

## THE BAHA MOUSA PUBLIC INQUIRY

---

### VICTIMS' RESPONSE TO TSOL LEGAL ARGUMENTS ON ANONYMITY

---

#### **Introduction**

1. This document sets out the response of the victims to the submissions of the Treasury Solicitor, on behalf of the MOD witnesses he represents, as regards the legal framework in which anonymity applications should be considered by the Chairman. For ease of reference those submissions will be termed 'the TSol submissions'. As will be seen from a comparison of the TSol submissions and those of the victims, there is much common ground as to the legal approach. The few points of divergence are set out below.

#### **Response**

##### *Test under the common law*

2. At paragraph 8 of the TSol submissions, it is noted that the Inquiry must "have regard to the common law duty of fairness". In the submission of the victims, the Inquiry must do more than have regard to this duty: it must act in accordance with it.
3. At paragraph 12 of the TSol submissions, it is asserted that where the risk to life from giving evidence is not 'real and immediate' so as to engage A2 ECHR, the common law test of fairness to witnesses nevertheless applies. The victims agree that this is the case. The TSol submissions go on, however, to state that the common law test, at least where a risk to life is concerned, is said to be that set out by Lord Woolf MR in *R(A) v Lord Saville of Newdigate* [2000] 1 WLR 1855. (In passing, it should be noted that the citation for this case in the TSol submissions is incorrect – Lord Woolf MR gave judgment in the first case under this name and not the later '*Widgery Soldiers*' case). In para 68(5) of his judgment, as quoted in the TSol submissions, Lord Woolf MR set out a test which requires 'compelling justification' for refusing anonymity measures if the fears of witnesses are based on reasonable grounds.

4. The victims are unable to agree that this represents the test at common law as regards witness anonymity.
  
5. First, it appears that Lord Woolf was, in setting out this test, dealing with circumstances in which the fundamental right to life was engaged. At the time of his judgment the Human Rights Act 1998 was not in force and so the fundamental right to life in A2 ECHR had to be considered within the framework of the common law under the approach in *R v MOD, ex parte Smith* [1996] QB 517 which, as Lord Woolf noted at para 34 of his judgment, meant that the more substantial the interference with human rights the more the court should require by way of justification in order to find the decision reasonable. At para 37, he stated that "it is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification". By paragraph 68(5) of his judgment, Lord Woolf had accepted that the fears of the soldier witnesses that their lives were at risk were objectively verified by MOD assessments which considered the risks to be 'significant' (see para 68(4)), such that there might well be an interference with the fundamental right to life. His use of the phrase "compelling justification" in para 68(5) reflects his use of the phrase in para 37 with reference to interference with fundamental rights. That Lord Woolf considered that there was such interference is confirmed by the last section of paragraph 68(5) where he found that the tribunal may have failed to attach sufficient significance to the fundamental nature of an individual's right to life. It appears, therefore, that the 'compelling justification' test was designed to address situations where an interference with the right to life had been established.
  
6. Second, when the House of Lords dealt with the question of witness anonymity in *In re Officer L* [2007] 1 WLR 2135, the respective approaches under A2 ECHR and the common law were considered separately, Lord Carswell confirming at para 29 that the common law test of fairness applied to perceived risks to life as a result of giving evidence where these did not cross the 'real and immediate' threshold (for example because they were not objectively verified). When addressing the common law test, however, Lord Carswell made no mention of any requirement of 'compelling justification' before anonymity measures may be refused, instead speaking simply of "balancing a number of factors which need to be weighed in order to reach a

determination” (para 22). Furthermore, the tribunal in the Robert Hamill Inquiry had not applied a ‘compelling justification’ test when considering the common law (see the recitation of their decision at para 14 of Lord Carswell’s opinion) and their conduct of the balancing exercise at common law was held to be proper by the House of Lords (see para 26). No distinction was drawn by Lord Carswell between cases where an objective risk to life was present and cases where it was not – his description of the common law approach at para 22 expressly contemplates situations in which there is “an allegation of unfairness which involves risk to the lives of witnesses” and his overview at para 29 mandates the use of the common law test (without any compelling justification element) wherever a threat to life does not cross the A2 threshold, without any distinction based on the reason why that threshold is not crossed. The case of *Officer L* therefore strongly suggests that no ‘compelling justification’ test applies at common law.

7. Finally, in *In re Witness A’s Application* (NIHC, 3 July 2008), Weatherup J grappled with this issue directly, and held that whilst the weightier the factors in favour of anonymity the weightier must be any countervailing factors if they are to prevail, there is no additional or residual requirement for compelling justification in the event that an increased risk to a witness could be established. It is understood that judgment in an appeal in this case is pending, but the victims accept that if any risk to life does not meet the A2 ECHR threshold then the common law balancing exercise applies without any requirement of compelling justification as part of the legal test. Of course, in the particular circumstances of an application, compelling justification may well be required as a matter of fact, if it is to outweigh the risks at hand, and the fact that there are reasonable grounds for fears on the part of witnesses will no doubt weigh heavily in the balance, even if the A2 threshold is not crossed. Where the A2 threshold is crossed, the A2 test will apply in lieu of the common law.

#### *Impact on Inquiry’s functions*

8. At paragraph 18 of the TSol submissions, it is asserted that “there is unlikely to be a serious impact on the performance of the Inquiry’s functions or the public’s perception of the impartiality of the Inquiry or its ability to follow the evidence if the orders sought are made”. This may well be an accurate

submission in respect of some of the applications made by MOD witnesses, but it will not inevitably be so and without seeing the individual applications of such witnesses the victims do not accept that there will never be any serious impact on the Inquiry's functions or public participation and confidence from anonymity measures. The nature of the impact of the measures will depend entirely on the subject to whom they relate and the degree of anonymity sought.

*Interference with Personal/Professional Life: A8 and A10 ECHR*

9. At para 24 of the TSol submissions, it is suggested that consideration of rights under A10 ECHR are only likely to be necessary when dealing with requests for 'Reporting Restrictions' rather than restrictions on the evidence presented to the public inquiry. The victims note that A10 ECHR includes not only the rights of the press and others to impart information which has been received, but also a prior right to *receive* information, held by the public more generally. The victims accept that measures proposed under A8 ECHR which restrict the evidence presented in the Inquiry room (where members of the public and press are entitled to be present) raise issues under A10 ECHR which should be taken into account by the Chairman in determining whether any interference with the A8 rights of witnesses is justified, following the approach in *In re S* [2005] 1 AC 593.
10. In paragraph 30 of the TSol submissions, it is asserted that "the interference in Article 8 rights of many applicants in the present case are likely to be substantial and direct, unless the orders proposed are made". Without viewing the individual applications for anonymity the victims are unable to accept this statement.
11. In paragraph 38 of the TSol submissions, it is stated that "the substantive interference with the A10 right is likely to be comparatively minor in the present case, compared with the substantial interference with an Applicant's Article 8 right that would be caused if the Reporting Restrictions are not granted." As above, the victims are unable to accept any generalised assertion as to the degree of interference with either A8 or A10 rights without sight of the specific circumstances of individual applications. TSol also submit that "the inability of the press to report the personal address or current role of

an individual does not substantially impinge upon its ability to fulfil its public role in reporting the Inquiry". Whilst it is currently difficult to see how the personal address of an individual witness could be of public concern, this may not be the case in relation to the current role performed by military witnesses to the Inquiry, and the victims reserve their position on this until they have seen the individual applications of the MOD witnesses.

RABINDER SINGH QC  
TESSA HETHERINGTON

16 January 2009

