

THE BAHU MOUSA PUBLIC INQUIRY

ANONYMITY: SUBMISSIONS OF THE VICTIMS ON LEGAL FRAMEWORK

Legal Framework

1. The Chairman's power to grant the measures sought by the applicant victims is derived from the Inquiries Act 2005, informed by the Human Rights Act 1998 and the common law.

2. Section 17 of the Inquiries Act 2005 provides:
 - (1) Subject to any provision of this Act or of rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.
 - (2)
 - (3) In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others).

3. Section 18 provides:
 - (1) Subject to any restrictions imposed by notice or order under section 19, the chairman must take such steps as he considers reasonable to secure that members of the public (including reporters) are able –
 - a. to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry;
 - b. to obtain or to view a record of evidence and documents given, produced or provided to the inquiry.
 - (2) No recording or broadcasting of the proceedings at an inquiry may be made except:
 - a. at the request of the chairman, or
 - b. with the permission of the chairman and in accordance with any terms on which permission is given.

Any such request or permission must be framed so as not to enable a person to see or hear by means of a recording or broadcast anything that he is prohibited by a notice under section 19 from seeing or hearing.

(3)

(4)

4. Section 19 provides as follows:

- (1) Restrictions may, in accordance with this section, be imposed on:
 - a. attendance at an inquiry, or at any particular part of an inquiry;
 - b. disclosure or publication of any evidence or documents given, produced, or provided to an inquiry.
- (2) Restrictions may be imposed in either or both of the following ways:
 - a.
 - b. by being specified in an order (a "restriction order") made by the chairman during the course of the inquiry.
- (3) A restriction notice or restriction order must specify only such restrictions:
 - a. as are required by any statutory provision, enforceable Community obligation or rule of law.
 - b. as the Minister or chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard to in particular to the matters mentioned in subsection (4).
- (4) Those matters are:
 - a. the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;
 - b. any risk of harm or damage that could be avoided or reduced by any such restriction;
 - c. any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry.
 - d. the extent to which not imposing any particular restriction would be likely:
 - i. to cause delay or to impair the efficiency or effectiveness of the inquiry, or
 - ii. otherwise to result in additional costs (whether to public funds or to witnesses or others).
- (5) In subsection (4)(b) "harm or damage" includes in particular:
 - a. death or injury;

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- b. damage to national security or international relations;
 - c. damage to the economic interests of the United Kingdom or of any part of the United Kingdom;
 - d. damage caused by disclosure of commercially sensitive information.
5. Breaches and threatened breaches of restriction orders and other orders made by an inquiry Chairman may be certified by the Chairman to the High Court for enforcement: s36.

Human Rights Act 1998

6. The Chairman, as a public authority within the meaning of the Human Rights Act 1998, has an obligation to act compatibly with Convention rights, including Article 2, Article 3 and Article 8 of the European Convention on Human Rights (A2, A3, A8 ECHR). All of these articles are capable of imposing an obligation on a public authority to take positive steps to prevent the interests protected by those articles from being damaged by non-state actors or forces, and are capable themselves of forming the basis for jurisdiction to restrain publicity: see *In re S* [2005] 1 AC 593 at para 23.
7. A2 ECHR includes a positive obligation on State authorities to take steps to safeguard life: see *Osman v UK* (1998) 29 EHRR 245. In that case, the ECtHR set out the necessary circumstances for a violation of this duty to arise:

“..it must be established to [the Court’s] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”
8. The leading authority on the application of A2 in the context of witness anonymity is *In re Officer L* [2007] 1 WLR 2135, where the House of Lords held that a ‘real and immediate’ risk was one that was objectively well-founded and present and continuing (see para 20). Once that threshold was crossed, the authorities must take all reasonable steps to avoid that risk. The reasonableness of steps involves consideration of the ease or difficulty of taking precautions and the resources available (see para 21) but not, in the submission of the applicant victims, wider public interest considerations. Equally, whilst the degree to which information about a witness is already in

the public domain may be relevant in considering whether publicity in connection with the proceedings will lead to any increased risk to the witness, it is submitted that once such a risk is established, the fact that some information about the witness is already in the public domain cannot be an automatic bar to the grant of anonymity. If the risk to life passes the 'real and immediate' threshold, it would ordinarily be reasonable to give the witnesses a degree of anonymity (see *Officer L* at para 29).

9. A3 similarly includes a positive obligation on State authorities to take measures designed to ensure that individuals are not subject to torture or cruel, inhuman or degrading treatment at the hands of others: see *A v UK* (1998) 27 EHRR 611. It is submitted that the approach to the A3 positive duty must mirror the A2 obligation to safeguard life.
10. The right to respect for private and family life within A8 ECHR may also require measures to protect anonymity or restrict the reporting of personal information: see, for example, *Craxi (No.2) v Italy* (2004) 38 EHRR 47 and *X (woman formerly known as Mary Bell) v SO* [2003] 2 FCR 686. The rights of the press and public under Article 10 ECHR to receive and impart information must, however, also be considered. The comparative importance of the competing rights must be examined and the justifications for interfering with each right and the proportionality of doing so must be considered: see *In re S* [2005] 1 AC 603.
11. The applicant victims submit that they have Convention rights under A2, A3 and A8 that are within the Inquiry's jurisdiction in relation to the issue of their anonymity as participants in the Inquiry:
 - a. The Chairman is a United Kingdom public authority within the meaning of s6 HRA 1998, and is exercising powers conferred by United Kingdom legislation in relation to inquiry proceedings within the United Kingdom. Whilst the victims are currently resident in Iraq they are being brought, in the exercise of those powers, to the United Kingdom to give evidence in those proceedings. If the measures sought are not granted, the acts of a United Kingdom public authority will (it is submitted) subject the victims to increased and significant risks to the interests protected by A2, A3 and A8 when they return to Iraq.

- b. Furthermore, the UK authorities are, by virtue of A2 and A3, required to hold an effective official investigation into the acknowledged violations of the victims' rights under A2 and A3 by agents of the UK. Were that official investigation to *itself* place the victims of the original A2 and A3 violations at a real, immediate and avoidable risk of losing their lives or suffering torture or inhuman treatment, it could hardly constitute an effective investigation.

Common law

12. In any event, however, it is submitted that the approach advocated by case-law under the Convention is equally applicable within the common law (and thus within the statutory framework under the 2005 Act), although a much wider range of considerations may also come into play: see *Officer L* at para 22.
13. The common law requirement that tribunals act in a procedurally fair manner includes an obligation to be fair to witnesses, including protecting them where necessary. The demands of fairness will depend on all the circumstances of the case and will include consideration of others involved in the proceedings and the public interest, but requiring witnesses to undergo an unnecessary risk will be unfair: see *R v Lord Saville of Newdigate, ex p. A* [2000] 1 WLR 1855 at paras 38-40 and para 44. To require witnesses to face a real and immediate risk to their lives or their freedom from torture or inhuman treatment when steps could reasonably be taken to avoid this is clearly also unfair, as is to require witnesses to undergo a disproportionate incursion into their freedom to lead their private and family lives as they see fit.

Suggested Approach

14. It is submitted that the relevant questions for the Chairman, in light of the above legal framework, are as follows:
 - a. Without the orders sought, what will be the likely effect of participation in the Inquiry on the applicant victims?

- b. Will there be a material increase in the risk to the lives of the applicant victims, or their freedom from torture or cruel, inhuman or degrading treatment? Such an increase in risk may result from increased and more widespread publication of the identities of the applicant victims even if their identities are, to a more limited extent, already in the public domain: see, for example, *Venables & Thompson v News Group Newspapers* [2001] 1 Fam 430 at paras 102 and 105.
- c. If yes, does such increased risk amount to a real and immediate risk – i.e. one that is objectively verified and present and continuing?
- d. If yes, are the measures sought by the applicant victims reasonably required in light of that risk, considering the ease/difficulty and cost of the measures sought?
- e. If there is no increased risk to life or freedom from torture or inhuman treatment or such risk does not cross the 'real or immediate' threshold, the Chairman should go on to consider whether or not the measures sought should nevertheless be granted, by balancing all relevant considerations for and against them, including the matters specified in s19(4) of the Act. Relevant considerations in favour of granting anonymity may include the subjective fears of witnesses for their lives (see *Officer L* at para 22) and the risk of harm or damage that they may suffer other than the risk to their lives, including incursions on their private life.

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