

THE BAHAMOUS PUBLIC INQUIRY

FURTHER SUBMISSIONS ON ANONYMITY ON BEHALF OF MOD WITNESSES REPRESENTED BY THE TREASURY SOLICITOR

Introduction

1. The Chairman, in his opening statement, ordered that:

“If anybody has submissions to make in relation to this order [the order of the Judge Advocate requiring the media not to publish certain information in relation to the Court Martial defendants], or any related matter affecting other service personnel, they must be made to me in writing by 14 November 2008, and I shall consider them and any further argument at the first Directions Hearing.”

2. Pursuant to this request, written submissions were made on 14 November 2008 (‘the 14 November Submissions’), the latter half of which identified concerns raised by four individuals and applied for directions relating to their identification or the publication of their evidence.
3. By letter of 17 November 2008, Mr Henderson indicated that the Inquiry required more details in order to deal with the anonymity submissions:

“So far as your submissions relating to anonymity are concerned, the application lacks the detail necessary to enable the Chairman to consider them. No point is taken against the applicants in this regard as the Inquiry appreciates that in relation to some of your clients may have received their instructions only recently. However, detailed applications should now be

submitted on behalf of the four applicants indicated in the confidential index accompanying the hard copy of your letter, to reach the Inquiry no later than 5pm this Friday, 21 November 2008.”

4. Regrettably, it was not possible to meet the suggested deadline because of the pre-existing commitments of leading and junior Counsel. However, these submissions are made in response to that request.

5. Unfortunately, the reality of the position at the moment is that while we recognise that the Inquiry has an understandable concern to process these requests as soon as possible, our recent experience leads us to suggest (for the reasons given below) that a detailed consideration of the anonymity requests of these four individuals is likely to be premature and that it might be sensible to wait until such time as those individuals are identified as prospective witnesses before evaluating the applications formally on the merits. However, we would find it very helpful were the Inquiry to set out a general procedure for hearing such applications to enable us to advise our clients on the merits and thus manage efficiently the concerns of prospective witnesses. A suggested solution is set out below.

General procedure for dealing with concerns of prospective witnesses

6. It would be of considerable assistance in our dealings with our witnesses if the Inquiry were to establish a general procedure to deal with the concerns of prospective witnesses as to the manner in which their evidence is given to the

Inquiry and reported. Such concerns will vary from case to case, but are collectively referred to here as the “anonymity concerns”. Similarly, any related applications are referred to as “anonymity applications”.

7. This is proving to be an important issue, and is likely to affect more than just those individuals in respect of whom submissions were made in the 14 November submissions. Already, in the short period since then, further individuals have contacted the Treasury Solicitor to express anonymity concerns.
8. The suggested procedure is, briefly, as follows:
 - a. **The Inquiry informs TSol / the MoD that it considers an individual to be a prospective witness.** Until such time as an individual is identified as a prospective witness by the Inquiry, it would not be necessary for any anonymity application to be made.
 - b. **The Inquiry does not publish the name of that prospective witness for 28 days to enable:**
 - i. The TSol/ the MoD to make contact with that individual to inform them that they have been identified as a prospective witness, that they may be asked to give evidence to the Inquiry, and that their name is due to be published in connection with the Inquiry;

- ii. The prospective witness to have an opportunity to raise any anonymity or security concerns with TSol or other legal representatives;
 - iii. TSol (or other legal representative) to obtain, if necessary, an MoD threat assessment or other such evidence required to substantiate an anonymity application;
 - iv. Consideration of the merits of any anonymity application in the light of the MoD threat assessment / other evidence;
 - v. A detailed anonymity application then to be made to the Inquiry, if necessary within the 28 day period.
- c. The Inquiry considers any anonymity application made, and makes such directions as it considers necessary, subject to which the name of the prospective witness may then be published.**

9. We consider that the advantages of such a procedure will include:

- a. No time, effort or expense would be spent by the Inquiry in the consideration of anonymity applications in respect of individuals who are not, in fact, prospective witnesses;
- b. Anonymity applications would only be made following the receipt of a MoD threat assessment or other evidence. This introduces a merits filter to help ensure that anonymity applications are properly made.

- c. It will enable any legitimate concerns of prospective witnesses to be appropriately safeguarded, prior to the publication of their names in connection with the Inquiry.

The individuals mentioned in the 14 November Submissions

10. In the light of the above points on the general procedure to be adopted, it is respectfully submitted that it is probably premature to consider the anonymity applications that were made in the 14 November submissions at this stage.

- a. Individuals A to C have not been identified as prospective witnesses to date by the Inquiry. Accordingly, no purpose would be served by having their anonymity applications considered at this point.
- b. Individual D was identified as a prospective witness in the Inquiry's letter of 11 November 2008. However in respect of this individual D, (as in fact with A to C) the MoD threat assessments which have been sought have not yet been received. In these circumstances, detailed submissions cannot properly be made by TSol on the individual's behalf.

11. For these pragmatic reasons, therefore, it is submitted that the general procedure proposed above might be adopted in respect of these four individuals, and any others following them. Therefore we request that:

- a. Individuals A to C should have permission, if they are identified as prospective witnesses, to make a detailed anonymity application if so advised, having obtained MoD threat assessments or similar.
- b. Individual D should have leave, if so advised, having obtained MoD threat assessments or similar, to make a detailed anonymity application by 9 December, being 28 days after notification being sent to TSol of his being a prospective witness.

12. Although they are prompted by our recent experience with the witnesses, we are conscious that this proposal is a revision to our 14 November submissions because anonymity directions are no longer immediately being sought from the Inquiry for Individuals A to C. It is hoped however, that in the circumstances, the Inquiry will consider that there might be some merit in adopting the general procedure suggested above.

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