

THE BAHA MOUSA PUBLIC INQUIRY

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

Introduction

1. These submissions are made, pursuant to the direction given by the Chairman in his Opening Statement of 15 October 2008, on behalf of the MOD witnesses currently represented by the Treasury Solicitor's Department.
2. The Treasury Solicitor has to date received instructions to act on behalf of 36 potential witnesses. It is anticipated that further instructions will be received in the coming weeks. Pursuant to arrangements in respect of representation put into place by the Treasury Solicitor, the seven soldiers who were the subject of Court Martial proceedings (hereafter the "CM7") are represented, for the purpose of making submissions on undertakings and anonymity, by Kingsley Napley, solicitors.
3. There is sufficient common interest amongst the 36 to enable representations to be made in respect of all on the question of undertakings. Those representations are set out in Part A below. The Treasury Solicitor has seen in draft form the written submissions to be advanced on behalf of the CM7. The submissions in Part A below echo some of those submissions.
4. Concerns have been raised by several of the 36 as to the consequences of their giving evidence in public. Some of the 36, however, have only very recently requested representation and it has

not as yet been possible to obtain full instructions from them on this issue. Representations on behalf of four of the witnesses are advanced at Part B below. It may well be necessary for additional representations to be made on behalf of others when their instructions have become clearer and the Chairman's permission will be sought to do so outside the time limit laid down in his opening statement.

5. A list of the 36 witnesses is provided in the annexe to these submissions. Since some of the representations on anonymity request the Chairman to take particular measures to protect the identity of the individual concerned, the Inquiry is invited to treat this annexe as strictly confidential. The annexe ascribes identifying letters to some witnesses. In the submissions that follow, gender-neutral expressions are used to avoid identifying the sex of the witness concerned.

Part A: Undertakings in respect of Criminal, Disciplinary and Administrative Action

6. The Chairman's observations regarding the need for witness cooperation so as to ensure the fullest and frankest account of events are respectfully repeated and adopted. It is noted that, to assist in the aim of securing cooperation, the Attorney General, The Right Honourable Baroness Scotland QC, has provided an undertaking that evidence provided by witnesses will not be used in evidence against them in any criminal proceedings save in two identified circumstances.
7. As valuable as that undertaking is, it is submitted that it does not go far enough if the objective identified is to be achieved.
8. First, for the reasons submitted by those representing the CM7, the Inquiry should seek an undertaking from the Director of Public Prosecutions that he will respect and adopt the undertaking of the Attorney should the decision whether to commence or discontinue criminal

proceedings fall to him instead of the Attorney under any new constitutional arrangements. Witnesses should not be left in any doubt as to the future effectiveness of an undertaking given on behalf of the prosecuting authorities.

9. Second, the Attorney's present undertaking would not prevent the evidence of one witness being used in criminal proceedings against another. In the Court Martial arising out of the events which are the subject matter of this Inquiry there were observations to the effect that witnesses formed "a wall of silence". The concern was that a number of witnesses declined to provide evidence that might be used against his or her colleagues. Precisely the same concerns arise here. It is submitted that if witnesses are properly to be encouraged to be frank and open in their evidence, they need to be assured that their evidence will not form the basis for criminal proceedings against other witnesses. The Attorney should be invited to widen her undertaking so as to cover the admission of hearsay evidence in criminal proceedings. It is therefore submitted that the following addition be made to the current undertaking:

"It is also undertaken that no application will be made by or on behalf of the Crown for evidence given by any witness to the Inquiry, whether orally or in writing, or in any written statement made preparatory to the giving of evidence, or any document or information produced by that person to the Inquiry, to be admitted as hearsay evidence under the Criminal Justice Act 2003 or common law hearsay provisions in any criminal proceedings against any other witness to the Inquiry."

10. Third, pursuant to the Attorney's undertaking, the evidence provided would not be used against witnesses in relation to criminal proceeding in civilian courts and proceedings under the Military Criminal Justice System ("Disciplinary Action"). The undertaking does not apply, however, to "Administrative Action" under the Army's General Administrative Instructions. Such action may be taken in relation to a wide range of professional shortcomings in military service. Administrative Action may result in a range of penalties, including termination of service. Since

the potential consequences of such action are serious, there is a real risk that the possibility of such action might act as a disincentive for some witnesses in cooperating fully with the Inquiry.

11. That undertaking should be framed in terms wide enough to cover not only the use of evidence given at the Inquiry in the course of Administrative Action against the witness concerned but also Administrative Action against any other witness. The imperative of avoiding a wall of silence bites with similar effect if the sanction in issue is professional as if it is criminal.
12. In those circumstances, it is submitted that it would be appropriate for an undertaking to be sought from the Chief of Staff of the Armed Forces in relation to Disciplinary and Administrative Action. That undertaking ought to prevent the use of evidence, including hearsay evidence, from any witness being used in any Administrative Action against any witness. It is submitted that an undertaking in the following form should be sought:

“The Chief of the Defence Staff undertakes in respect of any person who provides evidence to the Inquiry that no evidence given by any person to the Inquiry, whether oral or written, nor any written statement made preparatory to giving evidence, nor any document or information produced by that person to the Inquiry, will be used in evidence against him or her or against any other witness to the Inquiry in the course of any Disciplinary Action or Administrative Action under the Army’s General Administrative Instructions or otherwise.”

Part B: Anonymity

13. Witnesses A to D seek directions from the inquiry relating to their identification or the publication of their evidence as follows:

Witness A

14. Witness A invites the Inquiry to direct that s/he gives evidence in private and in a manner that means s/he cannot be identified. The grounds for this application are three-fold:

- (i) The personal security of the witness, having regard to the highly confidential nature of the work upon which s/he has been and expects again to be engaged;
- (ii) The safety of his/her family;
- (iii) The professional implications of giving evidence, having regard to his/her current position and anticipated career path.

15. In light of the above, it is requested that the Inquiry directs that Witness A gives his/her evidence in camera, and enters the court by a route other than via the public entrance. In addition, an order is sought that includes the following restrictions:

- (i) Witness A's name, personal details, identifying features, rank, military unit, place of residence and current location are not to be reported or published;
- (ii) The name, personal details, identifying features and place of residence of any family member are not to be reported or published;
- (iii) No image of the face, or part of the face, of Witness A or any of his/her family member is to be reproduced publicly in any media (including but not restricted to newspapers, television or internet) to protect the lives and safety of Witness A and his/her family.

Witnesses B and C

16. Two witnesses (witnesses B and C) invite the Inquiry to direct that their current military posts are not reported, published or in any way identified. In addition, Witness B asks that the same restrictions apply to his/her future military position.
17. These applications are founded on the sensitive nature of the witnesses' posts. It is submitted that their current or future positions would, in any event, not be relevant to the inquiry.

Witness D

18. Witness D invites the Inquiry to direct that his/her name is not to be published.

NEIL GARNHAM QC

DAVID EVANS

1 Crown Office Row
Temple
London EC4Y 7HH

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