

THE AL-SWEADY PUBLIC INQUIRY.

FURTHER NOTE FROM COUNSEL FOR AL-SWEADY AND OTHERS:

13.6.10.

Introduction.

1. We wish to emphasise that Counsel instructed for these parties have had no opportunity or resources to consider the factual background of this Inquiry, other than through the report of the ultimate judicial review decision, and the short brief from their instructing solicitor, provided also to the Inquiry. This contrasts with the position for all other counsel. Inasmuch therefore as the current issues are affected by their detailed factual context, we are unfortunately not in a position to assist the Inquiry as fully as we would have liked.
2. On the further issues identified in the Inquiry letter of 4.6.10., we make the following submissions:

The further issues.

Issue 1

3. We are grateful for the clarification from the Inquiry that this question relates to what may or may not be considered by a hypothetical future prosecutor of the witness, in deciding whether to prosecute.
4. The background and context of this Inquiry is such that there is a greater focus than in other, similar such, Inquiries on striking the right balance between the Inquiry's fact finding role and its accountability role.

5. This Inquiry arises against the backdrop of serious doubts being raised about the efficacy of the RMP(SIB) Investigations (see *Al-Sweady* [2009] EWHC 2387 (Admin) para. 54 in which it was said that ‘the RMP investigation was neither thorough nor proficient’).
6. Accordingly, while needing to safeguard the efficacy of the Inquiry’s fact finding role, by *inter alia* encouraging witnesses to come forward in an open and secure forum, there is also the need to, as far as possible, not frustrate any appropriate accountability measures. This Inquiry, unlike the Baha Mousa Inquiry, follows neither an adequate internal investigation nor Court Martial proceedings.
7. An extension of the undertaking in this Inquiry to cover prosecutorial decisions is unlikely to enhance the fact finding role while unnecessarily constraining subsequent accountability.
8. It is acknowledged that in *Den Norske Bank v Antonatos* [1999] QB 271 Waller LJ held (at p. 289A):

A witness is entitled to claim the privilege in relation to any piece of information of 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.
9. However, it is clear from the terms of the ‘evidential stage’ of any prosecution decision under the CPS Code for Crown Prosecutors, at paras. 4.5- 4.7, that only admissible evidence may be taken into account. Thus, there is no prospect of evidence that cannot be used at any subsequent trial being considered in taking a decision to prosecute. There is therefore no need for the undertaking to extend to such information or evidence.

10. We are confident that any Codes for other relevant prosecuting authorities, will either expressly or by implication, contain the same restriction.
11. There can therefore be no question of any future prosecutor taking into account against any Inquiry witness, the content of their cooperation with the Inquiry, when considering the evidential stage.
12. In determining whether such an undertaking should be sought, it is submitted that the Inquiry should consider whether it is necessary and proportionate to the interests identified by Public Interest Lawyers in its letter of 2 June 2010.

Issue 2

13. In its letter to the Inquiry of 26 May 2010, the Treasury Solicitor advocates seeking administrative undertakings from the Permanent Under-Secretary of State for the Ministry of Defence, the Commander-in-Chief Fleet, the Chief of the General Staff and the Chief of the Air Staff. Such undertakings are sought so as to achieve 'consistency across Inquiries of a similar nature'.
14. Again, due to the background and context of this Inquiry, there is a greater need to strike the right balance between the Inquiry's fact finding and accountability roles. The context of this Inquiry is such that it is strongly submitted that no administrative undertakings should be sought.
15. First and foremost, the privilege against self-incrimination does not extend to administrative sanctions that fall short of criminal proceedings. Thus, there is no justification in law to obtain any such undertakings.
16. Additionally, however, this Inquiry is distinct as, by contrast with the Baha Mousa Inquiry, there has not been, to our knowledge, any formal occasion, such as a Court Martial, upon which any potential witness has been obliged to give an honest account

of his own misconduct, whilst the extent of the internal army investigation has been limited. Thus, the need to procure immunity from administrative sanction for prior false testimony is much less pressing than for other inquiries and, critically the potential scope for appropriate administrative action is a live issue and one that should not be closed off. Administrative action arising from the conduct of proceedings in the Administrative Court may also, properly, fall for consideration.

Issue 3

17. As submitted by Public Interest Lawyers in its letter to the Inquiry dated 2 June 2010, the Inquiry should not, for the reasons set out therein, seek an undertaking from anyone other than the Attorney General.
18. Again, the privilege against self-incrimination is applicable only to potential criminal proceedings. The Inquiry's request for undertakings should be limited so as only to remove any risk of violating the privilege. The undertaking from the Attorney General removes such risk and accordingly no further undertakings are required.
19. Representations made by any witness in support of any further undertaking should only be considered when necessary and proportionate to the interests identified by Public Interest Lawyers in its letter of 2 June 2010.

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