

THE BAHA MOUSA PUBLIC INQUIRY

RESPONSE OF THE VICTIMS TO SUBMISSIONS FROM OTHER CORE PARTICIPANTS ON UNDERTAKINGS RE USE OF INQUIRY EVIDENCE

Introduction

1. In response to the Chairman's invitation of submissions on the desirability of seeking an undertaking preventing the use of evidence given to the Inquiry by a witness in subsequent administrative action against that witness, various Core Participants and other interested parties have made submissions requesting undertakings preventing the use of Inquiry evidence in a variety of circumstances, not limited to administrative action against Crown Servants. This document sets out the response of the victims to those submissions. In doing so, the victims will focus on the submissions made on behalf of the "Court Martial 7", which have been adopted by a number of other parties, whilst also commenting, where appropriate, on the submissions made on behalf of the potential MOD witnesses represented by the Treasury Solicitor.

Summary of Response

2. In their initial submissions in response to the Chairman's invitation (provided on 14 November 2008), the victims identified the two key roles of the Inquiry as part of an A2/A3-compliant investigation, namely the fact-finding role and the accountability role. They also drew a distinction between two situations:
 - a. Situations where witnesses have the *right*, by virtue of the privilege against self-incrimination protected by domestic law and A6 ECHR, to refuse to provide evidence to the Inquiry and to resist the Inquiry's powers of compulsion in s21 and s35 of the 2005 Act. In these situations the failure to protect the witness by means of an undertaking regarding the use of their evidence could severely limit the fact-finding role of the Inquiry as the Inquiry would be powerless to compel witnesses in the face of a refusal to provide evidence. Whilst an undertaking limiting the use of their evidence in subsequent

- b. Situations where witnesses do not have the *right* to refuse to provide evidence to the Inquiry and can therefore be compelled to provide evidence under s21 and s35. In these situations, the Inquiry is not powerless in the face of a refusal to give evidence – it can compel witnesses to answer, can permit witnesses to be cross-examined on such answers as are given, and in the event of a refusal to answer can not only freely draw inferences from the silence of the witness but can also subject the witness to criminal sanctions. By these means the Inquiry can preserve the effectiveness of its fact-finding role without resorting to measures which inhibit its accountability role. It is clear that Parliament intended inquiries to have such powers of compulsion, being well aware of the privilege against self-incrimination: undertakings that would have the effect of circumventing that intention should not be lightly given.
3. The victims maintain, consistently with their earlier submissions, that undertakings preventing the use of evidence in subsequent proceedings should only be sought in relation to the first group of situations, where an undertaking (and consequent limit on the accountability role of the investigation) is essential to preserve the fact-finding role of the investigation. Where the fact-finding role can be preserved by other means, undertakings which limit the accountability role of the investigation (and thus its fulfilment of the requirements of A2/A3 ECHR obligations) are inappropriate.
4. In relation to the specific undertakings sought by the Court Martial 7, therefore, the victims submit (in summary) as follows:
 - a. **Undertaking not to use evidence given by a person to the Inquiry to the prejudice of that person in connection with any criminal proceedings against that person, including in relation to investigating or deciding whether to bring such proceedings:** the victims accept that the privilege against self-incrimination may be seen to protect against a person being compelled to give evidence where there is a real risk that it may be used for these purposes, and

- b. **Undertaking not to use evidence given by a person to the Inquiry against them in administrative proceedings or for other detriment:** the privilege against self-incrimination does not extend to such use of evidence, and the victims do not accept that the seeking of such an undertaking would be appropriate.
- c. **Undertaking not to formally or informally transmit evidence provided to the Inquiry to any foreign state or court or international court or tribunal:** the privilege against self-incrimination does not extend to such use of evidence, and the victims do not accept that the seeking of such an undertaking would be appropriate.
- d. **Undertaking not to apply to use evidence given by a witness to the Inquiry in any criminal prosecution of another witness:** the privilege against self-incrimination does not extend to such use of evidence, and the victims do not accept that the seeking of such an undertaking would be appropriate.
- e. **Any undertaking given by the Attorney-General to also be sought from the Director of Public Prosecutions:** the victims have no objection to this.

5. More detailed submissions on these points are set out below.

Decisions to Prosecute/Criminal Investigations

- 6. The law in relation to the extension of the privilege against self-incrimination to the use of compelled evidence in criminal investigations and decisions to prosecute is far from certain: see, for example, *Istel Ltd v Tully* [1993] 1 AC 45 at 62 per Lord Ackner (citing Neill LJ) and at 69 per Lord Lowry; *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310 at 324-5 per Staughton LJ, and *Gafgen v Germany* (ECtHR, 30 June 2008) at paras 102-105. The victims accept, however, that the privilege may extend this far: see, for example, the wording of s14 Civil Evidence Act 1968; *Lundqvist* at 331-2 per Beldam LJ; *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 612E per Lord Wilberforce, and *Den Norske Bank ASA v Antonatos* [1999] 1 QB 271 at 295-6.

7. It was on the basis that the privilege against self-incrimination protected against anything which could fairly be said to give rise to the risk or increased risk of prosecution that an undertaking that the evidence of a witness to the Bloody Sunday Inquiry would not be used to the prejudice of that person in connection with any criminal proceedings was obtained: see Ruling of 27 November 1998. As the Court Martial 7 appear to accept (see para 3.14 of their submissions) the undertaking in the Bloody Sunday Inquiry was sought on the basis that without it witnesses would be positively entitled not to give evidence.
8. For the same reasons, the victims accept that it would be appropriate for this Inquiry to seek an undertaking from the relevant authorities to the effect that evidence given by a witness to the Inquiry will not be used to the prejudice of that person in or in connection with any criminal proceedings against that person (save for prosecutions 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).

Administrative Action

9. Conversely, and for the reasons stated in the initial submissions provided by the victims, an undertaking that evidence given by a witness will not be used against them in administrative action is inappropriate. Witnesses have no right under the law to refuse to answer questions on the basis that to do so may harm their future careers or professional development. Where witnesses refuse to give evidence on this basis, the Inquiry can (and should) compel them to co-operate.
10. As the Court Martial 7 frankly accept, evidence given to the Inquiry may lead to very serious findings against witnesses, including that they have participated or otherwise been involved in conduct which constitutes torture. To assert that such individuals ought to be protected against the use of such evidence in administrative action or for “other detriment” on the grounds that this may harm their career progression or disadvantage them in their role in the Army is to say the least deeply unattractive. It also runs counter to key purposes lying behind the Inquiry, namely to secure accountability for the

11. The submissions of the Court Martial 7 seek to draw a number of analogies to further their argument. Aside from the more general point that the practice of other Inquiries is not in any way binding on this one, the specific circumstances of the Inquiries relied upon should be taken into consideration. In particular, in neither the Hutton Inquiry nor the Rosemary Nelson Inquiry were the obligations under A2/A3 directly engaged (in the Hutton Inquiry because no issues of State responsibility for the death of David Kelly arose, and in the Rosemary Nelson Inquiry because the relevant events took place prior to the coming-into-force of the Human Rights Act 1998: see *Re McKerr* [2004] 1 WLR 807 (HL)). If the undertaking sought by the Court Martial 7 (and others) in relation to administrative action and 'other detriment' is put in place, the obligations under A2/A3 to ensure accountability will be severely limited in circumstances where this limitation is not required by A6 or the common law.
12. Furthermore, it should be noted that even in the case of the Hutton and Nelson Inquiries, the undertakings given by the Cabinet Office and Police Service (respectively) did *not* extend to the use of evidence given by a witness to the Inquiry against that witness in disciplinary proceedings to the extent that such proceedings involved allegations so serious as to justify the removal of that witness from office. Thus, even absent the A2/A3 obligations to secure accountability, it was recognised that where serious failings in those holding public office were found, there should be no impediment to appropriate action being taken. It hardly needs to be said that a person who took part in torture should in principle be subject to administrative action: the public interest could hardly justify turning a blind eye to such conduct.
13. Finally, the submissions on behalf of the Court Martial 7 draw an analogy with the victimisation provisions in anti-discrimination legislation (see para 4.6). This analogy is misconceived, and highlights the flaws in the arguments in favour of the undertaking sought. The purpose of the victimisation provisions in anti-discrimination legislation is to protect those who seek to *enforce* the

victims of racial discrimination shall not be deterred from doing any of the acts set out in [those provisions]" (emphasis added). This is confirmed by the European Union Directive that led to the Employment Equality (Religion or Belief) Regulations 2003 cited by the Court Martial 7, which provides at Article 11:

"Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment." (*emphasis added*)

14. Thus, the provisions further the goal of equality by providing that those who assist in its enforcement are protected from detrimental treatment done "by reason that" they have complained about discrimination or sought redress for it by bringing or participating in proceedings. This requires not merely that the detrimental treatment would not have occurred 'but for' the act of enforcement, but that the act of enforcement subconsciously or consciously motivated the act (see *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065). The victimisation provisions have never prevented employers from taking action against those who are found, in tribunal proceedings, to have committed acts of unlawful discrimination, and one can immediately see why any such reading of them would be entirely contrary to the aims behind the equality legislation, just as the undertaking sought here would be contrary to the aims behind this Inquiry (and A2 and A3).

Foreign and International Proceedings

15. It is accepted that the evidence given to this Inquiry may give rise to findings that witnesses before the Inquiry have been involved in conduct which amounts to torture under the UN Convention Against Torture and peremptory norms of international law. It is also accepted that the crime of torture is

16. Nevertheless, the position is that the privilege against self-incrimination does not apply to proceedings outside the United Kingdom: see Civil Evidence Act 1968, s14; *Brannigan v Davison* [1997] AC 238 at 248; *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] 1 AC 547 at 636. Witnesses before the Inquiry do not, therefore, have the right to refuse to provide evidence to the Inquiry on the grounds that to do so would incriminate them in relation to foreign or international proceedings. Whilst it is accepted that the risk of such incrimination is a factor that might be taken into consideration by the Chairman under s21(4) of the 2005 Act when determining whether or not a requirement to give evidence should be revoked or varied on the grounds that compliance with it is not reasonable (as held by the Privy Council in *Brannigan*), the victims submit that the discretion within s21(4) should be exercised *against* permitting any refusal to comply with a s21 notice on these grounds. The reason that torture is a universal crime is because it is regarded by the international community as an appalling crime of the utmost gravity: see *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, especially at paras. 30-33 (Lord Bingham); and para. 130 (Lord Rodger: “the torturer is abhorred as a *hostis humani generis*”). Its effective investigation requires, as the Court Martial 7 accept, the comprehensive investigation of the facts surrounding allegations of torture. To permit witnesses to refuse to give evidence of those facts would run contrary to those requirements, and to the public interest, which must be considered under s21(5).

17. If witnesses are not permitted to refuse to give evidence on account of the risk of incrimination in foreign or international proceedings then, for the reasons set out above, it is not appropriate to seek an undertaking controlling the use of evidence in those proceedings. That is particularly so when such an undertaking would run contrary to key principles and provisions in international instruments addressing torture. The Court Martial 7 accept that the United Kingdom has a key duty to undertake an effective investigation of allegations of torture and/or loss of life as a result of the use of force by State agents, both under UNCAT and A2/A3 ECHR. What they fail to recognise,

“The purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter “torture or other ill-treatment”) include the following:

- (a) Clarification of the facts and establishment and acknowledgment of individual and State responsibility for victims and their families;
- (b) Identification of measures needed to prevent recurrence;
- (c) Facilitation of prosecution and/or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.” (*emphasis added*)

18. To require the United Kingdom to thwart these objectives and to decline to provide mutual assistance to foreign or international tribunals where this is not strictly necessary to secure the fact-finding role of the investigation would be inappropriate.

19. If, contrary to the above, the view is taken by the Inquiry that the risk of incrimination in foreign or international criminal proceedings *would* entitle witnesses to refuse to provide evidence to the Inquiry then, consistently with their stance on other issues, the victims accept that steps should be taken to secure sufficient protection for the witnesses so that they cannot make such refusals. In this connection, however, they ask the Inquiry to note that the witnesses are already protected by A6 ECHR (as the submissions of the Court Martial 7 accept – see para 5.21) and would also be protected by international guarantees against self-incrimination such as that within Article 14(3)(g) of the International Covenant for Civil and Political Rights and within

20. If an undertaking was to be thought necessary, then this would primarily be a matter for the Government, but it is difficult to see how such an undertaking could be made given its international obligations in relation to torture and war crimes, the non-absolute nature of the privilege against self-incrimination and the need to avoid the fettering of discretion.
21. In any event, the victims submit that any such undertaking should not be in the form sought by the Court Martial 7, which goes significantly beyond the protection of witnesses from self-incrimination, extending as it does to the provision of *all* evidence and elements of the Inquiry Report to foreign States/courts and international tribunals, irrespective of the use to which it may be put. Many uses of Inquiry evidence may not raise any issue regarding self-incrimination. The victims therefore submit that, if any form of undertaking is to be sought from the relevant authorities, it should be to the effect that evidence given by a witness to the Inquiry and the section of the Inquiry Report setting out the evidence of that witness should not be transmitted to any foreign state or court or international tribunal in circumstances where it will be used by that state/court/tribunal to the prejudice of that witness in or in connection with criminal proceedings against him or her and in circumstances where such use would amount to a violation of the privilege against self-incrimination within those proceedings.
22. As regards the request of the Court Martial 7 for further protection in the form of an undertaking that legal assistance would be provided and funded for witnesses in the event that criminal proceedings are taken against them using the evidence they gave to the Inquiry, this is primarily a matter for the State but the victims have no objection to such an undertaking, given that it does not limit either the fact-finding or accountability roles of the Inquiry.

Use of evidence given by *any* witness

23. The Court Martial 7 and the MOD witnesses appear to accept that the privilege against self-incrimination does not extend to the use of compelled evidence from one witness in criminal proceedings against another: see s14

24. The undertaking sought would limit the accountability role of the Inquiry in circumstances where it is not rendered essential by the privilege against self-incrimination, and the victims therefore submit that it is not appropriate. It is notable that the Court Martial 7 are unable to point to any other public inquiry which has made use of such a device. It is appreciated that Mr Justice MacKinnon made reference to the “more or less obvious closing of ranks” exhibited at the Court Martial. That a repeat of such behaviour is, essentially, threatened by the Court Martial 7 and the MOD witnesses (in their request for this undertaking and in particular at para 9 of the submissions of the MOD witnesses) is both staggering and deeply disappointing. Nevertheless, the answer to such a threat is to make use of the powers of the Inquiry to compel the provision of evidence, to cross-examine witnesses, and to draw inferences from silence. The circumstances of the Inquiry will be different from those of the Court Martial, having the benefit of hindsight and a much clearer understanding of the matters involved, making cross-examination more effective and making it more difficult for witnesses to ‘close ranks’. The answer is not, in any event, to limit the accountability role of the Inquiry by extending the privilege against self-incrimination to the incrimination of others.

25. Furthermore, and in any event, witnesses can already take comfort in the fact that acceptance of hearsay evidence in criminal proceedings is tightly regulated by the Criminal Justice Act 2003 and the common law, and is controlled by (and properly a matter for) the criminal courts. Whilst it is accepted that the 2003 Act broadens the circumstances in which hearsay evidence may be admitted, that was the result of a policy decision by Parliament. The exceptions are still limited and the ‘interests of justice’ ground in s114 requires consideration of a number of matters including the circumstances in which the statement was made, whether oral evidence of

Undertakings from DPP as well as Attorney-General

26. In respect of those undertakings which the victims submit are appropriately sought in relation to this Inquiry, the victims have no objection to such undertakings being sought from the Director of Public Prosecutions in addition to the Attorney-General, to cater for any changes in the division of functions between the two offices.

Conclusion

27. For the reasons set out above, the victims submit that undertakings may be sought in respect of the use of a witness' evidence to his or her prejudice in connection with criminal proceedings against him, and that any undertakings sought from the Attorney-General should also be sought from the Director of Public Prosecutions, but object to the other undertakings sought in the submissions of the Court Martial 7 and the MOD witnesses.

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