

THE BAHA MOUSA PUBLIC INQUIRY

**GENERIC LEGAL ARGUMENTS ON ANONYMITY
ON BEHALF OF M.O.D. WITNESSES
REPRESENTED BY THE TREASURY SOLICITOR**

INTRODUCTION

1. These submissions are made on behalf of the MOD witnesses currently represented by the Treasury Solicitor's Department in accordance with the direction of the Inquiry that "*generic legal arguments on anonymity (covering, in particular, the test to be applied)*" are to be served by 13 January 2009.

2. They relate to applications which it is anticipated will be made on behalf of a number of individual witnesses for orders under s17 or s.19 of the Inquiry Act 2005, including any one or more of the following:
 - i. An anonymity order;
 - ii. An order that the witness gives his evidence from behind a screen such that the public cannot see his appearance;
 - iii. An order restricting the publication of images of the witness;
 - iv. An order restricting the publication of the address of the witness;
 - v. An order that no evidence shall publicly be given to the inquiry as to the personal address of the witness;
 - vi. An order that no evidence shall publicly be given to the inquiry as to the current post of the witness.

3. In making individual applications, regard will be had to the directions from the Inquiry that, in general, personal addresses and the present occupations of witnesses will not be adduced in evidence on the ground that they will not be relevant. Nonetheless, these submissions refer to the grounds for restriction orders covering those matters in the event that it should be necessary to make such applications in particular cases where the general rule is said not to apply.
4. To the extent that any of the orders sought are not properly to be characterised as restriction orders under s.19, they will be sought pursuant to the Inquiry's general powers under s.17. Both categories of application will be made on the basis that, unless the orders sought are granted:
 - i. There would be a risk of death or bodily injury to the witness; and/or
 - ii. There would be a risk of serious interference with the witness' private and family life.
5. As a result in such cases, the Inquiry will be invited to make the orders sought:
 - i. Because it is obliged to do so under s.6 HRA 1998 and Articles 2, 3 and/or 8 ECHR; and/or under the common law obligation of fairness; and/or
 - ii. Because, in the proper exercise of its discretion, it ought to do so:
 - (a) under s.19(2)(b), where the restriction is conducive to the inquiry fulfilling its terms of reference and/or necessary in the public interest having regard to matters in s.19(4)]; and/or
 - (b) where the order sought is not properly characterised as a restriction order, under its general powers under s.17 relating to the procedure and conduct of the Inquiry.
6. This document seeks to identify the test to be applied in deciding whether the Inquiry is obliged to make the orders sought ('order required as a matter of law'), before turning to the further or alternative arguments as to the circumstances in which the Chairman should exercise his discretion to do so ('the discretionary argument'). Inevitably, the

latter submissions, being more fact sensitive, can be dealt with only in outline at this stage.

7. It is recognised that it is somewhat artificial to attempt to develop any of these arguments in the abstract; precisely applicable tests can only accurately be formulated once the facts of the individual applications are known.

ORDER REQUIRED AS A MATTER OF LAW: RISK OF DEATH, INJURY OR TORTURE

Legal test

8. The Inquiry is a public body and must not act in a way which is incompatible with a Convention right, s.6 HRA 1998. It must also have regard to the common law duty of fairness.
9. The fact that there are both Article 2 and common law tests when assessing an application for anonymity where there is a risk to life was explained by Lord Carswell in *In re Officer L* [2007] 1 WLR 2135 at para. 29¹:

"I suggest that the exercise to be carried out by the tribunal faced with a request for anonymity should be the application of the common law test with an excursion, if the facts require it, into the territory of article 2. Such an excursion would only be necessary if the tribunal found that, viewed objectively, a risk to the witness's life would be created or materially increased if they gave evidence without anonymity. If so, it should decide whether that increased risk would amount to a real and immediate risk to life. If it would, then the tribunal would ordinarily have little difficulty in determining that it would be reasonable in all the circumstances to give the witnesses a degree of anonymity. That would then conclude the exercise, for that anonymity would be required by article 2 and it would be unnecessary for the tribunal to give further consideration to the matter.

If there would not be a real and immediate threat to the witness's life, then article 2 would drop out of consideration and the tribunal would continue to decide the matter as on governed by the common law principles. In coming to that decision the existence of subjective fears can be taken into account on the basis which I earlier discussed (see para 22). For the same reasons as those which I have set out in para 20, however, I would not regard it as essential in every case to commence consideration of the issue by seeking identify such subjective fears."

¹ *Officer*

L also considered the matter in the light of the Inquiries Act 2005.

10. It is submitted that where the fears are for serious bodily injury or of being subjected to other inhuman or degrading treatment or torture, the test under Article 3, also a fundamental and unqualified right, would be the same as that articulated for Article 2.

a) Test under Articles 2 and 3

11. The test under Articles 2 and 3 for whether an application for anonymity (or, by extension, whatever order is sought²) should be granted is therefore:

- i. *Viewed objectively, would a risk to the witness's life be created or materially increased if they gave evidence without anonymity? and*
- ii. *Does that increased risk amount to a real and immediate risk to life?*

b) Test under common law

12. If there is no real and immediate risk to life, then the application falls to be determined under the common law test. Lord Woolf MR set this out at [68] in *R (A) v Lord Saville* [2002] 1 WLR 1249 (hereafter '*Widgery Soldiers*');

"in our judgment the right approach here once it is accepted that the fears of the soldiers are based on reasonable grounds should be to ask: is there any compelling justification for naming the soldiers, the evidence being that this would increase the risk?"

13. The common law test starts with a similar question as that under Article 2: viewed objectively, are there reasonable grounds for the witness's belief that a risk to their life would be created or materially increased if they gave evidence without anonymity.³

14. If so, is there a compelling justification for not granting the protection sought? Factors may include:

- i. The likely effect on the inquiry's ability to arrive at the truth if it refuses or grants the application in whole or in part;

² 'Anonymity' in *Officer L* was used compendiously to refer to applications to keep their names withheld and for evidence to be given behind a screen. It is submitted that all the same legal test would apply to all the orders sought.

³ *Re Officer L* [26]. Arguably there is a subtle difference in that *R (A) v Lord Saville* requires that there be 'reasonable grounds' for believing that a risk will be created or increased, whereas the Article 2 test is whether a risk would be created or materially increased.

- ii. The effect of the public's perception of the impartiality of the inquiry, having regard to the factors which led to the Minister's decision to hold the inquiry and its terms of reference;
- iii. The likely effect on the public's ability to follow the evidence.⁴

15. In this balancing exercise, the objective risk, the subjective fears of the applicant, the likely effect of granting anonymity in removing or reducing that fear, and conversely the likely effect on him of refusing the application in whole or in part, are all factors that can properly be taken into account.⁵ As Lord Carswell said:

*"It is unfair and wrong that witnesses should be avoidably subjected to fears arising from giving evidence, the more so if that has an adverse impact on their health."*⁶

16. In considering the objective risk to which an Applicant is likely to be subject, the following questions are likely to be relevant

- i. Does the applicant himself have any objective basis for his fear?
- ii. What is the MoD threat assessment?
- iii. Would the public disclosure of the identity or evidence of the witness be prejudicial to national security?

17. In considering an Applicant's subjective fears, the following questions are likely to be relevant

- i. What is the nature of the applicant's fear?
- ii. How serious is it?
- iii. How would the subjective fear be reduced by granting of order sought?
- iv. Is there medical evidence as to the impact on the witness' health as a result of being identified as witness or the impact that there would be if the protection sought were not given?
- v. Did witness give evidence at CM?

⁴ As considered by the Robert Hamill Tribunal and accepted by the House of Lords in *Re Officer L* as relevant factors: see paras. 14 and 26.

⁵ *Re Officer L* [22], [26].

⁶ Para. 22.

- vi. Did anything happen during course of CM or afterwards to reinforce / allay fears
- vii. Is there any medical evidence as to what impact on health was as result of fears of giving evidence at CM?

18. There will in many cases be a positive impact on the Inquiry if it grants the application, in that the applicant will be less fearful of providing evidence. Witnesses are likely to be more candid if they do not fear that their evidence will lead to reprisals against themselves, their colleagues or their families. This will be a factor to be taken into account by the Inquiry. Conversely, there is unlikely to be a serious impact upon 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.

19. In response to anonymity applications made by soldier witnesses, the Bloody Sunday Inquiry tribunal observed:

"Our task is to do justice by ascertaining, through an inquisitorial process, the truth about what happened on Bloody Sunday. The proper fulfilment of that task does not necessarily require that the identity of everyone who gives evidence to the inquiry should be disclosed in public. The tribunal will know the identity of all witnesses and, unlike a court, will itself take responsibility for investigating their credibility if there is reason to think that such an investigation is necessary. Indeed we think that there are likely to be circumstances in which granting anonymity will positively help us in our search for the truth. Witnesses are unlikely to come forward and assist the tribunal if they believe that by doing so they will put at risk their own safety or that of their families.

Moreover it would be a mistake to suppose that the grant of anonymity would always operate to protect soldiers who are alleged to have been guilty of serious offences on Bloody Sunday. There may well be witnesses who wish to give evidence that is favourable to the interpretation of events for which the families and the wounded contend, but who will not co-operate with the tribunal without assurances as to their anonymity. We are aware, for example, of certain television programmes in which people describing themselves as ex-soldiers present on Bloody Sunday have criticised the conduct of the army on that day, but have done so anonymously, presumably for fear of reprisals by their former comrades. Accordingly, we will be willing to grant an appropriate degree of anonymity in cases where in our view it is necessary in order to achieve our fundamental objective of finding the truth about Bloody Sunday. We will also be prepared to grant anonymity in cases where we are satisfied that those who seek it have genuine and reasonable fears as to the potential consequences of disclosure of their

personal details, provided that the fundamental objective to which we have referred is not prejudiced.⁷

20. Similar considerations are likely to apply here.

ORDER REQUIRED AS A MATTER OF LAW: INTERFERENCE WITH PERSONAL/ PROFESSIONAL LIFE

Legal test

21. Article 8 provides:

"1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

22. A person's professional life comes within the scope of his Article 8 rights, *Niemietz v Germany* (1992) 16 E.H.R.R. 97 (para. 29). An act which significantly interferes with a person's ability to pursue his chosen career would interfere with his Article 8(1) right.

23. The orders which it is anticipated will be sought apply in one or both of two situations:

- i. The Inquiry, by calling the applicant as a witness, itself discloses his or her name / image / address / current position, unless it grants the order sought (such orders may be compendiously termed 'Evidential Restrictions', in that they serve to restrict the evidence that is presented to the public inquiry, eg in an anonymity application, the name of the individual, or in a screen application, his appearance);
- ii. Information having been given to the Inquiry in public, the press then report that information, unless the Inquiry grants the order sought ('Reporting Restrictions').

⁷ Cited at para. 13 of *Saville* [2000].

24. It is necessary to consider this potential distinction because in the case of Reporting Restrictions, Article 10 may be engaged, whereas with Evidential Restrictions, there is unlikely to be an issue with regards to freedom of the press.

a) Test for Evidential Restrictions

25. The Inquiry must not act in a way which is incompatible with Article 8. If it proposes to act in a way that interferes with the witness' rights under Art 8(1), that interference must be justified under Article 8(2).

26. It follows that the Inquiry must grant the order sought if

i. Absent the order, the Inquiry's act of calling the applicant as a witness and/or of disclosure of the his name / appearance / address would cause interference with his Article 8 rights, and

ii. The Inquiry cannot justify that interference under Article 8(2) as being

(a) necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others, and

(b) proportionate.

b) Test for Reporting Restrictions

27. Where Reporting Restrictions are being sought, the first stage is the same, namely unless the Reporting Restrictions were made, would there be an interference with the applicant's Article 8 rights?

28. In the event that there is such an interference with Article 8, absent a Reporting Restriction, then there will a conflict of rights, because a Reporting Restriction will

necessarily interfere with Article 10 right of freedom of expression.⁸ In such instances, the House of Lords in *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 highlighted four propositions at [17]:

- i. Neither Article has as such precedence over the other;
- ii. Where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary.
- iii. The justifications for interfering with or restricting each right must be taken into account;
- iv. The proportionality test must be applied to each.⁹

29. In respect of each individual application it will be necessary to consider the evidence which discloses the interference with Article 8. The following questions may be relevant:

- i. Professional:
 - (a) In what way does the Applicant believe his or her career would be damaged without the protection of the order (other than as the result of any criticism that the Inquiry makes of them)? For example, will sensitive posts no longer be available to him if his image is publicly recognised?
 - (b) On what basis does the Applicant have such fears? What objective evidence is there supporting such fears.
 - (c) How serious would the damage be?
 - (d) Did the Applicant give evidence at the Court Martial? On what basis? Were any restrictions imposed?

⁸ That right is given further protection under s.12 of the Human Rights Act 1998, subsection 4 of which reads:
"The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
(a) the extent to which—
(i) the material has, or is about to, become available to the public; or
(ii) it is, or would be, in the public interest for the material to be published;
(b) any relevant privacy code."

⁹ *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 at para.17.

- (e) Did his career suffer as a result?
- (f) If not, why does the applicant think that the situation would be different with the Inquiry?
- (g) Does the Applicant's employer support the application?

ii. Personal and family life

- (a) In what way does the Applicant believe his or her personal/family life would suffer without the protection of the order?
- (b) How serious would such interference be?
- (c) Is there evidence of adverse health consequences that may arise to him or family?
- (d) On what basis does the Applicant have such fears? What objective evidence is there supporting such fears?
- (e) Did the Applicant give evidence at the CM? On what basis? Were any restrictions imposed?
- (f) Was there intrusion into personal / family life as a result of his giving evidence previously?
- (g) If not, why does the Applicant think that the situation would be different with the Inquiry?

30. Much will turn on the precise facts of the particular case. For example, it was an important element of *In re S* that the impact of the trial upon the child on whose behalf the application was made would be '*essentially indirect*'¹⁰. In contrast, 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.

¹⁰ See para [25]

Justification under Art 8(2)

31. It will be for the Inquiry to justify the interference with the Applicant's Article 8 rights that would result from bringing as evidence, his name / address / current role, or by making him give evidence without the protection of a screen, thus disclosing his visual appearance.
32. As the Inquiry has recognised, there will seldom be a need for the Inquiry to adduce evidence as the personal address of witness or his or her current role. Certainly it is difficult to imagine circumstances in which the Inquiry's need to ascertain a witness' personal details would outweigh an established Art 8(i) right. The observation of the Bloody Sunday Inquiry made noted above is relevant in this context¹¹.
33. It is accepted that the Inquiry is generally to be conducted in public, but this not a trial and so judicial observations on the need for trials to be in public are not directly applicable. For instance, there are no Article 6 rights in play, one of the reasons cited for the need for hearings of trials in public¹². Inquiries need not necessarily be in public at all. This was the case prior to the Inquiries Act 2005, (see *Persey v The Secretary of State for Environment, Food and Rural Affairs* [2003] QB 794¹³), and is provided for by s.19 of the Inquiries Act, where the Minister or the chairman can impose restrictions if they believe them to be conducive to the inquiry fulfilling its terms of reference.
34. Furthermore, it is notable that even in the case of trials, restrictions on the public nature of the hearing are possible. In *R v Legal Aid Board, ex p Kaim Todner* [1999] QB 966 Lord Woolf MR recognised that

*"Any interference with the public nature of court proceedings is...to be avoided unless justice requires it. However, Parliament has recognised that there are situations where interference is necessary."*¹⁴

¹¹ Cited at para. 13 of *Saville* [2000].

¹² See for example *Diennet v France* (1995) 21 EHRR 554, para 33

¹³ At [42]: "Inquiries, in short, come in all shapes and sizes and it would be wrong to suppose that a single model – full-scale open inquiry - should be seen as the inevitable panacea for all ills."

¹⁴ At p.977

35. Examples of such statutory interferences include CPR rule 39.2 and s23 – 25 of the Youth Justice and Criminal Evidence Act 1999, for special measures where the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings, such as evidence in private (s. 25), and the screening of a witness from the accused (s. 23).
36. Similarly, the performance of the Inquiry's functions may be enhanced if such an application were to be granted, because the Applicant would be less fearful of providing evidence, and likely to provide fuller and better evidence than they might otherwise. They are likely to be more candid and co-operative if they do not fear that giving evidence may seriously harm their career, or lead to significant interference with their private life otherwise, such as through press intrusion.
37. In providing undertakings to witnesses in respect of criminal and administrative action, the Inquiry has already acknowledged that fears of witnesses as to the potential consequences of their evidence need to be mitigated, in order to promote the fundamental purpose of the Inquiry in determining the truth of the events surrounding the death of Baha Mousa.

Extent of the competing interference with Article 10 in Reporting Restriction cases

38. The substantive interference with the Article 10 right is likely to be comparatively minor in the present case, compared to the substantial interference with an Applicant's Article 8 right that would be caused if the Reporting Restrictions are not granted. 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. These are not matters of relevance to the public, for the same reasons as it is also argued that they are not of relevance to the Inquiry. Doubtless these considerations underlay the Inquiry's present stance as indicated in paragraph 3 above.
39. As Junior Counsel to the Inquiry, Nicholas Moss, stated on 3 December 2008 in relation to the reporting restrictions of Justice McKinnon in relation to the CM7 "*It is also right to say that the nature of protection that is granted by the order only restricts the reporting of*

limited and specified matters. As such, this is not an order that any in any way inhibits the substantive work which is facing this Inquiry."¹⁵

40. As already noted, the general position that hearings should be in public, and that the press should be free to report the details of such hearings, is not without exception even in the case of criminal trials, let alone in the case of public inquiries. For example, the Youth Justice and Criminal Evidence Act 1999 section 45 gives powers to restrict reports about adult witnesses "*if the court is satisfied (a) that the quality of evidence given by the witness, or (b) the level of co-operation given by the witness to any party to the proceedings in connection with that party's preparation of its case, is likely to be diminished by reason of fear or distress on the part of the witness in connection with being identified by members of the public as a witness in the proceedings.*"

III. THE DISCRETIONARY ARGUMENT

Legal framework for orders under s.19(3)(b)

41. A restriction order may specify restrictions that the Chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4).

42. Subsections 19(4) and (5) provide:

(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 cost (whether to public funds or to witnesses or others).*

(5) *In subsection (4)(b) "harm or damage" includes in particular--*

¹⁵ Transcript page 56-57.