applications for anonymity, and there is no requirement or objective justification for the two legal bases for anonymity applications to be aligned. Whilst it may, in certain contexts, be appropriate to develop the common law in alignment with the Convention, it is not permissible to modify the Convention jurisprudence so as to harmonise it with the common law – cf (in a slightly different context) the observations of Lord Hope in *Van Colle v Chief Constable of Hertfordshire Police* [2009] 1 AC 225 at paragraph 82:

> *In cases brought under sections 6 and 7 of the Human Rights Act 1998 where the article 2 positive obligation is said to have been breached by a public*

authority, the relevant principle is that described by the Strasbourg court in Osman. In my opinion the common law, with its own system of limitation periods and remedies, should be allowed to stand on its own feet side by side with the alternative remedy.

(v) So the fact that it may be appropriate in a particular case, in accordance with the observations of Lord Carswell in *Re Officer L* at paragraphs 27 – 29, to conduct a common law balancing exercise having regard to Article 2 considerations does not undermine the integrity of the well-established test for establishing a prospective breach of Article 2 (or 3) of the Convention.

Issue 2: Was In re A and others [2009] NICA 6 wrongly decided?

20. The MoD submits that the Court of Appeal in Northern Ireland in *In re A and others* was correct in holding that the observations of Lord Woolf in R *(A) v Lord Saville of Newdigate* [2000] 1 WLR 1855 (at paragraph 68(5)) were not of general application. The following matters are relevant:

(i) The pronouncement by Lord Woolf at paragraph 68(5) of R *(A) v Lord Saville of Newdigate* falls to be analysed in its proper context. The context was that at paragraphs 67 to 69. Lord Woolf explained his conclusions by reference to the facts of the particular case and it does not appear that in doing so, he was purporting to lay down any principle of general application.

(ii) In *Re Officer L*, Lord Carswell (at paragraphs 22 and 27 - 29) analysed at length the common law principles to be applied to an application for anonymity. He did not refer to the observations of Lord Woolf at paragraph 68(5) as representing the principles generally governing such applications, nor, as Girvan LJ observed at paragraph 21 of *In re A and others* did he purport to state any novel proposition on this issue.

(iii) Finally, as Girvan LJ identified in *In re A and others* (at paragraph 23) the conclusions as to the effect of Lord Woolf's judgment do not in any event detract in practical terms from the scope of the common law test. Girvan LJ explained it in the following way:

'the common law test requires fairness to the individual witness in all the relevant circumstances of the individual case. The determination of what is fair requires the carrying out of a balancing exercise. The nature of such an exercise necessarily requires putting into the scales the arguments and factors favouring the granting or withholding of anonymity. The passage from Lord Woolf should not be read as stating a broad overriding principles that the common law duty of fairness in any case where a clamed risk to life and subject fears arise requires that anonymity should be granted in the absence of compelling reasons…Common sense and humanity would lead to the conclusion that the greater the risk the more persuasive the case for anonymity and the more the court would have to be persuaded that the countervailing factors are even more persuasive so as to lead to a refusal of anonymity or, in the words of Lord Woolf, there would have to be some compelling reason for refusing anonymity.'

10th June 2010

JEREMY JOHNSON
5 Essex Court
Temple

MELANIE CUMBERLAND
6 King's Bench Walk
Temple