

# THE BAHA MOUSA INQUIRY

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## SUBMISSIONS OF THE VICTIMS ON USE OF INQUIRY EVIDENCE IN ADMINISTRATIVE ACTION AGAINST CROWN SERVANTS

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### Introduction

1. In his opening statement on 15 October 2008, the Chairman noted that he had obtained from the Attorney-General an undertaking that evidence given by individuals during the Inquiry process would not be used in evidence against them in any criminal proceedings (including proceedings for offences against military law), save where such criminal proceedings constituted a prosecution for giving false evidence to the Inquiry, or failing to provide or interfering with evidence in a manner prohibited by s35 of the Inquiries Act 2005. The Chairman then invited submissions as to whether a similar undertaking should be sought in relation to the taking of administrative action against Crown Servants.
2. This document sets out the submissions of the victims on that issue. In short, the victims submit that such an undertaking is unnecessary and undesirable.

### Article 2 and Article 3 ECHR: Investigative Obligations

3. This Inquiry follows the recognition by the House of Lords, in *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153, that the rights in Schedule 1 to the Human Rights Act 1998, including articles 2 and 3 of the European Convention on Human Rights ('A2 and A3 ECHR'), apply in the context of the military base where Baha Mousa and the other detainees were held. The purpose behind the Inquiry is, in part at least, to contribute to the fulfilment of the United Kingdom's obligations under A2 and A3 to conduct an effective official investigation into breaches and arguable breaches of those articles.
4. The requirements of an effective official investigation are well-established in the caselaw of the ECtHR. In relation to A2:

“The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.” (*Jordan v UK* (2003) 37 EHRR 105, para 105, emphasis added)

“The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible.” (*Jordan*, para 107, emphasis added)

“Where lives have been lost in circumstances potentially engaging the responsibility of the State, that provision [A2] entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished.... In this connection, the Court has held that if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation to set up an “effective judicial system” does not necessarily require criminal proceedings to be brought in every case and may be satisfied if civil, administrative or even disciplinary remedies were available to the victims...” (*Oneryildiz v Turkey* (2005) 41 EHRR 20 para 92, emphasis added)

5. Similar requirements apply in relation to A3:

“The Court considers that, in these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in...[the] Convention”, requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible (...). If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance (...) would be ineffective in practice and it would be possible in some cases for agents of the state to abuse the rights of those within their control with virtual impunity.” (*Assenov v Bulgaria* (1999) 28 EHRR 652 para 102, emphasis added).

6. Thus, an effective official investigation must incorporate a comprehensive fact-finding process, and taken overall must have the capacity to lead to the identification and punishment of those responsible for any breaches of A2 and A3. These two functions may be referred to as the ‘fact-finding role’ and the ‘accountability role’.

7. The ECtHR has held in a number of cases that an ability to compel witnesses to provide evidence is an essential part of an A2/A3 investigation (see, for example, *Jordan v UK* at para 127; *Edwards v UK* (2002) 35 EHRR 19 at para 87). The power to compel witnesses supports the investigation's fact-finding and accountability roles. It is recognised as a required element by the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted by General Assembly Resolution 55/89 Annex, 4 December 2000).

### **The Right to Silence and the Privilege against Self-Incrimination**

8. The power to compel witnesses may, however, conflict with requirements implicit within the right to a fair trial guaranteed by A6 ECHR, namely the right to silence and the privilege against self-incrimination. These are well-established in the Strasbourg case-law – see, for example, *Saunders v United Kingdom* [1997] BCC 872 at para 68:

“The Court recalls that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (...). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through the methods of coercion or oppression in defiance of the will of the accused.”

The rights are equally grounded in domestic law:

“One of the most basic freedoms secured by English law is that (subject to any statutory provisions to the contrary) no one can be forced to answer questions or produce documents which may incriminate him in subsequent criminal proceedings.” (*In re Arrows Ltd* (No. 4) [1995] 2 AC 75, at 95 per Lord Browne-Wilkinson).

9. The right to silence and the right not to incriminate oneself may act as a brake on the fact-finding role of an A2 or A3 investigation, by providing grounds for a refusal to provide evidence. Such a refusal will also, necessarily, act as a brake on the accountability role of the investigation. It is necessary, however, to examine the scope of the rights.

### *The Right to Silence*

10. Whilst a general immunity from being compelled on pain of punishment to answer questions posed by other persons or bodies has been recognised, it has also been recognised that this liberty must be curtailed in the interests of society and there are many instances where enforceable duties to provide information are imposed: see *R v Director of SFO, ex parte Smith* [1993] 1 AC 1 at 30-31 per Lord Mustill; *Weh v Austria* (2005) 40 EHRR 37 at para 45. Thus, the “right to silence” protected by the common law and A6 applies only to those questioned in the context of criminal proceedings: see *Murray v UK* (1996) 22 EHRR 29. In civil proceedings, all competent witnesses are compellable: see, for example, *Y & K (Children)* [2003] EWCA Civ 669.

### *The Privilege against Self-Incrimination*

11. The privilege against self-incrimination may, however, provide an exception to the general rule that witnesses in civil proceedings may be compelled to give evidence. As its name suggests, the privilege is designed to protect against the risk of *criminal* liability as a result of evidence which a witness has been compelled to give against himself: see also *Saunders v UK; In re Arrows Ltd (No. 4)* [1995] 2 AC 75.

12. The privilege is not absolute (see *Weh v Austria* at para 46; *Brown v Stott* [2003] 1 AC 681). Procedures will sufficiently respect the privilege against self-incrimination provided they do not extinguish the very essence of the privilege, with regard to the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material is put: see *Jalloh v Germany* (2007) 44 EHRR 32 at para 101. Thus, where the circumstances under which compulsion is exercised are not improper and it is clear that any compelled material will not be used in criminal proceedings, the essence of the privilege may be preserved: see, for example, *Heaney & McGuinness v United Kingdom* (2001) 33 EHRR 12 at paras 51-54, and *Weh v Austria* at para 44, where the ECtHR noted:

“..it also follows from the Court’s case-law that the privilege against self-incrimination does not per se prohibit the use of compulsory powers to obtain information outside the context of criminal proceedings against the person concerned.”

13. A similar approach has been taken under domestic law – see thus *Istel Ltd v Tully* [1993] 1 AC 45, where the assertion of the privilege in civil proceedings was held to be unnecessary in circumstances where an undertaking not to use compelled evidence in the prosecution of criminal offences had been sought and obtained from the prosecuting authorities. The House of Lords held that the courts were entitled to substitute some different protection in place of the privilege against self-incrimination, providing that such protection was adequate. As Lord Lowry explained at 68:

“...it is clear that there is no *absolute* privilege against answering incriminating questions: the privilege is against exposing oneself to the reasonable risk of prosecution.”

See also *R v Kearns* [2002] 1 WLR 2815 at para 32ff.

14. In many circumstances, therefore, the provision of an undertaking not to use compelled evidence in the prosecution of criminal offences will sufficiently protect the privilege against self-incrimination. In the context of an A2/A3 investigation, this approach will prevent any brake on the fact-finding role, because individuals will not be able to refuse to provide evidence on the grounds that they will thereby incriminate themselves. The brake on the accountability role, however, remains, because the evidence provided cannot be used to secure the criminal liability and consequent punishment of those found responsible.

### **The Inquiry**

15. The Inquiry will not determine any person’s civil or criminal liability (s2, Inquiries Act 2005) but, in this context, forms part of the fact-finding process within an effective official investigation into breaches of A2 and A3 committed against Baha Mousa and the other detainees. It also performs an accountability role – identifying those responsible for any such breaches and (where possible and appropriate) facilitating their discipline or punishment.

16. The Inquiry has the power to compel witnesses to provide evidence (s21, Inquiries Act 2005), enforceable by criminal penalties (s35). This power is, however, subject to the exceptions set out in s22(1), which provides:

“A person may not under section 21 be required to give, produce or provide any evidence or document if –

- (a) he could not be required to do so if the proceedings were civil proceedings in a court in the relevant part of the United Kingdom, or
- (b) the requirement would be incompatible with a Community obligation.”

17. Thus, Parliament has recognised that the power to compel witnesses to provide evidence may conflict with other privileges they enjoy under the law entitling them *not* to provide evidence. It has provided that such privileges are to be respected. Those privileges include the privilege against self-incrimination. No doubt in recognition of the potential for the exercise of such privilege to provide a brake on the fact-finding and accountability roles of the investigation, the Chairman has obtained an undertaking that evidence provided to the Inquiry will not be used in the prosecution for criminal offences, including offences against military law which, by virtue of the penalties available, would be treated as ‘criminal charges’ for A6 purposes: see *Engel v Netherlands* (1979-80) 1 EHRR 647. As explained above, this approach has the advantage of preventing any brake on the fact-finding role of the investigation, but retains the brake on its accountability role.

18. It is submitted that such a brake on the effectiveness of an A2/A3 investigation should only be imposed where strictly required by A6. A6 does not require the imposition of such a brake in the context of Crown Servants’ exposure to administrative action. As explained above, in both domestic law and under the ECHR the privilege against self-incrimination does not prohibit the compulsion of evidence *per se* (at least where, as here, any compulsion is proper, proportionate, and attended by procedural safeguards). Nor does it apply to protect individuals from the use of their own compelled evidence in non-criminal proceedings such as administrative action.

19. There being no requirement under A6 or domestic law for a brake on the accountability role of the Inquiry in the form of an undertaking that evidence given during the Inquiry will not be used in administrative action, it is

20. The victims appreciate and share the objective of the Chairman in seeking to ensure that the fullest and frankest accounts of events are provided to the Inquiry. That objective is, however, common to all civil proceedings and is traditionally protected by the administering of the oath, the practice of cross-examination, the compellability of witnesses (enforceable here by fines of up to £1000 or 51 weeks' imprisonment – see s35(7)-(8) of the 2005 Act), the ability to draw adverse inferences from silence where appropriate, and the public duty of candour owed by all Crown Servants. Protection from administrative action is not usually part of that protection, even though on one view it might encourage a witness to say more than he or she otherwise would.

21. Given this, and particularly in light of the key accountability purposes behind A2/A3 investigations, the victims submit that such protection should not be extended in this case. If the evidence given by witnesses to the Inquiry cannot be used in criminal, disciplinary or administrative action against them, there is a serious risk of Crown Servants enjoying the “virtual impunity” described by the ECtHR in *Assenov v Bulgaria*. Furthermore, the evidence provided to the Inquiry may cast very serious doubt on the capability and/or competence of Crown Servants to perform their roles properly and effectively. To prevent that evidence from grounding administrative action to restore the operational effectiveness of the armed forces or Government departments and to prevent a recurrence of the tragic events of September 2003 would be a step too far.

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